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NGOs as Legitimate Partners of Corporations

A Political Conceptualization

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A Political Conceptualization

by

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Summary

The interaction between corporations and non-governmental organizations (NGOs) has become an important topic in the debate about corporate social responsibility (CSR). Yet the exact role of NGOs in business-NGO partnerships often remains unclear. The debate on CSR predominantly assesses the role of corporations but not of NGOs in NGO-business partnerships.

This book takes a step towards overcoming this asymmetry and explicitly focuses on clarifying the role of NGOs as legitimate partners of corporations. It argues that the political role of NGOs is not confined to their interaction with official political or economic institutions but also extends to their role as partners of corporations.

It is little disputed that NGOs as political actors suffer from a legitimacy deficit. In this book it is argued that this legitimacy deficit encompasses three dimensions: the structural dimension refers to their status as representatives of civil society, and specifically of a constituency, who has not elected them. The substantive dimension relates to questions about the legitimacy of NGOs' claims. And last but not least, there is a procedural dimension of the legitimacy deficit of NGOs because certain of their activities, such as street protests which are typically conducted in the name of civil society but which sometimes even cross the border into violence, raise doubts about the legitimacy of their behaviour in putting forward their claims.

This book outlines a political model that provides a meaningful conceptualization of NGOs as legitimate partners of corporations. It argues that a political conceptualization of the role of NGOs in their interaction with corporations can only be meaningfully assessed based on a broad conception of democracy. In search of a political model that fulfils these requirements it compares the different interpretations that liberalism and deliberative democracy assign to civil society, to NGOs and to the institutions and processes which constitute a normative framework for the role of NGOs as legitimate partners of corporations. It argues that the deliberative, in contrast to the liberal conception of the relevant institutions and processes, provides the ground for a meaningful conceptualization of NGOs as political actors in their interaction with corporations.

Based on the reflections on an appropriate political model, this book then develops a conceptual framework that can guide our judgment when assessing the legitimacy of NGOs as partners of corporations on a more pragmatic level. The goal

is to find criteria that specifically allow us to distinguish legitimate partner NGOs from two related actor types with whom they share certain characteristics but who have not earned the normative legitimacy that "true NGOs" strive for. The conceptual framework distinguishes between NGOs, interest groups, and activists along the three dimensions which constitute the legitimacy deficit of NGOs (substantive, structural, procedural). It argues that a procedural conception of the legitimacy of NGOs offers normative orientation for clarifying the boundaries between them and interest groups on the one hand and between them and activists on the other hand.

Introduction

The Problem

Since at least the end of the Cold War and the ensuing wave of democratization which fostered the emergence of civil society throughout large parts of the world, non-governmental organizations (NGOs) have been nearly omnipresent actors on a global scale (see e.g. Clark, 1995: 507ff.; Edwards and Hulme, 1996: 961; Cohen, 2003: 106). NGOs represent the voice of civil society and as such they occupy an important space which is neither regulated by the state nor subject to the logic of economic markets. As a consequence, NGOs are understood to be non-governmental as well as nonprofit organizations (Murphy and Bendell, 1999: 5). In civil society groups, people who come together free of governmental or economic coercion do so in order to "mould the formal laws and informal norms that regulate social interaction" (Scholte, 2004: 214). But the problem is that in practice civil society groups cannot be entirely separated from governmental and/or economic spheres. NGOs thus always bear the burden of proof that they are not striving for public office or pecuniary gain (Scholte, 2004: 214).

Whereas NGOs were long perceived as making claims towards state institutions, they have widened their focus in recent years and have come to act as self-acclaimed watchdogs not only of political institutions but also of international economic institutions and corporations in particular. The most effective proof that NGOs were shifting their target from the political to the economic order – at least in terms of media attention – was given by the massive street protests against the meetings of global economic institutions such as the WTO Ministerial Conference in Seattle in November 1999 ("the battle of Seattle") or the IMF/World Bank Meeting in Prague in September 2000 (Chandhoke, 2002: 37, 40). What has triggered public awareness of corporate power have been events such as the Nestlé baby milk scandal in the 1970s, when Nestlé came under public attack for advertising infant milk in developing countries (Kaptein and Van Tulder, 2003; Tucker and Melewar, 2005), the discovery of sweatshops producing for Nike in South East Asia in the 1990s (e.g. Kapstein, 2001), Greenpeace' campaign against Shell for their plan of sinking the oil platform Brent Spar in 1995 (e.g. Grolin, 1998; Zyglidopoulos, 2002), and the public vilification of Shell for their behaviour in the conflict with the Ogoni

People in Nigeria (e.g. Livesey, 2001; Wheeler, Fabig, and Boele, 2002). These cases represent milestones of an awakening process during which people have come to realize that the growth of corporate power exceeds the problem solving capacities of governments, and as a consequence they have started to target companies directly (Spar and La Mure, 2003: 80; Risse, 2004: 309; Bendell, 2005: 371; Palazzo and Scherer, 2006: 81). In this context, NGOs, or more generally, social movements played a central role by bundling the claims of people and translating them into powerful messages. In the first decade of the new century, social media have empowered NGOs even further by providing them with the means to create a viral spread of anti-corporate campaigns almost effortlessly. One of the undisputed leaders in this field is Greenpeace with its impressive and effective campaigns against Costco for its unsustainable seafood policies, or against Nestlé for sourcing palm oil from companies that engage in unsustainable deforestation, thereby threatening the livelihoods of people and animals alike (Khor, 2011). However, some authors claim that due to the wealth of campaigns companies have also become more adept at protecting themselves against them. Zadek states that Nike reacts much calmer to the "steady stream of anti-sweatshop campaigners" with which it is faced than it used to and that Nestle "has learnt to live with being the prime target of the longest single, anti-corporate campaign in history linked to the dangers associated with the inappropriate use of milk powders in feeding babies" (Zadek, 2010: 157). While interpretations about the effective learning on the part of corporations vary, all of the examples mentioned so far undeniably represent instances of rather conflict-laden relations between civil society organizations and corporations.

More recently however corporations have come to recognize that one way of protecting themselves against attacks by NGOs lies in engaging in more consensual forms of interaction. This trend is reflected by the rise in what is called NGO-business partnerships (Nijhof, de Bruijn, and Honders, 2008: 155) or more generally cross-sector social partnerships (Seitanidi, Koufopoulos, and Palmer, 2010: 139ff.). Such partnerships have become a hot topic in the debate about Corporate Social Responsibility (CSR). Their increasing importance is illustrated by the findings of a 2007 report which identified "non-profit social actors (. . .) who have proven competence in partnering with companies" (Dalberg Global Development Advisors, 2007: 1). The report reveals that a vast majority of companies (73%) believe that such partnerships will be increasingly important in the future.

Whilst such results must be taken with a grain of salt since the answers in surveys tend to suffer from a social desirability bias, there are further reasons to assume that partnerships have acquired a firm place on the CSR agenda. Even though "reliable figures on the number of collaborations between [NGOs] and corporations are not readily available", there is "considerable case study and anecdotal evidence" for this trend (Crane and Matten, 2007: 436). What is more, if we look at the literature partnerships are not as new as it might seem. One of the earliest accounts of the importance of partnerships stems from Waddock who recognized partnerships as "social problem-solving mechanisms among organisations" more than 20 years ago (Waddock, 1989: 79). In the meantime a variety of reasons for companies to rely on partnerships have been identified. While the motive of some corporations

to engage simply consists in the wish to enhance their reputation with the public at large others specifically aim to "develop better working environments in which to operate, to gain credibility among policy makers and opinion formers" (Schiller, 2005: 5) and to successfully and effectively implement CSR programs (Dalberg Global Development Advisors, 2007). As a consequence, partnerships have significant impacts on the local and global level and they have important implications for organizational learning (Selsky and Parker, 2005: 850).

How Do Corporations Choose Their Partner NGO?

Knowing why a company wants to enter into a partnership is certainly interesting, but deciding with whom it wants to enter a partnership is just as important (Tapscott and Ticoll, 2003). Selecting a partner NGO is certainly not an easy task given the overwhelming number of NGO.

Statistics about global numbers of NGOs are notoriously sketchy. However, if we believe the Yearbook of International Organizations, "the number of international NGOs has increased from 6,000 in 1990 to more than 50,000 in 2006" (World Bank, 2010). Moreover, about 3400 NGOs have consultative status with the ECOSOC, out of which about 400 are accredited to the Commission on Sustainable Development (CSD), a subsidiary body of ECOSOC (United Nations, 2011).

As civil society initiatives continue to gain momentum, the list of potential partner NGOs grows (Murphy and Bendell, 1999: 5). What is more, they represent a wide variety of claims, ranging from economic development to sustainability to gender issues and they exhibit widely different strategies and priorities. Surveys have shown that upon considering engagement companies in particular are also concerned with the accountability or legitimacy of their partner NGOs (Dalberg Global Development Advisors, 2007; The Forster Company and TwentyFifty Ltd, 2005; Schiller, 2005). There are various reasons for this concern.

Reputational considerations are not just an important driver for corporations to enter a partnership, but they also motivate them for a careful assessment of their partner NGO's legitimacy (see e.g. Nijhof, de Bruijn, and Honders, 2008; Dalberg Global Development Advisors, 2007; Gartzke, 2004; The Forster Company and TwentyFifty Ltd, 2005). Companies know that their reputation is at risk if they for example enter into a partnership with an NGO that is not committed to its mission as a representative of civil society but is rather a pressure group that follows its own hidden agenda. As an anonymous business states in a report on NGO-business partnerships "we got our fingers burned once when the Trustees of a charity we supported had extreme religious views" (The Forster Company and TwentyFifty Ltd, 2005). Another unpleasant experience was made by Adidas when they selected a Thai supplier for the match ball for the World Cup 2006 and then got disappointed by the behaviour of the Thai Labour Campaign, an organisation with which it had "openly" engaged in the past (Adidas, 2006). The Thai Labour Campaign apparently produced a negative report on the conditions in the supplier's factory without

even contacting the company to request direct access to the factory. Instead, Adidas claims, "the authors of the report have relied on information collected through a small number of off-site worker interviews. As a result, the report contains many inaccuracies and draws a misleading picture about the factory" (Adidas, 2006).[1] As this anecdote shows, it is essential that a partner NGO is transparent about its mission in a wider sense and that it fulfils the normative condition which Anita Roddick, the famous founder of The Body Shop once expressed as a fact by characterizing NGOs as those actors who "above all others, tell the truth with no hidden agenda" (The Forster Company and TwentyFifty Ltd, 2005: 3).

What is more, a corporation can also damage its reputation if it engages in a PR campaign that fakes CSR activity for example by deliberately selling a strategic alliance with a corporate front group, that is, a "neo-liberal business organizations which espouse a business agenda under the cover of NGO legitimacy", as part of its CSR engagement (Gray, Bebbington, and Collison, 2006). Once such a CSR activity is unmasked as pure window-dressing, the company not only loses its reputation but its credibility as an actor in CSR at large.

Apart from reputational motives, the interest in an NGO's legitimacy also derives from considerations about reciprocity. Since NGOs put companies under pressure to legitimize themselves, they should also be willing to legitimize themselves. Companies feel that they face higher accountability standards than NGOs. While according to a survey "three quarters (76%) of NGO respondents have a written policy about who they will work with, only 32% make these policies available for business [and for the public] to see" (The Forster Company and TwentyFifty Ltd, 2005: 4). However, in return NGOs reproach companies that they are exploiting the accountability issue "to deflect attention from their own activities" (Schiller, 2005: 7).

Finally, a partnership also typically involves financial contributions and, what is more, the commitment of time and energy of different people (The Partnering Initiative, 2008). The more of these resources are involved, the higher the stakes for the corporation. It is thus only reasonable for corporations to make sure that the organization with whom they partner is transparent and can be held accountable for its actions.

This evidence suggests that there are a variety of reasons for why the legitimacy of partner NGOs is an issue in practice, and companies show some discernible efforts of assessing it. Yet, the approach that companies choose for judging it is rather haphazard and mainly consists of coarse controls. In general, companies mainly assess NGOs with regard to their sector function and reputation, and they gather information from the internet, annual reports and media coverage (The Forster Company and TwentyFifty Ltd, 2005). More specifically, 30% of businesses look at an NGO's human rights record. The stance that an NGO takes up on international initiatives such as the Global Accountability Project, the Global Reporting

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[1] For more cases of NGOs with a hidden agenda see Fassin (2009).

Initiative or the UN Draft Norms of Business and Human Rights[2] thereby serves as an indicator on which businesses like to rely (The Forster Company and TwentyFifty Ltd, 2005). While these endeavours represent first steps into the right direction, there is currently no classification of what the legitimacy of a partner NGO entails precisely and no systematization along which corporations could judge it.

This is surprising, given that there seems to be quite broad agreement that NGOs suffer from a legitimacy deficit as becomes evident if we look beyond the strategic considerations of companies in their CSR practice and turn to the literature on NGO legitimacy (Crane and Matten, 2007: 413ff.; Collingwood and Logister, 2005; Edwards, 2000; Gray, Bebbington, and Collison, 2006; Habermas, 2001; Leggewie, 2003; Scherer and Palazzo, 2007: 1109; Chandhoke, 2005: 359ff.; Ossewaarde, Nijhof, and Heyse, 2008; Vedder, 2007; Sternberg, 2010).

What is it that makes the legitimacy of NGOs such a salient issue? As we will see later, the legitimacy deficit of NGOs is most often related back to their status as representatives of civil society, and specifically, of a constituency, who has not elected them, and to the fact that their leadership is self-elected (see e.g. Scholte, 2004: 231). Who gives Greenpeace, which according to The Times is "the world's most powerful NGO" (Pattenden, 2011) the mandate to fight for the shutdown of nuclear power plants?

Beyond that, questions also arise with respect to the legitimacy of NGOs' claims. How do we know whether the claim an NGO raises is legitimate? Given that their claims relate to norms like justice, freedom, or equality which are all "essentially contested concepts" (Benhabib, 1994: 27) and for which, as a consequence, exist no universally accepted definitions, defining the legitimacy of an NGO's claim might not always be easy.

Furthermore, there is also criticism about the methods which NGOs choose in order to promote their claims. Is it legitimate to sabotage the operations of a corporation in the West by blocking the access to its manufacturing facilities in order to raise public attention for the bad environmental record in another part of the world?

In a multiple case study, Fassin identified the following questionable practices of NGOs: unfair communication and distorted information, unfair method and abuse of power, arbitrary selective choices and hidden agenda, conflicts of interests, and even fraud (Fassin, 2009). With regards to unfair communication and distorted information concern has been raised at the "exaggerated, often apocalyptic tone of public statements; serious doubts about the integrity and honesty of some of the scientific and technical claims made by some NGOs; and increasing alarm at some of the more high-risk stunts undertaken to attract media publicity" (Adair, 2000: 5). NGOs are suspected of intentionally fabricating "evidence" and of engaging in misinformation and distortions of the facts (Adair, 2000). Most prominent was the Greenpeace

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[2] Given that the United Nations Sub-Commission on the Promotion and Protection of Human Rights failed to approve these norms in April 2004, they have presumably lost their role as an indicator in the meantime. It is to be expected that corporations these days rather orient themselves along the stance of an NGO on John Ruggie's Guiding Principles for Business and Human Rights which he submitted to the UN Human Rights Council in March 2011 (www.business-humanrights.org).

campaign against Shell, operating with false information on the amount of toxic materials present in Brent Spar, misleading the media and the public (Grolin, 1998). In a different context, European NGOs have been accused of spreading wrong information about child labour and the violation of human rights in Indian industry (The Economic Times, 2007).

Last but not least, certain self-acclaimed representatives of civil society engage in activities, such as street protests which sometimes even cross the border into violence, or tree spiking which puts the lives of loggers at risk. Such behaviour raises doubt about the appropriateness and hence the legitimacy of their behaviour in putting forward their claims.

As a consequence of the growing scepticism about NGOs, ironic acronyms abound, such as BRINGOs (Briefcase NGOs), BONGOs (business-organised NGOs), PONGOs (politically-organised NGOs), DONGOs (donor-organised NGOs), GONGOs (government-organised NGOs), RONGOs (royally-organised NGOs), MONGOs (My own NGO) (Naidoo, 2003) and MANGOs (market-oriented NGOs) (Shamir, 2004). There is a general feeling that almost every association seems to feel entitled to call itself an NGO, while the boundaries between "true NGOs" and associations that pursue business-oriented or government-dictated agendas are far from clear.

This book is based on the conviction that such blurred boundaries, not only between NGOs and business- or government-oriented associations, but also between NGOs and "chaotic troublemakers", are mainly responsible for the perceived legitimacy deficit of NGOs and it is therefore worth clarifying not only the boundaries but also the stakes of legitimacy. The specific focus of this book is thus to define the legitimacy of NGOs as partners of corporations. The research question before us is, what makes an NGO legitimate as a partner of a company? To answer this, I will deploy a novel perspective which assesses the legitimacy of NGOs as partners of corporations from a political-theoretical point of view and I will use this perspective in order to develop a conceptual framework which allows us to identify legitimate partner NGOs.

Outline and Methodology

This book is divided into four parts. In *Part I*, I will set out to portray an understanding of NGOs as actors that are inextricably linked to normative questions concerning the public sphere or the public good, and that therefore must be assessed from a political-theoretical perspective. I will argue that promising starting points for such a venture can be identified in certain strands of both stakeholder theory and CSR. While the former provides the grounds for assessing the normative legitimacy of NGOs in the first place, the latter more specifically presents us with a view of corporations as political actors which can be expected to concern themselves with the normative legitimacy of their partner NGOs.

With this in mind, I will set out to provide a thorough justification of what political theory is most suitable for answering my research question in the second

and third part. *Part II* of this book specifically directs its focus at actors, that is, at civil society in general and NGOs in particular, in the postnational constellation. I will argue that a political conceptualization of the role of NGOs in their interaction with corporations can only be meaningfully assessed based on a broad and normative conception of democracy. In search of a political model that fulfils these requirements I then compare the different interpretations that liberalism and deliberative democracy assign to civil society and NGOs.

In *Part III* of this work, the systematic critical comparison between liberal and deliberative conceptions of central terms will be continued with respect to the institutions and processes which constitute a normative framework for the role of NGOs as legitimate partners of corporations. It will be argued that the deliberative, in contrast to the liberal conception of the relevant institutions and processes, provides the ground for a meaningful conceptualization of NGOs as political actors in their interaction with corporations.

In *Part IV*, the findings from the preceding parts will be used for setting up a conceptual framework which allows us to distinguish legitimate partner NGOs from two related actor types with whom they share certain characteristics but who have not earned the normative legitimacy that "true NGOs" strive for. The conceptual framework distinguishes between NGOs, interest groups, and activists along three dimensions which are said to constitute the legitimacy deficit of NGOs (substantive, structural, procedural). The goal is to find criteria that can guide our judgment when assessing the legitimacy of NGOs as partners of corporations. It will be argued that a procedural conception of the legitimacy of NGOs offers the most meaningful normative orientation for clarifying the boundaries between them and interest groups on the one hand and between them and activists on the other hand. But we must keep in mind that in practice the delineations between NGOs, interest groups, and activists are not clear-cut. In reality, NGOs might exhibit features that are characteristic of interest groups, or they might resort to behaviour that is associated with one actor type or the other. In recognition of this complexity this book does not aim to present an unambiguous checklist for companies to consult when judging their potential partner NGOs. Instead, based on a thorough clarification of the terms of the debate, it will develop normative guidelines for a matter which has come to play a central role in CSR.

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Chapter 1
NGOs as Representatives of Public Claims

Defining NGOs

NGOs are a phenomenon that has received considerable attention across different disciplines, originating in social movement theory (Smith, 1998; della Porta and Diani, 1999; Carty, 2002; Hernes and Mikalsen, 2002; Koopmans and Rucht, 2002; Snow, Soule, and Kriesi, 2004)[1] and development studies (see e.g. Najam, 1996; Ebrahim, 2003; Edwards and Hulme, 1996; Fowler, 2000; Bebbington, 2005). While both disciplines originally looked primarily at the interaction between NGOs and the state or international organizations, a widening of the focus has occurred to include the interaction between NGOs and the economic sector as well (Hamann and Acutt, 2003; Covey and Brown, 2001; Carty, 2002; Hernes and Mikalsen, 2002; Chesters, 2003). Yet, despite or maybe precisely because of this widespread attention, finding an unequivocal definition of defining NGOs has proved to be a very difficult quest that has become the main subject of several articles (e.g. Jegers and Lapsley, 2001; Martens, 2002; Vakil, 1997). As a matter of fact, there is no single agreed-upon definition of what NGOs are. The diversity of definitions is so broad that it even raises the question whether finding a consensus would have to be termed "mission impossible" (Martens, 2002: 271).

As I argue here, the difficulty of setting up an unequivocal, conclusive and exhaustive definition is directly linked to the fact any meaningful definition of NGOs is inherently normative. What do I mean by that?

The normativity of the term NGO derives from the fact that NGOs typically share a collective commitment to some belief or principle and that very often they appeal to universal norms such as justice or freedom (Spar and La Mure, 2003: 79). NGOs are those actors that inject "values and moral pressure into the global marketplace" (Clark, 2001: 19). As a consequence, most definitions of NGOs contain normative elements.

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[1] It should be noted that social movement literature hardly uses the term NGO but instead refers to different forms of social movements in general. In accordance with Teegen et al., however, I perceive NGOs to be institutionalized forms of social movements (Teegen, Doh, and Vachani, 2004; see also Kaldor, 2003b: 86ff.).

The strong normative focus also becomes evident in the self-perception of NGOs as agents of social transformation (Arenas, Lozano, and Albareda, 2009) and in mission statements where they claim to give a voice to the "fragile earth" (Greenpeace) or to "champion a healthy and just world" (Friends of the Earth). In general, NGOs focus on issues that they think deserve advocacy.

If we look for "a least common denominator" across different definitions we could identify it as consisting in an implicit or explicit relation to "the public". This relation becomes evident in the characterizations of NGOs as promoters of the "public interest" (Fries, 2003: 237) or as "value-based organizations that emphasize their contributions to the public good at the heart of their missions" (Brown and Jagadananda, 2007: 7), or as groups that addresses "issues in support of the public good" (United Nations Department of Public Information, 2006a).

Moreover, the norms that NGOs claim to promote – like justice or freedom – are norms that, as mentioned above, are essentially contested and that need to be publicly constituted in a democratic society. By emphasizing the public character of their claims, NGOs set themselves apart from interest groups as we will see later.

But what is "the public"? How do we define the public interest and the public good? What or who belongs to the public sphere? The inextricable link between NGOs and the public, whether the public good, the public interest or the public sphere, makes their definition very elusive and emphasizes the need for clarification. Such clarification, I argue, can best be gained from adopting a political-theoretical perspective on NGOs. After all, the question of how to arrive at definitions of what is public and what is private has been one of the central preoccupations of Western thought since classical antiquity (Weintraub, 1997: 1). If we identify NGOs as actors who operate at the core of such questions, we have to take a closer look at the political-theoretical foundations on which our arguments rest.

I would even go as far as to claim that a definition which avoids all normative issues would be meaningless. We must resist the temptation to use the term NGO as a catch-all term which encourages analytical vagueness (Collingwood and Logister, 2005: 186; see also Martens, 2002: 271ff.). If we want to exclude normative questions, we risk ending up with a definition of NGOs as a residual category, such as, any organization that is not officially operated by a government (or an international organization) or that is not obviously an economic actor can call itself an NGO and raise allegedly public claims in the name of "the general interest". Hence, whenever we attempt to ascribe to NGOs a meaningful role we are immediately faced with normative judgements. We cannot assign NGOs the goal of promoting public interests without first having an idea of what we understand by the term public interest.

Moreover, definitions which acknowledge the normative dimension of NGOs, at the same time serve as definitions of legitimate NGOs.[2] Let me illustrate this

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[2] A definition which does not confine NGOs to the promotion of public values is provided by Kovach et al. who admit that "the typical notion of an NGO is an organisation that provides welfare services to disadvantaged groups". But for them, NGOs can also be "advocacy groups who represent, for example, business interests or trade union rights at international conferences" (Kovach,

point by taking the definition of NGOs put forward by the UN Department of Public Information as an example: there, an NGO is defined as "a not-for-profit, voluntary citizens' group, which is organized on a local, national or international level to address *issues in support of the public good*" (United Nations Department of Public Information, 2006a, emphasis added). The normative dimension in this definition is expressed by the term "issues in support of the public good". We can conclude from this definition that not-for-profit, voluntary citizen groups that fail to prove that they address issues in support of the public good do not count as NGOs. Hence, the UN definition implicitly relates not just to NGOs, but to legitimate NGOs.

The important role that normative elements play in the characterization of NGOs finally also has implications for the type of legitimacy that interests us here. Even though legitimacy is sometimes treated as a descriptive concept – for example, by Max Weber, who defines legitimacy as describing a social order that has "the prestige of being considered binding" (Weber, Roth, and Wittich, 1978: 31) – the focus here is on clarifying the normative basis for the legitimacy of NGOs as partners of corporations. In fact, the particular relevance of the normative legitimacy for NGOs can be directly linked to their role as organizations that strive to promote the common good (Brown and Jagadananda, 2007: 7).

Support from Stakeholder Theory

The notion of NGOs as actors whose legitimacy as representatives the public claims deserves closer examination receives support from stakeholder theory, that is, from normative stakeholder theory to be precise. Let me briefly illustrate where to locate such a notion of NGOs in stakeholder theory.

In stakeholder theory we can distinguish two major strands which assign NGOs a different role as stakeholders of corporations, namely the instrumental and the normative strand of stakeholder theory (Donaldson and Preston, 1995).[3]

Neligan, and Burall, 2003: 21). The problem with such a definition is that it frees NGOs from their self-imposed normative duties and makes them indistinguishable from purely economic types of associations. Even more confusing is the definition put forward by Collingwood and Logister which perceives NGOs as acting "on the basis of imperatives grounded in distinctive values and interests" (Collingwood and Logister, 2005: 190, note 1), respectively as "not representative of the body politic as a whole, but of particular groups' interests and values" (Collingwood and Logister, 2005: 178). Such a focus on NGOs completely eradicates the difference between them and interest groups. On the problem of classifying representatives of public claims as "special interest groups", see also Ulrich (2008: 429f.).

[3] Please note that the purport of this distinction is not free from criticism (Jones and Wicks, 1999; Freeman, 2004; Jensen and Sandström, 2011), but it is still considered a helpful starting point for illustrating the different roles that NGOs are ascribed. Moreover, there is also a third approach to stakeholder theory which supposedly covers descriptive/empirical aspects. However, in line with Ulrich, it is assumed here that the descriptive conception is part of the instrumental view (Ulrich, 2008: 422, FN 134).

The instrumental strand of stakeholder theory typically only accepts NGOs as stakeholders because of their *power* or influence (Hillman, Keim, and Schuler, 2004; see, critically, Ulrich, 2008: 421ff.). NGOs exercise their power most evidently when they conduct campaigns or even boycotts against multinational corporations (Klein, Smith, and John, 2004: 92ff.). As mentioned above, some of the historically most famous examples of how much NGO criticism can damage a corporation's reputation are the Nestlé baby milk scandal in the 1970s (Kaptein and Van Tulder, 2003; Tucker and Melewar, 2005), the campaign against Nike's sweatshops in the 1990s (e.g. Kapstein, 2001), and the Greenpeace 1995 campaign against Shell's planned sinking of the oil platform Brent Spar in the North Sea (Livesey, 2001; Zyglidopoulos, 2002). From an instrumental perspective, the stakeholder status of NGOs is furthermore greatly enhanced through the empowerment which they experience through their effortless access to the internet and particularly to social media. However, an instrumental perspective cannot provide the rationale for assessing the normative legitimacy of NGOs as representatives of public claims. From an instrumental point of view, the only aspect that counts with regard to the legitimacy of NGOs is whether they have power; and power is typically an explicitly descriptive category. In its most famous definition by Max Weber it relates to "the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, *regardless of the basis* on which this probability rests" (Weber, Roth, and Wittich, 1978: 53, emphasis added). An identification of NGOs as stakeholders based on their power thus fails to take into account normative considerations about their legitimacy.

A normative conception of stakeholders, on the other hand, explicitly aims at identifying legitimate stakeholders. It characterizes those groups as stakeholders who have legitimate claims on the corporations. Legitimate claims are typically those from stakeholders to whom a corporation owes moral obligations (Mitchell, Agle, and Wood, 1997; Jones and Wicks, 1999), which have been described as "reciprocity-based obligations" (Phillips and Freeman, 2008: 107). Since NGOs however, are characterized as secondary or derivative stakeholders with an at best indirect connection to the corporation, this approach cannot explain their legitimacy as stakeholders *prima facie*. However, various scholars have recognized NGOs as stakeholders with a special status (Teegen, Doh, and Vachani, 2004; Baur and Palazzo, 2011) which can be justified as follows: some normative claims as typically raised by NGOs – such as those that refer to basic human rights – are valid claims because their violation would be wrong, "for reasons prior to any stakeholder obligation" (Phillips, 2003: 30). Therefore, NGOs, especially if understood as critical watchdogs, who are "committed to a universalist rather than partisan cause" (Young, 2001: 675), are legitimate stakeholders of corporations. As a result, such a characterization of NGOs as stakeholders of corporations does justice to the normative core of NGOs as outlined above.

As might become evident from my reflections so far, I will not try the impossible and give a conclusive exhaustive definition of NGOs in this book. Instead, I will content myself with the characterization of NGOs as actors who promote public claims. This characterization will also guide the search for the "best political theory". In

the fourth part of this book, I will develop a typology that is specifically helpful for further clarifying the normative legitimacy of NGOs as partners of corporations but at this point I would like to first sketch out three dimensions of the legitimacy deficit of NGOs, and then point out the addressees of NGO legitimization. Finally, I will locate NGOs in the CSR debate and present a notion of CSR which assigns corporations a status from which we can derive a duty to concern themselves with the normative legitimacy of NGOs.

The Triple Legitimacy Deficit of NGOs

From what has been said so far, it might have become clear that NGO legitimacy is an issue with wide implications which range from a practical relevance for corporations upon choosing their partner NGOs to fundamental questions about our notions of the public good and the public sphere.

If we synthesize the "common sense" reservations about the legitimacy of NGOs with the reflections on their link to questions of the public good, we can distinguish three dimensions of the legitimacy deficit of NGOs, namely a structural, a substantive, and a procedural dimension. This distinction, as will become evident later, is on the one hand valuable for categorizing the different political-philosophical conceptions of the institutions and processes that constitute the normative framework for legitimate partner NGO, on the other hand it also provides normative orientation for distinguishing legitimate NGOs from activists and interest groups.

In the following I will address those aspects of NGO legitimacy which refer to the fact that NGOs represent the needs of a "constituency" which has not elected them as part of the *structural dimension*. The structural dimension thus primarily refers to the lack of formal democratic legitimacy of NGOs. This is true because even if they are registered organizations that face some kind of duties levied by certain nation states, they often cannot be held accountable for their actions on a transnational level (Habermas, 2001; Zürn, 2004; Habermas, 2004: 174). Rather than a constituency some authors prefer to refer to the beneficiaries of an NGO's actions (see for example Murphy and Bendell, 1999; or Lee, 2004). However, in this book, the term "constituency" is preferred over the term "beneficiaries", as constituency is a political term whereas beneficiary has an economic connotation. Since I understand NGOs to be political actors involved in a political interaction with corporations, it is consistent to primarily rely on political instead of economic terms.

However, as we have seen above, the legitimacy problem goes further. There are also doubts about the legitimacy of the claims of NGOs. I will assign these questions to what I call the *substantive dimension* of the legitimacy deficit of NGOs. To be precise, the substantive dimension can be divided into an input and an output aspect. On the input side, the substantive dimension directly refers to the legitimacy of the claims that NGOs represent. As has been mentioned above, NGOs often claim to act in the public interest. But how can we decide what is a public interest and what is a

private interest given that this is one of the most fundamental challenges in Western political theory? What norms should guide such a judgment? These questions will be addressed from a political-theoretical perspective in Chapter 7, and on a more pragmatic level in Chapter 12. On the output side, the substantive dimension refers to the legitimacy of the outcomes of NGO actions. Taking into consideration the output of an NGO's activities in order to determine its legitimacy implies adopting an instrumental view of NGOs. Examples for output-oriented questions are: do the actions of an NGO lead to the fulfilment of public interest? Are NGOs legitimate partners of a corporation if the partnership generates desirable outcomes? These questions will be addressed in the section "Deliberative Principle of Legitimacy" (Chapter 9) where epistemic justifications, that is, justifications of the legitimacy of NGOs based on the outcomes of their activities, and procedural justifications, that is, justifications of the legitimacy of NGOs based on the procedure by which they legitimize themselves, will be compared.

And last but not least, there are also procedural questions to be dealt with, namely when we ask ourselves – as seen with the examples of NGOs which rely on misinformation when conducting campaigns – whether the strategies that NGOs choose for promoting their claims conform to their status as representatives of public claims. I will assign all these questions to the *procedural dimension* of the legitimacy deficit of NGOs. What kinds of behaviour are legitimate for NGOs in order to put forward their claims? This question will be addressed in Chapter 14, where procedural characteristics of legitimate NGOs will be outlined.

We must consider further, however, whether these dimensions stand in a substitutive, a complementary, or even an ordinal relation to each other. Do we have to resolve all three dimensions of the legitimacy deficit of NGOs at once, i.e. do we have to make them democratically elected (in order to overcome their structural legitimacy deficit), and decide what claims are legitimate (in order to overcome their substantive legitimacy deficit), and define the procedures which are legitimate for putting forward these claims (in order to overcome their procedural legitimacy deficit)? Obviously, the relation between these dimensions is not free of conflict. For example, if we insist that NGOs must be democratically elected in order to count as legitimate representatives of civil society, we cannot at the same time decide what claims they are allowed to advocate or how they should put them forward. In such a case, the choice of the voters would be severely restricted and the democratic election would boil down to an act of acclamation.

This example shows that the three dimensions are inextricably linked: we need to decide which dimension we want to focus on, which is to say we must assess which dimension yields the most meaningful conceptualization of the legitimacy of NGOs as partners of corporations. Once we have done that, the other two dimensions will fall into line. That is, if we make the legitimacy of an NGO dependent on its formal representation of civil society (structural dimension), then this presupposes that it raises legitimate claims (substantive dimension) and behaves legitimately (procedural dimension). Vice versa, if we say that an NGO raises legitimate claims, this makes it automatically a legitimate representative of civil society and implies that it behaves legitimately.

The practical relevance of these three dimensions of the legitimacy deficit of NGOs will become evident in the fourth part of this book which attempts to deduce the normative core of NGOs as legitimate partners of corporations by exploring the boundaries of their legitimacy.

Addressees of NGO Legitimization

A question that inevitably arises when assessing NGO legitimacy is before whom do NGOs have to legitimize themselves? Most often it seems that NGOs have to legitimize themselves in two dimensions: on the one hand, they need to legitimize themselves before the people who they claim to represent, i.e. their constituency; on the other hand, they need to legitimize themselves before their donors, foundations, governments etc. The separation of the addressees into two dimensions also suggests itself for the research question. The primary addressees of NGO legitimization, according to the research question, seem to be companies but of course NGOs also need to legitimize themselves before civil society because it is civil society whom they claim to represent. Various scholars differentiate between these two dimensions with the terms "upward accountability" and "downward accountability". Upward accountability refers to relations with donors, foundations, and governments, and mostly focuses on the use of designated money for designated purposes (Ebrahim, 2003: 814; Edwards and Hulme, 1996: 967). Downward accountability, on the other hand, refers primarily to relationships between NGOs and their constituency (Ebrahim, 2003: 814),[4] and is sometimes also called voice accountability (Slim, 2002: para 14; see also Baur and Schmitz, forthcoming). As a consequence of differentiating between the upward and downward dimension of accountability, there is also a tendency to set up lists of stakeholders of NGOs as a guideline for defining to whom NGOs are accountable. The stakeholder approach to NGOs seems to share the assumption of associative democracy "that society is neatly composed into associative groupings, which are capable of representing the diversity of all citizens" (Hendriks, 2006: 497).[5] Yet, it is very difficult to set up exhaustive lists of stakeholders due to the complex relations in which they stand to each other and to the NGO. Very often their demands are conflicting (Hilhorst, 2002: 204; see also Collingwood and Logister, 2005: 188). Moreover, a categorization of stakeholders often serves strategic goals (Banerjee, 2000: 25), and if the pressure for increased accountability particularly towards donors rises, it can effectively obstruct the pursuit of an NGO's core objectives (Ossewaarde, Nijhof, and Heyse, 2008: 42) and lure NGOs into aligning their goals with those of corporations (Baur and Schmitz, forthcoming; Benjamin, 2008; Eikenberry and Kluver, 2004).

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[4] In a narrow sense, downward accountability refers to the relationships between NGOs and their partners, supporters, and staff (Edwards and Hulme, 1996: 967).

[5] More on associative democracy will be said in the section "Liberal Principle of Legitimacy" (Chapter 9).

In this book, I argue that the legitimacy of NGOs in the eyes of the two addressees, that is, of civil society and corporations, cannot be assessed separately. I claim that the legitimacy of NGOs as partners of corporations is inextricably linked to their legitimacy as representatives of civil society: NGOs are only legitimate partners of corporations if they are legitimate representatives of civil society. More specifically, I would even contend that the two dimensions dissolve into one another if NGOs are defined as actors with public claims that must legitimize themselves before the public sphere; and the public sphere in principle has the potential to encompass both of these two dimensions, civil society and companies as long as their arguments conform to the discursive logic of civil society (Habermas, 1996b: 359/360; Palazzo, 2002: 57ff.; Cortina, 1995: 54).

Of course, as will be pointed out later, the specific requirements for NGO legitimization before the public sphere depend on the notion of the public sphere that one advocates. But, for the moment, suffice it to say that the public sphere is perceived as the primary target of NGO legitimization and that both civil society and companies are actors in the public sphere.

A Remark on the Role of NGOs as Experts

One might wonder why the role of NGOs as experts has not been addressed so far. The reason for that is simply that what interests us here, is the *democratic role* of NGOs. The expert role of NGOs is not part of their democratic role. It is not core of their *raison d'être*, which is to put forward public claims, but something that rather evolves as a by-product of their engagement and is not assessed here. The interaction between corporations and NGOs in which NGOs exclusively play the role of experts does not mirror the coming together of civil society actors with economic actors. Of course, NGOs can acquire considerable expert knowledge in their field of action but what is of interest here is how they in a first step legitimize themselves vis-à-vis corporations and how they manage to mark a distance to related actors, that is interest groups and activists. Judging NGO-business-partnerships in which NGOs play highly specialized expert roles would imply to assess them from an output-oriented, instrumental, and technocratic perspective. A focus on the expert role of NGOs moreover entails the risk of elitism; and as soon as elitism comes into play, it is hard to pursue a democratic focus (see Collingwood and Logister, 2005: 188). As will become evident in this work, the legitimacy of NGOs as partners of corporations is not assessed from an output-oriented perspective (i.e. the legitimacy of NGOs as partners of corporations is not judged by the output that can be expected from such a partnership) but from an input-oriented perspective. To be precise, the perspective taken in this work assesses the legitimacy of the input of NGOs along three dimensions: the legitimacy of their substantive input, of their structural input, and of their procedural input.

Locating NGOs in the CSR Debate

As convincing as the reflections so far might sound, we must not forget that the actual choice of a partner NGO, and the assessment of its legitimacy, in essence depends on how corporations perceive their corporate social responsibility since their interaction with NGOs is typically driven by considerations about how, if at all, they want to frame their responsibility as actors in society. We therefore need to find a link between the political-theoretical view of NGOs and CSR, and more specifically, we need to find a notion of CSR that can account for a notion of NGOs as representatives of public claims as outlined above. The core requirement for such a notion of CSR is that it must provide a conception of corporations who are willing to concern themselves with the normative legitimacy of NGOs understood as representatives of public claims. The anecdotal evidence in the introduction which quoted mainly strategic considerations of corporations (such as those relating to reputation or resources) as being relevant for their choice of partner NGOs, does not immediately suggest that there might be a real interest on behalf of corporations to think beyond the business case.

I argue that one way to understand why corporations care about the normative legitimacy of their partner NGOs, is to conceptualize them as political actors, since only corporations which ascribe themselves a political, as opposed to a merely economic responsibility, are willing to think beyond the business case – and this is what is needed if we want to acknowledge the special role of NGOs. There is one particular strand of CSR, the so called political strand of CSR, which as I will argue below, provides the grounds for subjecting the choice of partner NGOs to considerations that take into account their normative legitimacy. However, in order to highlight the particular strengths of this strand, we must first look at the dominant instrumental strand and argue why this strand cannot account for the notion of NGOs as actors that promote public claims.

Instrumental CSR

A look at how the interaction between corporations and NGOs is dealt with in the discourse on CSR, reveals an overwhelming tendency to characterize their interaction as a market-oriented relationship "such as corporate economic strategy, strategic alliances, or collaborative leadership with little application to corporate social responsibility (CSR), sustainability, or stakeholder engagement beyond their economic implications" (Murray, Haynes, and Hudson, 2010: 162), or, put simply, as a mere business case. The predominant interest of this strand of CSR lies in understanding and explaining the processes of interaction between NGOs and corporations, and therefore can be attributed to an overall "positivist framework of CSR" as critically defined by Scherer and Palazzo (2007: 1096).

As a consequence of this positivist bias, even though NGOs receive vast attention in CSR,[6] most of it is based on an instrumental perspective. A variety of articles focus on the impact that NGOs have on corporations (Spar and La Mure, 2003; Argenti, 2004; Hendry, 2005; Burchell and Cook, 2006; Egels-Zandén and Hyllman, 2006; Schepers, 2006) or examine the relationship between companies and NGOs from a strategic perspective (Yaziji and Doh, 2009; Gray, 2007; Henriques, 2001; Hamann and Acutt, 2003; Guay, Doh, and Sinclair, 2004; Hendry, 2006; Jonker and Nijhof, 2006; critically see Gray, Bebbington, and Collison, 2006). The latter becomes evident in articles that examine NGOs within a business paradigm (Teegen, Doh, and Vachani, 2004), for example by broadening "the business model concept to incorporate cross-sector collaborations, arguing such partnerships can create and deliver both social and economic value, which can be mutually reinforcing" (Dahan et al., 2010: 326).

At the heart of this type of research is a win-win perspective which is symptomatic for much of the CSR literature in general but also for articles that deal with NGO-business partnerships in particular. However, this perspective has serious implications for the choice of partner NGOs. As will be argued throughout this book, judging NGOs within a business paradigm ignores the normative role of NGOs as actors that represent morally legitimate public claims rather than particularistic economic ones, and that therefore, as outlined above, have a special status among the stakeholders of a corporation. Judging the potential of a partner NGO with a win-win situation in mind in the best case requires that companies only take into account the claims of non-adversarial NGOs, that is essentially of "watchdogs without teeth" (Baur and Schmitz, forthcoming; Shamir, 2004: 681); in the worst case it leads corporations to cooperate with front groups, that is, with business organizations that are disguised as NGOs.

The instrumental perspective on NGO-business partnerships is thus part of a larger scheme which revolves around CSR as a business opportunity, as a means to accommodate pressures and to avoid regulation by "emphasizing voluntarism rather than legal obligation or public accountability" (Levy and Kaplan, 2008: 436; see also Shamir, 2004). However, apart from concerns about how genuine the commitment to social responsibility of corporations with such an approach is – because, what about all those situations where responsibility does not pay off? (Ulrich, 2008: 401) –, there is also rather scant evidence for the truth of its central claims. The latter reservation is probably best expressed by a former executive of a large oil company who reportedly said that if the win-win argument were so compelling, "then we wouldn't be sitting around this table" (Utting, 2000, quoted from Levy and Kaplan, 2008: 436). However, the very same executive also pointed out that it was NGO and consumer pressure that had changed corporate behaviour (Utting, 2000, quoted from

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[6] See for example Doh and Guay (2006), van Huijstee and Glasbergen (2010), Dahan, Doh, and Teegen (2010), Seitanidi (2010), Hamann and Acutt (2003), Guay, Doh, and Sinclair (2004), Burchell and Cook (2006), Egels-Zandén and Hyllman (2006), Jonker and Nijhof (2006), Schepers (2006), Scherer and Palazzo (2007).

Levy and Kaplan, 2008: 436). This statement portrays an understanding of NGOs as critical forces which have to be reckoned with outside the rather narrow win-win mindset.

It remains to add that the instrumental and descriptive focus on the role of NGOs in their interaction with corporations extends beyond CSR into management literature which has begun to use insights from social movement theory (Berry, 2003; Rowley and Moldoveanu, 2003; Spar and La Mure, 2003; Den Hond and De Bakker, 2007; Argenti, 2004; Rondinelli and London, 2003). Management theory is interested in understanding the functional logic of social movements and draws on social movement theory in order to assess questions such as when stakeholder groups will act (Rowley and Moldoveanu, 2003), what makes them powerful (Berry, 2003), and how their activities influence corporate social-change activities (Den Hond and De Bakker, 2007). Thus, not surprisingly, just like the majority of the CSR literature, management literature equally mostly concentrates on descriptive, functional aspects of the interaction between business and civil society.

Whilst instrumental CSR and similar research in related disciplines has its merits, it does not capture the specific role that NGOs assume by promoting public claims vis-à-vis corporations. Why would corporations in search of the business case for engaging with NGOs care about the normative legitimacy of NGOs? An answer to this question can be found in more recent research that assesses CSR from a political perspective.

Political CSR

An alternative way of approaching CSR consists in seeing it as a political process in which business reacts to social pressure (Murphy and Bendell, 1999: 38f.). Based on such a perspective on CSR, partnerships between NGOs and corporations have a "public character" "because they claim to undertake actions (rule-making; foster technical and/or social innovation, managing an issue area or development process; promoting education and so on) that serve public ends" (Meadowcroft, 2007: 195). Thus, the reference to "the public" which we identified in most of the definitions of NGOs is extended to their interaction with corporations.

By conceptualizing partnerships between NGOs and corporations as a public and therefore political matter, political CSR assigns both parties involved a political role. However, so far the focus of political CSR has mainly rested on the corporate side of the interaction (Baur and Palazzo, 2011). Since the political role of NGOs will be subject to a thorough assessment in the following chapters, I will briefly outline the core assumptions about the political role of corporations here. The political role of corporations can on the one hand be derived from their factual influence on political life and on the other hand from normative reflections.

The factual political role of corporations is linked to the observation that particularly over the past decade corporations increasingly engage in processes that regulate their behaviour and from which standards and rules result for example in

the context of multi-stakeholder initiatives such as the Ethical Trading Initiative, the Marine Stewardship Council, or the Extractive Industries Transparency Initiative, just to name a few. NGOs frequently also play a central part in such institutions. Outside multi-stakeholder initiatives corporations particularly often assume a political role in developing countries where government is too weak to provide the services required to fulfil basic needs of the population. In such countries, corporations often engage in political tasks like the provision of education, health, infrastructure and security (Valente and Crane, 2010: 52). Yet, with the retreat of the welfare state, corporations also in Western democracies, when faced with expectations that they ensure some of the basic rights previously protected by the state, often equally assume a political role (Moon, Crane, and Matten, 2005: 440). And finally, the same is true if corporations find themselves confronted with other inherently political claims that are typically put forward by NGOs, such as claims referring to justice (for example if they are accused of being complicit in human rights abuses (see e.g. Wettstein, 2010)), or to environmental protection (for example if they are accused of exploiting the natural environment (see e.g. Berry, 2003)).

Empirical evidence in support of the specific assumption that corporations care about the normative legitimacy of NGOs, has recently been provided by organizational studies. In her study on organizational identity orientations Brickson has shown that an increasing number of companies exhibit what she calls relational or collectivistic organizational identity orientations. Companies with such organizational identity orientations can be expected to be concerned with the normative legitimacy of NGOs. Why is that? According to Brickson, stakeholder relationships – viewed from the side of the corporation – are not only influenced by the character of a stakeholder but also by the organizational identity orientation of a corporation (Brickson, 2007: 865). Her hypotheses are based on a typology that distinguishes between corporations on the basis of three different types of organizational identity orientations: individualistic corporations, relational corporations and collectivistic corporations. Only the latter two can be expected to care about the normative legitimacy of an NGO because these companies enter partnerships with NGOs out of at least partly ideational motives. For such companies, NGOs are more than just a means to an end. Relational corporations base their stakeholder relationships in general on dyadic concern and trust, and they manage their relationships with nonprofits in particular through dyadic partnerships, which means that they establish and rely on strong personal ties between their partnering nonprofits and themselves. Collectivistic corporations base their stakeholder relationships in general on a common collective agenda and manage their relationships with nonprofits in particular through coalition-based ties, which means that they enter into alliances. Both the reliance on strong personal ties as well as the will to establish alliances suggest that partner NGOs are chosen carefully.

Individualistic corporations, by contrast, generally base their stakeholder relationships on instrumentality and manage their relationships with nonprofits in particular through decoupled ties, which means that they try to minimize interdependence between their partnering nonprofits and themselves. Instrumental arguments for partnerships between NGOs and companies state, for example, that "activities

of NGOs can help Multinational Corporations (MNCs) build up market presence in emerging markets" or that "NGOs are very much in touch with what is happening in society and can therefore generate business intelligence for companies" (Gartzke, 2004: 4). According to such a rationale, it is irrelevant whether the partner NGOs are concerned about their legitimacy or whether they are un-democratic, power-oriented, particularistic associations.

Thus, provided that a company's organizational character is not individualistic, it can be expected to be interested in guidelines for carefully assessing the normative legitimacy of its partner NGOs. How could a company otherwise accept its political responsibility but at the same time reject its obligation to legitimize its choice of partners for exercising this responsibility?

As to the *normative* perspective on the political role of corporations, the view of corporations as political actors has had quite a long-standing tradition. The normative perspective specifically asks why corporations *should* assume political responsibility and among others deals with questions of their legitimacy when doing so. It is safe to say that the legitimacy of corporations as political actors is at least as disputed as that of NGOs. This is hardly surprising given the triumph of liberal market ideology over communism at the end of the Cold War. In liberal market economies all regulatory power is assigned to the state, which however, as we will see in Chapter 3, should be kept to a minimum size. Therefore, liberal thinkers and neoclassical economists alike, would radically dispute the desirability and the legitimacy of a political role of corporations which goes beyond lobbying for their own interests.

However, as early as in the 1970s, a first important step towards conceptualizing corporations as political actors was made by Ulrich in his book on big corporations as "quasi-public institutions" (Ulrich, 1977). Ulrich forcefully argued in favour of a political responsibility of corporations which not only refers to the internal but also to the external dimension.[7] Conceptualizing corporations as political actors in a comprehensive sense or – as most prominently put forward by Ulrich in his later work "Integrative Economic Ethics"[8] – in an integrative sense entails an obligation to carefully assess normative aspects of the interaction between corporations and their stakeholders.

The integrative approach to business ethics derives these claims from the political-theoretical premises of deliberative democracy which conceptualizes ethical-rational politics in the light of discourse ethics (Ulrich, 2008: 288). Whilst

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[7] Ulrich thereby expanded on the work from the Swedish social scientist Eric Rhenman whose work "Industrial Democracy and Industrial Management. A Critical Essay on the Possible Meanings and Implications of Industrial Democracy" had laid the basis for assigning corporations a mainly internal political responsibility. Rhenman's work at the same time probably constitutes the first contribution to stakeholder theory (Rhenman, 1968: 24ff.).

[8] The German original was first published in 1997 under the title "Integrative Wirtschaftsethik" (Ulrich, 1997); in the meantime the work, in its fourth revised version, has been translated to English (Ulrich, 2008).

these premises will be spelled out in detail in the following chapters, it is important to note that by addressing some of the foundational issues which lie at the heart of modern political-theoretical discussions on the relation between business and society (Ulrich, 2008: 7) the integrative approach sets the stage for assessing the interaction between corporations and NGOs from a political-theoretical perspective. In the meantime, research that promotes such a discursive notion of the political responsibility of corporations has gained quite some currency (see also Palazzo, 2007: 68; Scherer, Palazzo, and Baumann, 2006: 520; Palazzo and Scherer, 2008; Scherer and Palazzo, 2011). The integrative and other discursive approaches to CSR can be subsumed under the label "post-positivist" because they adopt a critical view on positivist theory building and place "emphasis on the normative foundations of responsible business behaviour" (Scherer and Palazzo, 2007: 1097).

According to such conceptions of corporate social responsibility, corporations not only assume a "share of responsibility" for the regulatory framework in which they operate (Ulrich, 2008: 410) but also justify their behaviour vis-à-vis a "well-ordered society" of free citizens. The specific issue of the legitimacy of the political role of corporations is then addressed as follows: In a democratic society, political legitimacy is based on the accountability that elected political actors have vis-à-vis their constituency. However, since corporations are obviously non-elected political actors, we must find other ways to conceptualize their legitimacy. The public legitimization of corporate behaviour before the critical sphere of civil society thereby serves as an approximate substitute for the formal means of electoral sanction. The politicization of corporations thus means that corporations legitimize their behaviour in public discourse, that is, they practice "deliberative corporate policy-making" (Ulrich, 2008: 419ff.). Corporations which assume their responsibility as political actors justify their own behaviour discursively. Corporate political legitimacy is then based on the connection between corporate policies and discursive processes of public will-formation in civil society. The democratization of corporate activities occurs through continuous discourse participation and enlarged mechanisms of transparency, monitoring and reporting. This view reflects "the assumption that in pluralistic societies, a common ground on questions of right and wrong, or fair and unfair can only be found through joint communicative processes between different actors" (Scherer and Palazzo, 2007: 1097). NGOs assume a special role in this context because they are those actors who most visibly and most persistently call for the political responsibility of corporations.

We can thus summarize that by adopting a political perspective on CSR on the specific issue of NGO-business partnerships, the win-win perspective which characterizes instrumental CSR is replaced by a view of partnerships as an arrangement in which corporations and NGOs together engage for the common good (Baur and Palazzo, 2011; Waddell and Khagram, 2007). Corporations who see their engagement with NGOs as a means to promote the common good can be expected to care about whether the NGO in question is effectively a representative of public claims, because if not, they would have to reconsider their engagement.

By conducting an in-depth assessment of the legitimacy of NGOs in such a political interaction with corporations, this book provides a systematically reflected

notion of partner NGOs which so far has been missing in political CSR. At the same time, this book will also clarify some of the central concepts that underlie the notion of the interaction between corporations and NGOs as a political interaction. Finally, it will provide guidance for identifying those NGOs that meet the normative standards derived from political theory, and distinguishing them from related actors who do not possess the same kind of legitimacy.

Part II
Actors: Civil Society and NGOs in the Postnational Constellation

Chapter 2
The Postnational Constellation: A Broad Conception of Democracy

Extending the Sphere of Political Action

The postnational constellation is the defining paradigm for examining the interaction between NGOs and companies. The term "postnational constellation" denotes the attempt to describe the changed global conditions with respect to relevant actors (Zürn, 1999; Habermas, 2001: 58ff.; Chambers, 2003: 313ff.; Habermas, 2004: 174ff.). The decreasing influence of nation states as the most powerful actors on a global scale is perceived as the most substantial change. Nation states remain important global actors, but they have to share the global arena with global players such as multinational companies and NGOs (Warren, 2002: 683; Habermas, 2004: 175).

It would thus be wrong to think of NGOs and other transnational actors – with or without a formal mandate – as continuing "the work" of nation states on a global level (Edwards, 2000: 12f.). While nation states remain important players, NGOs are free to bring up issues that nation states would rather not mention. NGOs, for example, criticise violations of human rights more outspokenly than governmental representatives (Beck, 1997: 174). Postnational politics is not just the continuation of international politics by different actors.

The phenomenon of civil society as a political force in the postnational constellation is also addressed by the term "governance without government" (Rosenau and Czempiel, 1992). Theorists of "governance without government" address the possibilities of promoting a more democratic global order without necessarily creating material entities or formal organizations that are usually associated with the concept of government (Young, 1994: 14; see also Risse, 2004: 289ff.). Civil society organizations are considered to be one such mechanism through which such governance without government could be achieved (Chambers, 2003: 313). Overall, the "governance without government" discourse shares its focus with the discourse on the postnational constellation, but it assesses the problem from a more technical perspective. In this work the term "postnational constellation" is preferred over

the "term governance without government" because it more explicitly focuses on the normative dimensions of the changed political circumstances in the globalized world.[1]

Just like globalization, the postnational constellation is not a homogeneous condition that prevails globally and is acknowledged by everybody. Instead, it differs notably in regard to issues and countries (Zürn, 2002: 10). However, there are certain characteristics that distinguish the postnational from the national constellation. Zürn states that statehood consists of three aspects: namely resources, recognition and the realization of government goals. The increasing influence of NGOs in the postnational constellation becomes especially evident in the latter two aspects. According to Zürn statehood in the postnational constellation is jagged (Zürn, 2002: 224): whereas in the national constellation all three aspects were converged into one political organization, the nation state, in the postnational constellation this is no longer the case and a new architecture of statehood arises (Zürn, 1999: 2; see also Palazzo, 2007: 62ff.).

The postnational constellation implies that the *formulation of government goals* increasingly takes place at the level of international institutions. At this level, nation states share the playing field with transnationally organised interest groups and non-governmental actors who play a role in agenda-setting and to a certain extent in actual negotiations (Zürn, 1999: 21). Increasingly, norms set by international institutions address behind-the-border issues. Such regulations not only affect the nation state, but now also societal actors. This trend enhances the impression that nation states have become partially disengaged from international politics (Zürn, 1999: 17). In this context NGOs enter the scene, especially when it comes to monitoring the implementation of norms. But, as is widely known, they not only lack a formal mandate but also the means of sanctioning agents who breach the rules. The role that NGOs play in the aspect of *recognition* derives from their participation in the monitoring of international agreements. In this context NGOs increasingly assume the role of instances conferring legitimacy onto states. Yet, the allocation of authority through NGOs undermines conventional ideas of sovereignty (Zürn, 2002: 223). A democratic account of legitimacy requires that authority is conferred by those who are governed (King, 2003: 25). The political authority that NGOs assume in their interaction with international institutions is obviously not justified in a formal and narrow democratic sense. It is a fact that shifting responsibilities from the national to the supra- or transnational level creates gaps of legitimacy (Habermas, 2001: 71).[2]

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[1] A distinction between a normative strand and a more technical strand of literature on the role of civil society actors in a globalized world is also put forward by Collingwood and Logister who distinguish between normative work on global governance and its role for NGOs on the one hand and policy-oriented work on the other hand. The former sees the involvement of NGOs in global governance as opening the door to a whole range of alternative conceptions of the world order; the latter is less concerned with identifying NGOs as agents in global normative structures but rather analyzes specific problems that arise from increased NGO participation in global governance (Collingwood and Logister, 2005: 175ff.).

[2] Yet, as will be stated in the section "Three Contexts for NGOs as Representatives of Public Claims" (Chapter 2), in the interaction between NGOs and international institutions there is at

But the postnational constellation is not only characterized by the new interplay between international institutions and NGOs. Political processes also occur outside international institutions, namely between NGOs and multinational corporations. In the postnational constellation there is a wide range of issues that are undeniably public, are effective across borders, but are not (yet) regulated. Yet, if we adopt a wider conception of regulation, we can classify those issues that NGOs settle in their direct interaction with companies under the category of "civil regulation". Civil regulation denotes the quasi-regulation of business by civil societies (Bendell, 2005: 363) and encompasses "voluntary, private, non-state industry and cross-industry codes that specify the responsibilities of global firms for addressing labor practices, environmental performance, and human rights policies" (Vogel, 2010: 68; see also Zadek, 2010; and Vogel, 2008). In some sectors, civil regulation already covers an impressive market share. For example, in 2008 over 80% of wood and wood products coming into the UK were certified by civil regulation (Moore, 2009).

Many of the issues that are of particular concern to civil society organizations are of an economic kind, caused by the globalization of markets. For a long time it used to be the state that domesticated market forces, but with the facilitated expansion of business operations across the globe, the nation state has lost the ability to entirely exercise control over the regulatory environment in which companies act. Multinational companies elude the control of nation states. As Wheeler dramatically states (2001: 179):

> By letting supranational institutions fall far behind financial ones, we relinquish our political will to the faceless mercy of economic systems. If a cosmopolitan form of legitimate law cannot be established (and soon), the basic prerequisites of a just life could be threatened further by depoliticized global forces. Politics, then (. . .) is in danger of disappearing altogether.[3]

Even though Wheeler's observation is correct, it blanks out civil society as a political counterweight to de-politicized global forces. Instead of companies being regulated by the state, they are confronted by civil society associations that increasingly adopt the role of a critical instance for companies. NGOs, as the main actors of civil society, have come to represent public concerns directly to companies (Spar and La Mure, 2003: 80; Palazzo and Scherer, 2006: 81; Risse, 2004: 309) and so fill the legal gaps that arise in a globalized economy with moral claims (Kaldor, Anheier, and Glasius, 2003: 9). Hence, in their interaction with companies NGOs assume a political or even "paragovernmental" role (Dryzek, 1999: 44).[4] They control, judge

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least some sort of notional chain of accountability which connects "voters via national parliaments and national governments to global governance organizations" (Scholte, 2004: 211).

[3] The disappearance of politics is actively propagated by the neoliberal design of a "world market society", which aims at reducing the role of politics to night watchman states. According to this design the only political task that needs to be tackled on a global level is the ensuring of global free trade (Habermas, 2004: 185).

[4] This paragovernmental role is structurally enhanced if NGOs are financed mainly by governmental actors; yet their dependence on donors risks distorting their priorities (Kaldor, 2003b: 92).

and try to influence the behaviour of companies and hence aim at conferring legitimacy onto economic actors (Nijhof, de Bruijn, and Honders, 2008: 155). Yet, as mentioned above, the interactions in which NGOs assume the role of informal control agencies for companies undermine the conventional ideas of sovereignty. Just like in the monitoring of international agreements, they allocate authority without having a formal mandate. They suffer from the "democratization paradox": on the one hand, they are recognized as democratic forces; on the other hand, they themselves often lack democratic structures and accountability (Leggewie, 2003: 1). Hence, we can state that that the lack of credibility extends to all "political arenas 'beyond the nation state'" (Leggewie, 2003: 3).

This brief portrait of the postnational constellation points to the *extension of the sphere of political action* in the postnational constellation. For a long time the notion of the political sphere was restricted to issues that were regulated by the state, but in the postnational constellation public issues stretch beyond the control of the state and are advocated by non-state actors. Moreover, political action is no longer tied to the uniquely constitutive space of the political (Mouffe and Holdengraber, 1989: 43/44). Political action now involves not only governmental or intergovernmental activities, but potentially all interactions between the three dominant actors on the global scale, namely governmental actors (states and international organizations), economic actors (companies) and civil society actors (i.e. NGOs). As Young notes, all activities are political

> ... in which people organize collectively to regulate or transform some aspects of their shared social conditions, along with the communicative activities in which they try to persuade one another to join such collective actions or decide what direction they wish to take. (Young, 2004: 377)

Figure 2.1 visualizes this extended notion of the political, which will be essential for assessing the legitimacy of NGOs as partners of corporations in what follows.
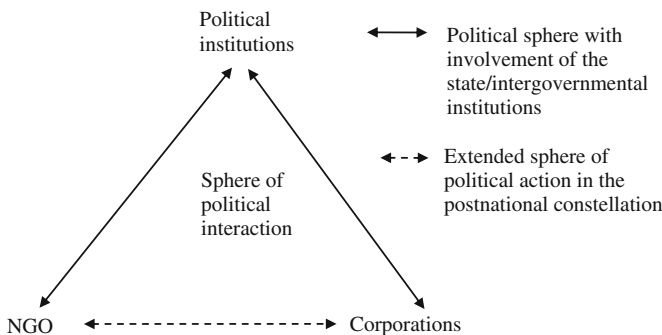

Fig. 2.1 Extending the sphere of political action in the postnational constellation

The Democratic Roles of Civil Society and NGOs in the Postnational Constellation

Let us now take a closer look at the political role that civil society and NGOs assume in the postnational constellation. Even though this book seeks to contribute specifically to the question of NGO legitimacy vis-à-vis corporations, I want to take a brief look at the "bigger picture" of NGOs as political actors in the postnational constellation and at the democratizing role of civil society within the postnational constellation. This overview will underline the need for a broad notion of democracy in the postnational constellation outlined above. At the same time it will make evident that how we judge the democratizing potential of civil society actors is inextricably linked to the normative conception of democracy that we advocate. As has been pointed out above, politics undertaken by non-governmental actors (and also by multinational companies) suffer from a democratic deficit. It is thus necessary to consider how the postnational constellation could be rendered more democratic.

Directing my focus to the democratizing potential of civil society does not imply that I am refuting the importance of democratic institutions. I do not want to debate whether international institutions or civil society constitute the more promising driver for democracy.[5] Nor do I see the distribution of power in the postnational constellation necessarily as a zero-sum game: I do not consider the increase in power of civil society actors to mean a concomitant reduction of state power and authority. The interrelations among states and/or international institutions, civil society and economic actors are complex and dynamic (Sending and Neumann, 2006: 655). For example, non-state actors such as NGOs are often actively encouraged by states. As Fraser rightly points out, the tendency to put all hopes in transnational social movements to overcome the democratic deficits of a globalized world is naïve as long as there are no corresponding formal political institutions which are required to serve the general interest. Major institutional readjustment is thus indispensable for transnational social movements to assume "the emancipatory democratizing functions that are the whole point of public-sphere theory" (Fraser, 2005: 7).

But the research question at hand starts from the empirical observation that civil society has come to play a political role in the postnational constellation. Against this background, my task is to assess what civil society would have to look like in order to play this political role "reasonably". It will be evident that the democratic functions I ascribe to civil society in what follows are functions that civil society *ideally* assumes. There is much criticism about the effective democratic impulse of civil society. As Edwards points out, civil society has been portrayed as a "magic bullet for all social, economic and or political ills", but now attention has turned to the failings of civil society itself (Edwards, 2000: 2), such as to the fact that civil society is not as inclusive as it should be (Chandhoke, 2005: 360; see also Youngs, 2004: 142f.; and Edwards, 2000: 16ff.). In general, one should be careful to avoid

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[5] On the facilitating role played by institutions of global governance in strengthening civil society, see Muetzelfeldt and Smith (2002: 55ff.) and Scholte (2004: 226f.).

romanticizing the term civil society. It is important to keep in mind that civil society can be un-civil (Dryzek, 2006: 123). However, let us leave aside these failings for the moment; they will be addressed in the fourth part of this book when the problem of un-civil behaviour is discussed.

The only solution for overcoming the legitimacy deficit of transnational politics – in which NGOs take part – seems to lie in democratization. But democratization as a continuation of the national state model on a global scale would imply a "world republic", and, as Kant already recognized, the idea of a world republic is utopian (Kant and Humphrey, 2003: 12ff.). To this day there is some agreement, that beyond the national level, majoritarian ideas of democracy, which advocate decision-making by a demos based on elections and plebiscites, need to be left behind. The global scale is just too big for a single policy that promotes freedom and human rights (Leggewie, 2003: 4; see also Keane, 2003: 94; Kersting, 2002: 120).[6]

In the absence of a democratic world state, we need to look for surrogates that promote democracy on a global scale.[7] The two most promising drivers for democracy in the postnational constellation are a) systematically democratized (governmental) institutions and b) a vibrant civil society.[8] I will focus on the latter here, and assess how civil society has to be conceptualized in order to play a legitimate role as a postnational democratic force. I will argue that civil society does have democratizing potential. However, this potential is not a given, but must be continually proved and legitimized by civil society actors.

How can we derive civil society's role as a surrogate for a missing "world government" or as a driver for global democracy? When focusing on the democratizing potential of civil society, it should be noted that political theory (in contrast to political science) often tends to refer explicitly not to the democratic role of civil society but to the democratic role of the public sphere. There is some terminological confusion as regards the meaning of and the relation between the terms "civil society" and "public sphere". They are sometimes used interchangeably. In this book, as will be discussed in detail later, civil society is considered to be the most important actor of the public sphere which in turn is conceived of as an institution.[9] Hence, if a democratizing potential is ascribed to the public sphere, we can conclude that civil

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[6] I cannot enter the debate about a world state here, but see Kersting (2002), Leggewie (2003), Höffe (1999) or Held (1995) for different points of view.

[7] The word surrogate in this context refers back to Kant who suggested a *league*, i.e. a global federation, as a surrogate for a world state. Kant calls such a league a negative surrogate (for a world republic) which averts war (Kant and Humphrey, 2003: 15).

[8] Thompson links these two perspectives to two approaches: cosmopolitan governance and civil societarianism. Even though I also focus on the democratic force of civil society in this section, I do not want to use the term civil societarianism because, according to Thompson, civil societarianism neglects the force of governmental institutions (1999: 116). Kersting does not distinguish approaches, but in a similar vein identifies the extension of public international law and the global public sphere as surrogates for global democracy (2002: 123).

[9] As Habermas writes: "The communication structures of the public sphere must be kept intact by an energetic civil society". He thus also ascribes to civil society a central role as an actor in the public sphere (1996b: 369).

society as the most important actor of the public sphere also assumes an important role as a driver for democracy.

The democratizing potential of a public sphere, and thus of civil society, on a global scale hinges on its exercise of a political control function. With the adoption of a political control function, a global public can act as a surrogate for democracy because it has the potential to control whether political actions on a transnational scale adhere to democratic standards (Kersting, 2002: 123).[10] NGOs that act on a global scale as representatives of citizens then also contribute to the strengthening of the public sphere as a democratic surrogate for the missing state on a global scale (Bohman, 1996b: 89).

It is not my goal here to give an exhaustive definition of civil society, which is actually considered almost impossible by many researchers (Cohen, 1998: 369ff.; Fries, 2003: 221; Lohmann, 2003: 12; Hendriks, 2006: 486). How one defines civil society strongly depends on the political-philosophical perspective one assumes. As Benhabib rightly states, "any definition of essentially contested concepts like democracy, freedom, justice is never a mere definition; the definition itself already articulates the normative theory which justifies the term" (Benhabib, 1994: 27). However, while the same is true for civil society and while no conception of civil society is neutral (Cohen, 1999b: 213), there is at least one shared understanding of civil society in political science, in political theory and across different schools of thought: they all agree that civil society, and thus NGOs as representatives of civil society, are a potentially positive force for democracy (Whaites, 2000; Warleigh, 2001; Kersting, 2002; Kaldor, 2003a; Leggewie, 2003).[11]

I will point out the differences between deliberative and liberal views of civil society in detail in Chapter 4, where I argue for a constitutive and positive normative conception of civil society, but for the moment let us assume a relatively pragmatic definition of civil society "in terms of political association and public action not encompassed by the state on the one hand or by the economy on the other" (Dryzek, 1999: 44).

Based on this pragmatic definition of civil society, what concrete political roles can we assign to NGOs? The most obvious contribution to democracy by NGOs stems from putting global problems on the agenda (Clark, 2001: 17f.). They create "a new space of solidarity" on a global scale (Chandhoke, 2005: 356) by inserting "the voices of under-represented groups into the global arena" (Edwards, 2000: 14; see also Youngs, 2004: 138f.). NGOs have "inaugurated a normative turn in world politics, which has been traditionally marked by realism and the politics

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[10] By adopting a critical role, the global public can mitigate the colonializing assaults of system imperatives on the life world in a democratic manner (Habermas, 1990b: 36).

[11] The justifications for the democratic force of civil society vary, of course: classical liberals argue, for example, that the democratic potential of civil society derives from the fact that it provides a counterbalance to the state; communitarians, on the other hand, see the positive effect of civil society on democracy as arising from the fact that it provides a site where communities – in contrast to self-interested individuals or the state – "co-determine their own destinies" (Hendriks, 2006: 490).

of national interest and national sovereignty" (Chandhoke, 2005: 358).[12] In their role as political actors on a global scale, NGOs often act as a discursive interface between international organizations and a global citizenry (Nanz and Steffek, 2004: 315). They ideally make the state or international organizations more inclusive of marginalized groups (Montpetit, Scala, and Fortier, 2004: 141).

Warren classifies the different types of democratic effects potentially produced by associations, including NGOs, as follows (2001: 60ff.; see also Warren, 2003: 46f.):

- *Developmental effects (on people)*: Associations ideally "contribute to forming, enhancing, and supporting the capacities of democratic citizens" (Warren, 2001: 61).[13] This view corresponds well with the view that the public sphere is the place where moral learning and opinion-formation takes place (Benhabib, 2002: 106) and where "insurgent discourses and identities can first establish themselves" (Dryzek, 2000: 79; see also Kaldor, 2003b: 11).
- *Public sphere effects*: Associations ideally "contribute to the formation of public opinion and public judgment, especially by providing the social infrastructure of public spheres that develop agendas, test ideas, embody deliberations, and provide voice" (Warren, 2001: 61). Apart from providing social infrastructure, they also provide communicative infrastructure (Bohman, 2004: 351). This notion articulates well with my own claim about the relation between the public sphere and civil society: civil society is the most central actor of the public sphere and as such promotes democracy.
- *Effects that underwrite democratic institutions*: Associations ideally promote institutions and venues that not only strengthen and actualize individual and political autonomy but that also help to transform autonomous judgments into collective decisions. In a directly effective manner, associations adopt this function by providing political representation, organizing political processes, activating pressure and resistance and by "serving as alternative venues for governance" (Warren, 2001: 61). But even more important for this book are the indirect institutional effects which associations have on institutions of state and market "in democratic ways through resistance" or through resorting to "alternative venues of collective action" (Warren, 2001: 61).

Warren's classification draws attention to the fact that the range of democratizing effects of civil society is very broad; it takes place at different levels, from the individual to the institutional, and in different spheres, from the civil to the political. At the same time, by labelling the whole range of these effects as democratic, it becomes clear that the democratic potential of civil society can only be adequately

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[12] However, NGOs vary in their stance on globalization. Not all NGOs necessarily reject globalization; some back reforms of international market structures and some favour "radical alternative models of economic and social organization" (Youngs, 2004: 162).

[13] These effects of civil society receive special emphasis from neo-Tocquevillean theorists (Hendriks, 2006: 490).

acknowledged if one assumes a broad conception of democracy. Civil society's democratic effects are not strictly reflected in the formal political realm of elections or governmental structures; they mainly become manifest outside the classical sites of politics, or at the interfaces between formal institutions and "alternative venues of governance" (Warren, 2001: 61). Although the power of deciding is weak in these public spheres, it is in these spheres that opinions are formed which eventually become effective in governmental venues (Warren, 1999: 354). As we will see in the following chapters, a broad conception of democracy also implies a substantively broad conception of the central institutions and processes that constitute a normative framework for legitimate partner NGOs.

Such a broad notion of democracy supports the description of the postnational constellation in the first part of this chapter, where I argued that political action in the postnational constellation extends from governmental and intergovernmental actors to non-governmental actors and corporations. It specifically supports the endeavour to conceptualize the interaction between NGOs and corporations in the postnational constellation as a political engagement.

As I have shown, there is some agreement across different schools of thought that NGOs are to be recognized as democratic forces in the postnational constellation and that their contribution to democracy mainly happens outside the classical sites of politics. However, as will become evident in later chapters, this agreement rests on shaky ground. As soon as we clarify the normative meaning of the actors involved and of the central institutions and processes that shape their legitimacy, it will become evident that the interpretation of these central terms differs significantly depending on whether one looks at them from a liberal or a deliberative approach.

It moreover must be noted that not even the different types of democratic effects that are generally associated with civil society actors as indisputable as they might seem at first sight. All three types of democratic effects inherently contain normative assumptions about our conception of democracy. For example, what kind of capacities do we deem relevant for democratic citizens? What do we want the formation of public opinion to look like? What is our ideal of political representation? This inherent normativity is not only restricted to the effects that one expects from NGOs; I will argue that any assessment of the political role of NGOs in the postnational constellation necessarily depends on the normative conception of democracy at its base. This argument is supported by the fact that, as mentioned in the first part, NGOs are generally perceived to be norm-guided, value-based actors that organize around ideas and that share a collective commitment to some belief or principle (Spar and La Mure, 2003: 79; Brown and Jagadananda, 2007: 7).

Before I set out to gain normative orientation from political theory, I will present a systematic overview over the different contexts in which NGOs assume their role as political actors in the postnational constellation. The main criterion for distinguishing these contexts is the degree of their institutionalization which essentially denotes the degree to which political action involves formal governmental actors. The reason for choosing this criterion lies in the fact that the degree of institutionalization within which NGOs assume their political role yields different democracy-theoretical implications for their perceived legitimacy deficit.

Three Contexts for NGOs as Representatives of Public Claims

A distinction based on the degree to which the context of an NGO's role as a representative of public claims is institutionalized yields the following three types of interaction: interaction in formally institutionalized contexts, i.e. with the involvement of official political or economic institutions, interaction in semi-institutionalized contexts (the "hybrid model"), and interaction in un-institutionalized contexts (the "wild model"). Since, as I will argue, the different contexts pose different challenges in addressing the legitimacy deficit of NGOs, it is impossible to address all three of them at the same time. In this book, I will address only the least institutionalized context in which NGOs assume their political role, namely the interaction between NGOs and corporations that occurs exclusively in the extraconstitutional sphere.

Interaction with Official Political or Economic Institutions

The most institutionalized context can be found in the interaction between NGOs and international institutions, such as the United Nations (UN) or the World Trade Organization (WTO). In such cases the admission of NGOs is formally defined, such as by the UN resolution 1996/31 on the consultative relationship between the United Nations and non-governmental organizations or by the WTO Guidelines for Arrangements on Relations with Non-Governmental Organizations.[14]

The most inclusive form of institutionalization is represented in tripartite agreements which recently have begun to include political, economic and civil society actors, such as the tripartite agreement between the government, NGOs, and business on child labour in Bangladesh (Edwards, 2000: 24), or the Extractive Industries Transparency Initiative (EITI).[15]

Partnerships between NGOs, business and intergovernmental organizations have experienced a boom since the Johannesburg Summit in 2002 which was all "about the legitimacy of the role of business in development, working with public bodies and civil society organisations" (Zadek, 2004: 3) and which led to the launch of numerous so called "partnerships for development".

Semi-institutionalized Contexts ("Hybrid Model")

Besides the formally institutionalized contexts of interaction between NGOs and official political or economic institutions, new modes of governance have

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[14] See http://www.wto.org/english/forums_e/ngo_e/guide_e.htm and http://www.wto.org/english/forums_e/ngo_e/intro_e.htm.

[15] In its classical form, the tripartite structure includes representation from governments, employers organizations and workers organizations, such as for example in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy from the International Labour Organization (ILO).

considerably gained ground. With their self-regulatory base these new modes of governance represent a less institutionalized context for NGO action. Due to its self-regulated, semi-institutionalized character I call this type of interaction the "hybrid model".

In the last few years there has been a proliferation of initiatives that aim at promoting the accountability of the third sector in general and of NGOs in particular (for an overview see Dombrowski, 2006). However, there is still no comprehensive accountability standard or benchmark for NGOs (The Forster Company and TwentyFifty Ltd, 2005: 6). The hybrid model encompasses attempts at engaging NGOs in more institutionalized contexts where they are held accountable for their claims and actions. It typically becomes manifest in the form of councils or forums like multi-stakeholder initiatives such as the Forest Stewardship Council (FSC), the Marine Stewardship Council, or the Canadian Council for International Cooperation, which has a self-regulatory Code of Ethics for its members. Another important role is played by standard-setting organizations such as Social Accountability International or the Philippine Council for NGO Certification, which has developed a very strict scheme of nonofficial oversight for civil society in that country. There are also initiatives that aim at overcoming certain aspects of the legitimacy deficit of NGOs, such as ActionAid, which has paid particular attention to developing NGO accountability to poor people or the Humanitarian Accountability Project (HAP), which focuses on raising NGO accountability to the recipients of international emergency relief (Scholte, 2004: 232; see also Ebrahim, 2003: 821; Hilhorst, 2002: 193ff.). Under pressure to demonstrate their own accountability, civil society associations increasingly and voluntarily join such semi-regulated, self-regulatory arrangements.

Interaction Outside Institutionalized Contexts ("Wild Model")

The "wild model" denotes interaction which corporations react more or less spontaneously to the claims of an NGO. I take the attribute "wild" from Cohen, who uses it to characterize free public communication, which is unorganized and decentered (not centrally coordinated), and which "does not make authoritative collective decisions" (Cohen, 1999a: 399). Interaction in the wild model may be based on information from standard-setting organizations or the like, but it basically occurs outside any institutionalized context. This model represents all NGO-business partnerships that are established on a bilateral basis and that do not officially involve third parties like governments or international institutions. The research focus of this book is on this type of interaction. Even though there is a trend towards basing partnerships on standards (The Forster Company and TwentyFifty Ltd, 2005: 1ff.), the "wild" type of interaction will continue to play an important role, if only because it often represents the first step in establishing regular contact between NGOs and corporations. Moreover, as will be outlined below, the institutionalization of partnerships between NGOs and corporations is not without risks. As I will argue, focusing the research on the "wild model" requires us to adopt a different

political-theoretical perspective than that which would allow us to assess the more institutionalized contexts of NGO action.

Implications of the Degree of Institutionalization for the Political Conceptualization of NGO Action

In the most institutionalized version of interaction between NGOs and international institutions there is some sort of "notional accountability chain" which connects "voters via national parliaments and national governments to global governance organizations" even though in practice the links have been very weak (Scholte, 2004: 211). In this type of interaction, there is an interplay between two spheres, namely the unregulated public sphere as the place where opinions are formed, and the regulated political arena, which receives inputs from the unregulated public sphere. Moreover, international organizations operate under the pressure of decision-making. They have more or less transparent political agendas and are committed to long-term goals whose achievement is usually subject to some kind of monitoring. The most institutionalized type of interaction can then most meaningfully be assessed by democracy theoretical models which conceptualize democracy as the interplay between unregulated public spheres and regulated political arenas.[16]

On a practical level, there is often some transparency to the decision made by an international institution to admit NGOs or reject them. For example, in a document issued by the United Nations Department of Public Information, the Committee on Non-Governmental Organizations outlines the reasons for not recommending a Czech NGO, named People in Need, for consultative status. It states that the NGO in question was a "front for the Czech Government, and used to destabilize and promote changes in regimes in different countries" (United Nations Department of Public Information, 2006b). Hence, the NGO was denied legitimacy based on its "unhealthy proximity" to a government. However, it must be noted that even with regard to this type of political engagement of NGOs, some observers raise criticism. Tripartite arrangements for one thing awaken fear of "corporatism".[17] There is moreover a general scepticism about close links between formal institutions and civil society organizations expressed by the fear that institutions oppress the "real character" of civil society organizations and force them into restricted formal speech in settings where the imbalance of power resides in favour of the corporations (Young, 2001: 675; Meadowcroft, 2007: 197). Banerjee calls the categories that international institutions such as the UN or the World Bank use for framing their

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[16] As we will see in this book, this conceptualization of democracy is exemplarily put forward by Habermas (1996b: 304ff.).

[17] According to the critics, close cooperative relations between the three types of organizations (international organizations, business, and civil society networks) might weaken the contributions of each actor. The fact that the actors involved are all essentially unrepresentative considerably restricts their contribution to the promotion of greater democracy in global governance (Ottaway, 2001: 266; see also Bendell, 2005: 371).

relationship with NGOs, "inimical to many groups that are negatively impacted by corporations" (Banerjee, 2008: 73), whereas Anderson is concerned about the opposite effect by describing international organizations and NGOs as "locked in a romance, a passionately mutual embrace, offering each other love tokens of confirmations of legitimacy and eternal fealty, but as with lovers everywhere, oblivious to the world outside and oblivious as to whether anyone else thinks that such mutual legitimations make either one any more 'legitimate'" (Anderson, 2000: 117). These criticisms aside, in principle there is some way in which the legitimacy of NGOs is linked to formal democratic measures in such a context.

In contrast to the institutionalized model, the hybrid model lacks the notional accountability chain which connects the self-regulatory arrangement with voters. Yet, I argue that we can use the same strand of democratic theory to assess the political role of NGOs in such contexts. Most of the self-regulatory arrangements link their governance structures to democratic values. The FSC, for example, claims that its governance structure is built upon the principles of participation, democracy and equity.[18] The Ethical Trading Initiative has "caucus groups" which serve to formally represent the common interests of groups of members.[19] Thus, even though formal democratic accountability is missing in the hybrid model, the fact that most of the self-regulatory arrangements commit themselves to democratic governance structures suggests that the type of political interaction that happens in this context can be assessed by the same democratic theoretical model as the institutionalized context. The self-regulatory arrangements supersede the regulated political arena. Moreover, standards developed in a semi-institutionalized context increasingly also inform statutory instruments from governments – as for example happened in the case of the French, Swedish and Danish requirement that certain companies (i.e. companies above a certain size in France and Denmark, state-owned companies in Sweden) publish sustainability reports in accordance with the Global Reporting Initiative's "G3 Sustainability Reporting Guidelines" (Zadek, 2010: 158; Global Reporting Initiative, 2010). The strengthening that voluntary initiatives experience by their integration into law and public policy can be interpreted as a shift from corporate responsibility to accountability (Utting, 2008: 960), or as an emergence of a "'post-voluntarist' agenda" for CSR (Utting, 2005: 384)

Regardless of their eventual integration in binding public agreements, these semi-regulated, self-regulatory arrangements often face criticism. Banerjee, for example, criticizes councils that were established to represent the interests of Aboriginal communities specifically affected by mining and resource exploration. These councils were perceived by Aborigines as an "extension of the Commonwealth Government that are accountable to [the government] rather than the communities they are supposed to represent" (Banerjee, 2000: 14). With a particular focus on the role of NGOs in such settings, they have to "walk a tightrope, given the fine line that exists

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[18] http://www.fsc.org/en/about/governance

[19] http://www.ethicaltrade.org/Z/abteti/who/gov/cauc.shtml

between promoting subaltern interests and legitimizing institutions that may rein-force corporate power" (Utting, 2007: 705). With respect to standards, it must be noted that while standards add a certain degree of control to a partnership and enhance its legitimacy, they are not panacea. An exclusive reliance on standards when judging the legitimacy of an NGO as a partner of a corporation tends to free companies from critical reflection and runs counter to truly discursive notions of CSR.

In the "wild model" the interaction between NGOs and corporations occurs exclusively in the extraconstitutional sphere. There is no formal political institution involved and there is no notional accountability chain. The unregulated interaction between NGOs and corporations thus does not operate under the same degree of decision-making pressure as NGO action in the context of international institutions. If we want to arrive at a meaningful conceptualization of the unregulated interac-tion between corporations and NGOs as a political interaction, we need to widen the conceptualization of political interaction to include this particular contextual-ized interplay. In the "wild model" the interaction between corporations and NGOs is much more informal and personal than in institutionalized contexts. The choice of partner NGOs is not subject to the same degree of transparency and indeed risks being arbitrary. As we will see later, corporations sometimes deliberately make use of this lack of transparency and enter into collaboration with so-called corporate front groups, that is, with business organizations that are disguised as NGOs. In any case, the acknowledgement of the rather implicit political context in which cor-porations typically choose their partner NGOs, acts as a central parameter when justifying which political theory we shall use for assessing the legitimacy of NGOs.

It remains to add that obviously much of what is said about the legitimacy of NGOs as partners of corporations in the "wild model" applies equally to their legit-imacy in more institutionalized contexts. Hence, the typology that is introduced in this book to distinguish "legitimate NGOs" from interest groups and activists can be considered equally valid for more institutionalized contexts, where the parties involved are required to be aware of who they partner with. However, after clarifying the use of the term partner NGO, we shall look for the political theory which pro-vides the best conceptualizations for conceiving of the specific interaction between NGOs and corporations in the "wild model" as a political interaction in the next chapter.

On the Use of the Term Partner NGO

As can be seen from the different contexts outlined above, the intensity and formal-ization of interaction between NGOs and companies varies according to the role that NGOs assume.[20] Given that this book focuses on the "wild model" where the links

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[20] For typologies of partnerships with different degrees of intensity see for example Austin (2000), Crane and Matten (2007: 187ff.) or The Forster Company and TwentyFifty Ltd (2005: 1).

between corporations and NGOs are rather weak, it is worth adding some remarks on how I use the term partner NGOs.

In accordance with the characterization of the "wild model" the use of the term partner in this work refers to the role that NGOs assume if they enter into an intensified form of interaction with companies but it does not presuppose any kind of formal or institutional structure of the interaction. I argue that NGOs can be partners of corporations as soon as a direct and regular exchange between them sets in. In fact, I use the term "partner" synonymously to the term "stakeholder" but the reason for preferring the term "partner" over the term "stakeholder" is that it assigns NGOs a distinctive *raison d'être* which sets them on a par with corporations whereas the term "stakeholder", if used without further specification, encompasses a wide range of actors many of who stand in a largely strategic, instrumental relationship to corporations.[21] Last but not least, my avoidance of the term stakeholder also has to do with the fact that this work has its theoretical basis in political theory. It is true that stakeholder theory often also assumes a political dimension for example when the political responsibility of corporations is integrated into their stakeholder management. But in these cases the political dimension is reduced to one among many strategic dimensions that corporations should keep in mind when managing their stakeholders.[22] The same is also true for attempts to make stakeholder theory fruitful for NGOs by setting up lists of stakeholders to which NGOs are accountable (see for example Lee, 2004: 6f.). In this book I argue instead that NGOs assume a special status as stakeholders of corporations because they differ from other stakeholders in two related respects, namely by promoting public claims and by having their origins in civil society (see Chapter 11). This special status is better expressed by acknowledging them as partners instead of integrating them into a list of strategic stakeholders.

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[21] See the Introduction for the different roles NGOs are assigned by different strands of stakeholder theory.

[22] Murphy and Bendell for example define the "political dimension of environmental management" as "reflected in the emerging emphasis on stakeholder management" (Murphy and Bendell, 1999: 39). Against this tendency, Ulrich advocates an explicitly non-strategic perspective on the "critical public sphere" (which NGOs are claimed to ideal-typically represent in this book) not as one stakeholder among others but as "the (highest) systematic site of corporate legitimation" (Ulrich, 2008: 429).

Chapter 3
Normative Orientation from Political Theory

If we want to conceptualize the role of NGOs as legitimate partners of corporations as an inherently political role, we need to clarify the central political-philosophical presumptions on which this conceptualization rests. This aims at yielding a coherent normative framework within which the book can operate. But why do we have to resort to political philosophy?[1] We must not forget that it is the discipline of political philosophy that deals with normative questions of "the political" and that offers distinctive conceptions not only of the central actors but also of the institutions and processes that constitute the normative framework for NGOs as partners of corporations. Because several influential schools of thought can be distinguished within political philosophy, it is argued here that every school provides a different normative framework along which NGOs can orient themselves. The shape of the normative framework depends on how the concepts that are central to the research question are cast, as the casting of the central concepts differs among the different schools of thought.

In the following, I will focus on liberalism on the one hand and the deliberative theory of democracy on the other and point out the implications of their different definitions of the central terms at hand. I will argue that the deliberative perspective offers the most *meaningful conceptualization* of the political role of NGOs as legitimate partners of corporations. All of this plays out against the background of the post-national constellation. However, it should be noted that in practice the delineations between the different schools of thought are not as clear-cut as one would wish them to be; hybrid forms exist and interpretations vary even among

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[1] It should be noted that the terms "political philosophy" and "political theory" are used interchangeably in this book because the delineation between these two disciplines is rather unclear. This becomes evident in the self-description of the journal "Political Theory" which states that: "Political Theory publishes articles on political philosophy from every philosophical, ideological and methodological perspective. It offers essays in historical political thought, modern political theory, normative and analytical philosophy, and the history of ideas, as well as critical assessments of current work." See http://www.sagepub.com/journalsProdDesc.nav?prodId=Journal200749

representatives of the same model.[2] Thus, liberalism and deliberative democracy are portrayed here in an "ideal-typical" way.[3]

Liberalism

The liberal political model is rooted in the theories of philosophers like Thomas Hobbes, John Locke, Jean-Jacques Rousseau and Adam Smith. Its main focus is individual liberty (Gaus, 2003: 1). Its common doctrine can be characterized as being "based on the assumption that individuals are mostly motivated by self-interest, not by a conception of the common good" (Dryzek, 2000: 9).[4]

Even though liberalism comprises a variety of strands, which cannot be spelled out in detail here, two central strands need to be distinguished from each other from the start, namely political and economic liberalism (Mouffe and Holdengraber, 1989: 32). Many central normative conceptions assume a different meaning depending on whether one looks at them from a political liberal or an economic liberal point of view.[5]

Economic liberalism primarily focuses on the self-interested character of people and perceives society as something that only evolves if relations with others provide people an advantage (Ulrich, 2008: 279). Liberalism, defined in economic terms, lacks sensitivity to the issue of democracy. Liberals, who unconditionally believe that the market is the best coordination mechanism in society and who are notoriously sceptical of the government, value the protection of individual (economic) freedom higher than democratic decisions (Forst, 2001: 347). However, the unease between liberalism and democracy is mostly a historical phenomenon which can be explained by the fact that "the rise of liberalism preceded the rise of modern democracy" (Dryzek, 2000: 9).

In the meantime, liberalism and democracy have been reconciled in the form of *political liberalism*. Put briefly, political liberalism shares its idea of man with economic liberalism by viewing people as self-interested. But in contrast to economic liberalism, it at the same time views people as moral beings (Ulrich, 2008: 279). Political liberalism thus acknowledges the importance of a moral community for the self-conception of individuals.

However, the conception of democracy that liberalism advocates is still rather narrow. Since liberals are sceptical of the state and want to limit its role to safeguarding individual liberty and property rights, they also want to keep the political

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[2] On the blurring boundaries between the different schools of thought and on subjects of emerging consensus, see Emanuel (1996: 14).

[3] More on ideal types will be said when introducing the typology that distinguishes between NGOs, interest groups and activists in Chapter 11.

[4] For arguments against this characterisation, see Brennan and Lomasky (2006: 223ff.).

[5] On the limited normative orientation of economic liberalism in political theory, see Macpherson (1980: 304ff.).

sphere as narrow as possible. For liberals the political sphere is the sphere where public issues are negotiated, and since the private sphere is where individual liberty is "at home", they want to narrow the scope of politics to a minimum:

> The only type of state acceptable to all, and therefore legitimate, is one that limits its functions to the guarantee of internal and external security within the society: such is the traditional "minimal state". (Manin, 1987: 339)[6]

Yet, even though liberalism is sceptical of the state, liberals attribute a central role to the constitution, namely of enabling individuals to enjoy a private life that is immune from public invasion (Dryzek, 2000: 12). Liberalism relies on democracy so as to protect justice, but in order to ensure that only the principles deemed valid are preserved, it adds constraints to democracy (Forst, 2001: 346f.).

The work at hand primarily looks at the political variant of liberalism. Since this book starts from a political conceptualization of the interaction between companies and NGOs, the theory with which this conceptualization is assessed must be a political, not an economic, theory.[7]

In the postnational constellation, liberalism is one of the dominant frameworks for assessing the roles of and processes between different actors.[8] As Bohman notes, the predominant mode of interaction between institutions and their public are aggregative mechanisms for decision-making, like the ones promoted by liberalism (Bohman, 1996a: 204). Also the interaction between corporations and NGOs is often assessed from an implicitly or explicitly liberal point of view. Liberalism had a major influence on the "depoliticized discussion on CSR and its limited concept of corporate legitimacy" (Palazzo and Scherer, 2006: 75). Consequently, liberalism is also prone to taking a depoliticized look at NGO. A liberal perspective on the role of NGOs as partners of corporations would tend to conceptualize them in a very similar way to corporations - namely as non-political actors that are "not subjected to immediate legitimacy demands" (Palazzo and Scherer, 2006: 75).

Deliberative Democracy

A political model that has emerged more recently is the model of deliberative democracy (e.g. Manin, 1987; Cohen, 1989; Benhabib, 1994; Warren, 1996; Habermas, 1996a; Bohman, 1998; Dryzek, 2000; Fung, 2003a). This political model conceptualizes ethical-rational politics in the light of discourse ethics (Habermas,

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[6] See also Kymlicka (1991: 1). The term "minimal state" refers to Robert Nozick's "Anarchy, State, and Utopia" (Nozick, 1974).

[7] It must be noted that economic liberalism also aims to serve as a basis for a political theory, but due to its ordering of priorities this results in a minimally democratic theory.

[8] As we will see section "The Liberal Conceptualization of the Public Sphere in the Postnational Constellation" (Chapter 6), the most famous strand of liberalism within the postnational constellation is known as "cosmopolitan democracy".

1996a; Ulrich, 2008: 288). Deliberative democratic theory can be defined as "a normative theory that suggests ways in which we can enhance democracy and criticize institutions that do not live up to the normative standard" (Chambers, 2003: 308). In contrast to liberalism, deliberative democracy assumes a concept of democracy that is not state-bound but extends the meaning of democracy to the deliberation of public spheres, with civil society as well as certain sectors of the economy recognized as spaces for association and public deliberation (Warren, 1999: 354).[9]

When Habermas introduced deliberative democracy in his essay from 1992 (German original), he presented it as a "proceduralist view of democracy" that differs from both the liberal and the republican paradigm "in relevant aspects" (Habermas, 1996a: 21). Despite this difference, however, he borrowed elements from both political models:

> From liberalism Habermas draws the idea of the individual as an autonomous agent, and from republicanism he draws the idea of popular sovereignty as the essence of democracy. (Noonan, 2005: 106)

In the meantime, deliberative democracy has become a buzzword, a "booming area of political thought", within political theory (Hendriks, 2006: 486). As with any trend, the more people who pick up a concept, the broader the range of interpretations. Just as with liberalism, there are also many different strands within deliberative democracy and there is often considerable disagreement among researchers who claim themselves to be deliberative democrats. I cannot define deliberative democracy conclusively here but I will instead name the most significant strands of deliberative democracy and then argue which is the most appropriate for expounding the research question.

With respect to the *academic discipline* and *level of abstraction*, it can be stated that deliberative democracy is not only an issue in political theory or political philosophy, but also in political science (Montpetit, Scala, and Fortier, 2004: 138). Mansbridge differentiates between the political-philosophical strand and the strand that is more closely related to political science, which she calls the pluralist strand (2006: 128). Beyond political science, sociologists also deal with deliberative democracy; and on a less abstract level, deliberative democracy is an issue in political practice (Hendriks, 2006: 501).[10]

Another distinction can be drawn between *micro deliberative theorists* and *macro deliberative theorists* (Hendriks, 2006: 486). While the former focus on defining the conditions for ideal deliberative procedures and thereby neglect the normative question of who should deliberate, the macro deliberative theorists "emphasize informal discursive forms of deliberation, which take place in the public sphere" (2006: 487).

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[9] According to McCarthy, we must conceive of deliberative democracy as the normative point of reference for all of Habermas' discussions of the historical genesis and structural problems of the democratic public sphere (McCarthy, 1994: 48).

[10] Such as in deliberative polls invented by Fishkin, Luskin, and Jowell (2000; see also Fung, 2003b: 354ff.; and Talisse, 2005: 190).

Their primary focus, according to Hendriks, is "on the unstructured and open conversations outside formal decision-making institutions" (2006: 487). In this book I share the focus of the macro deliberative theorists, since – as will become evident in subsequent sections – arguing in favour of a deliberative conception of NGOs as legitimate partners of corporations implies a focus on informal discursive forms of deliberation.[11]

Yet the most important distinction for the research question is the one introduced by Dryzek. He differentiates between a strand of deliberative democracy that has its roots in *liberal constitutionalism* and a strand derived from critical theory, which he calls the *discursive strand* of deliberative democracy (2000: 8ff.).[12] As Forst mentions, critical theory opposes liberal constitutionalism by not reducing the function of democratic institutions to basic liberal principles but rather by assigning them the task of bringing into effect the normative criteria of generality and reciprocity (Forst, 2001: 369).

Whereas liberal constitutionalist strands of deliberative democracy accommodate the prevailing liberal political economy, discursive strands involve "a continued quest for democratic authenticity" (Dryzek, 2000: 8). Democratic authenticity denotes a state in which "domination via the exercise of power, manipulation, indoctrination, propaganda, deception, expressions of mere self-interests, threats, and the imposition of ideological conformity are all absent" (Dryzek, 2000: 8). As we will see later, this description of democratic authenticity precisely captures what will be defined as legitimate behaviour of partner NGOs.

As stated in Part I, In the course of the rise of political theories of corporations deliberative democracy has come to present a distinctively new perspective on business ethics (Ulrich, 2008: 418ff.). It essentially promotes "politicized versions of CSR" and sets a counterbalance to the "de-politicized notion of CSR" as promoted by liberal views (Palazzo and Scherer, 2006: 81). A deliberative perspective on the interaction between corporations and NGOs conceptualizes all actors involved as subject to a discursive legitimization of their claims.[13]

Let me add one precaution before proceeding to the justification of the selection of theories: As a consequence of the popularity of deliberative democracy not only

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[11] However, I do not agree with Hendriks' statement that macro deliberative theorists ascribe to civil society a political role outside and *against* the state and that these activities require both communicative and strategic behaviour (Hendriks, 2006: 487). In this book, civil society is conceived not as being against the state but rather as an indispensable complement to the state (and the economy). On the importance of a balance between civil society and the state, see Whaites (2000: 131f.) and Keane (2003: 92f.). More about the constitutive function of civil society will appear in Chapter 4.

[12] Another distinction based on dominant political-philosophical influences stems from Gaus, who differentiates between liberal deliberative democracy and egalitarian versions of deliberative democracy (Gaus, 2003: 127).

[13] But as we will see section "The Deliberative View: The Public Sphere as a Site for Critical Reflection" (Chapter 6), not every deliberative democrat, and most notably not Habermas himself, would agree with extending the legitimizing function of the public sphere to the economic sector.

among political philosophers but also among political scientists and sociologists, who deal with issues on a less abstract level, much of the literature on deliberative democracy assesses deliberation primarily to be a means for reaching collective decisions. Literature on deliberative policy-making often judges the appropriate use of deliberation as a procedure in formal decision-making. However, in the context of this work, the aim is not to develop a conceptual framework in which NGOs can reasonably be ascribed a *formal* say as partners of corporations. Deliberation is not primarily viewed as a decision-making mechanism but rather as a particular conception of legitimacy, that is, as a procedure for achieving and conferring legitimacy.

Justifying the Selection of Theories: Why Not Communitarianism and Republicanism?

Any selection of theories must be justified. The question might arise why I am not including other influential schools of thought in this normative framework, such as republicanism or communitarianism. The reason for the exclusion is the fact that the most relevant "dividing line" for the research question runs between liberalism and deliberative democracy. Liberalism and deliberative democracy are exemplary in preparing the ground for an "economic" versus a "political" perspective on the role of NGOs as legitimate partners of corporations. While the liberal model reflects the trend in privatizing power, the deliberative model leans towards a politicization of the economic sector (Palazzo and Scherer, 2006: 72). As has been argued with regard to the postnational constellation, I consider the phenomenon of NGOs directly raising their claims to companies as a new form of political action which aims at filling the gaps that escape the political regulatory capacities of states and international organizations. A model like deliberative democracy, which perceives of the economy and its actors as elements within a politicized sector, is thus able to provide meaningful conceptualizations of this new form of politics.

Moreover, aside from the difficulty of including all schools of thought in this work, I agree with Forst that republicanism is in fact a strand of communitarianism: to be precise, republicanism is the strand of communitarianism which makes obvious the connection between communitarianism and democracy (Forst, 2001: 353). It is not necessary to treat the two schools of thought separately.

Thus, my argument applies to both communitarianism and its republican strand: I argue that they do not provide sufficient normative orientation in the context of the postnational constellation. With their focus on a value-integrated civil society which is based on a common conception of the good life (Ulrich, 2008: 279), communitarians are notoriously sceptical of globalization. However, this scepticism is not the reason for rejecting them, but rather their lack of normative orientation for new forms of political action that happen outside their own unit of analysis, which

is the community of values.[14] It is difficult for communitarians to think in transnational categories, because their unit of analysis does not exist on a global scale, at least not in the "thick" sense that their terms of analysis require. For communitarians, civil society associations should act primarily on the basis of shared values, not from an emancipatory spirit. In their eyes NGOs fulfil the task of strengthening the existing community. Legitimacy for communitarians thus requires more than just an electoral act or discursive justification: it also depends on emotive virtues such as community, loyalty and a shared cultured life or history (Abizadeh, 2002: 496). It is hard to assess the legitimacy of NGOs as partners for corporations within these categories, which are unsuitable for postnational conceptions of democracy.

With respect to republicanism, particularly in Forst's sense that it is the strand of communitarianism which makes obvious the connection between communitarianism and democracy (Forst, 2001: 353), it can be argued that it relies on an overly strong conception of democracy with an overemphasis on the role of civic virtues (Habermas, 1996a: 24). Barber, for example, presents a republican theory of "strong democracy" which he describes as "politics in the participatory mode where conflict is resolved in the absence of an independent ground in the process of ongoing, proximate self-legislation and *the creation of a political community*, capable of transforming dependent, private individuals into free citizens and partial interests into public goods" (1984: 132, emphasis added; see also Ulrich, 2008: 276ff.).[15] The idea of a political community being the prerequisite for democracy makes the link between republicanism and communitarianism evident.[16]

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[14] Consequently, the communitarian view deems the deliberative concept of democracy feasible only if it is connected to a concrete, substantively integrated ethical community (Habermas, 1996b: 280; see also Forst, 2001: 367).

[15] Yet *modern* republicanism has put this idea into perspective by acknowledging that democratic participation may be essential to the republic while at the same time admitting that freedom does not exhaust in the right of democratic participation (Pettit, 1997: 8).

[16] It must be noted that not all authors see republicanism as a mere variant of communitarianism. Maak, for example, states that the republican model does not centre on the substantial values of a community, in direct contrast to communitarianism. Instead, it supports a conception of civil society which considers the implementation of politics through citizens and formal (as opposed to substantial) ideas about the good life to be essential for successful social integration (Maak, 1999: 158). Similarly, Ulrich presents a modern version of republicanism which he calls "republican liberalism", in which the political process is characterized by deliberative politics (Ulrich, 2008: 279). Thus, Ulrich's republican liberalism is closer to the deliberative democracy presented here than to the classical republicanism which Forst and Habermas, and also Ulrich himself, criticize.

Chapter 4
Civil Society: Coming to Grips with an Elusive Term

Having outlined the main political theories, I will now assess the term "civil society" from a liberal and a deliberative perspective. The debate about the meaning of "civil society" is where NGOs have been given most attention within political theory (Whaites, 2000; Cohen, 1998; Keane, 2003; Chambers and Kymlicka, 2002; Seligman, 1992; Kaldor, 2003b). Whilst there is broad consensus that NGOs are civil society organisations, the challenge arises from the fact that the term civil society has experienced an almost viral spread in recent years.[1] The wide range of meanings now attributed to the term "civil society" results from its manifold historical roots. Aristotle was the first to use the term and ever since then almost every notable political school of thought has taken it up and given it its own meaning (Cohen and Arato, 1992: 84ff.).[2] Since no conception of civil society is neutral, it is important for any academic use of the term "civil society" to clarify the normative presumptions on which the definition is based (Cohen, 1999b: 214; Lohmann, 2003: 12). Such a return to foundations prevents the charge of theorizing on the basis of an overly elastic term. Yet, as Hendriks points out, not even within a given political theory is there consensus on what "civil society" encompasses (2006: 486). But let us at least presume that within a given political theory there is a certain degree of convergence about the meaning and normative role of civil society.

So how do political-philosophical traditions and civil society relate? Cohen claims that the roles which different traditions ascribe to civil society can be directly derived from their respective main concerns: liberalism is generally driven by the fear of state absolutism; communitarians focus on the threat of anomy and disintegration in modern societies; and republicans fight against corruption, paternalism and political apathy. These foci significantly influence their respective conceptions of civil society (Cohen, 1998: 371).

Before comparing the liberal version of civil society with the deliberative version, in accordance with the approach chosen for the other political-philosophical

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[1] Hendriks states that the prolific use of the term civil society has resulted in a terminological overload which makes it almost impossible to agree upon a definition (Hendriks, 2006: 486).

[2] For historical overviews of the concept see for example Kaldor (2003b: 6ff.), Seligman (1992: 15ff.) and Cohen and Arato (1992: 83ff.).

cornerstones in this book, I will offer a brief overview of the historical development of the term as well as, very importantly, a statement in favour of defining civil society positively and assigning it a constitutive role.

Historical Uses of the Term "Civil Society"

In its original version, "civil society" referred to a peaceful order based on the consent of citizens, or a zone of civility. Thinkers such as Locke, Hobbes, Ferguson and Kant based their conception of civil society on this notion, even though they of course differed in how they justified civil society (Kaldor, 2003b: 17ff.). Because in these versions the state served as the guardian of peace, a civil society which was defined by its distinction from un-civil societies could not be envisioned without the existence of a state (Kaldor, 2003b: 7). Kant became the most famous proponent of a peace-centred notion of civil society on a global scale by claiming that a universal civil society, governed by a cosmopolitan rule of law, would promote peace because under the condition of a global civil society "a transgression of rights in one place in the world is felt everywhere" (Kant and Humphrey, 2003: 18). According to this statement, the conscience and ensuing political participation of citizens worldwide would be mobilized (Habermas, 2004: 125).

Over the centuries the term has changed in meaning. One central shift took place between the Hegelian and Marxist conceptualizations of civil society, which included the market, to modern conceptions which leave the market out (Habermas, 1996b: 366; see also Kaldor, 2003b: 18). In the twentieth century civil society temporarily lost its intellectual basis. Sociology in the tradition of Durkheim and Parsons took up the idea of intermediary associations and of a community of free and equal citizens, so as to establish normative integration and to counter the atomizing tendencies of the modern state and the capitalist economy. But with the decline of functionalism in sociology and the rise of the structuralist school in Marxism, the attempts to translate the philosophical concept of civil society into the language of social sciences came to an end (Cohen, 1998: 370). However, empirically supported by the political changes in Eastern Europe, civil society eventually experienced a revival in the neo-Marxist milieu which aimed to overcome the differentiation between state and civil society and to promote projects of societal self-organization for the purpose of achieving independence from all official, governmental or party-controlled communication (Cohen, 1998: 370; see also Baker, 1998: 82f.). This version, which Kaldor calls the activist version of civil society, aims not only at restraints on state power but at a redistribution of power. According to Kaldor the activist version is about emancipation because it focuses on the empowerment of people and the extension of democracy (Kaldor, 2003b: 8ff.).[3]

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[3] This statement, however, is open to doubt. As will be argued in the next sections, a truly emancipatory conception of civil society only succeeds if civil society is assigned a constitutive, positive function as a sphere equivalent to the spheres of the state and the market.

More recently, as part of the post-Washington consensus, civil society has yet assumed another function. The term "Washington consensus" denotes a set of ten policy recommendations for severely indebted Third World countries including trade liberalization, privatization, deregulation, the strengthening of property rights and tax reforms. After disenchantment with the Washington consensus, caused in particular by the financial crises in the mid-1990s in Mexico, East Asia, Russia and Japan, there has been a shift away from an exclusive reliance on the free market as a guarantor of wealth and progress to the idea that there has to be some governance of both the market and globalization. The insight that globalization could not be left entirely to the corporate world yielded a new focus: the state could not be replaced by the market but some of its functions could be replaced by civil society because NGOs were recognized as the truly democratic forces (Chandhoke, 2002: 43ff.).[4] This notion consequently portrays civil society not only as a counterpower to state power but also as a substitute for many functions performed by the state (Kaldor, 2003b: 9).

Last but not least, there is also a significant amount of criticism about the supposedly Euro-centric concept of civil society (Baker, 1998: 85f.). This criticism is represented by the so-called postmodern version which advocates understanding of civil society in a way that is not entirely focused on individual autonomy but also includes communalist elements. The problem with this version is that communities can be coercive. Individual autonomy and voluntary associations are essential for the emancipatory character of civil society (Kaldor, 2003b: 42).

This admittedly rough overview reveals that the concept of civil society has played a central and cross-ideological role in thinking about democracy and that it has adopted a wide range of meanings over time. Yet what all approaches share is the focus on the problematic relation between private and public, between individual and social, between individual interest and public ethics, and between individual passions and public concerns (Seligman, 1992: 5).

Facing the Challenge: Assigning Civil Society a Constitutive Role

The brief overview of the historical development of the term "civil society" has revealed an enormous breadth of interpretations. Yet, asides from focusing on similar problems, another common tendency can be discerned at play across ideological borders: most definitions assign civil society either a competitive, hostile role as a counterpower to the state or the economy, or a subordinate role as a residual category for questions that cannot be resolved by either the state or the market. I would argue that neither of these roles is fruitful. Civil society needs to be defined constitutively and positively; otherwise, in their function as representatives of civil society, NGOs would repeatedly have to first justify their role as representatives of a claim

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[4] See also Kapstein (2001: 107f.), Stiglitz (2002), Edwards (2000: 10), and Öniş and Şenses (2005) on the Washington consensus and the subsequent post-Washington consensus.

and to argue against the market and the state. They would act from a subordinate position. Only with a constitutive definition of civil society can we assign NGOs a meaningful role as actors with a *raison d'être* equal to economic and governmental actors who are not reduced to a subsidiary role. But, as will be argued later, in order to arrive at a constitutive definition of civil society, we need to agree on the distinctive core of civil society.

The competitive or even hostile role of civil society became especially manifest in the 1990s when civil society became a "slogan" for offering a new base for political and economic initiatives (Cohen, 1999b: 211). This trend had its origins in Latin America and Eastern Europe where civil society was perceived as a source of self-organization and where civic autonomy emerged as a reaction to the ever increasing power of the state. In the West, this concept was taken up by radicals who extended it to include a check not only on the state but also on the power of capitalism (Kaldor, 2003b: 21; see also Chandhoke, 2002: 36). However, the understanding of civil society as an alternative centre of action is sometimes accompanied by a decidedly negative view of either the state or the economy, or both. Civil society then operates "between the Scylla of the state and the Charybdis of corporations, both of which are roughly comparable in their gigantism and concomitant capacity to oppress" (Lomasky, 2002: 51). Portraying civil society as a *competitive or even hostile counterpower* which aims to replace or fight either the state or the economy, stands in contrast to recognizing it as an *intermediating* force, that is, as an essential component of a system of checks and balances in modern democracy. In this book, civil society, the state and the economy are seen as being mutually constitutive of each other.[5]

A *constitutive definition of civil society* starts from the assumption that neither a society in which all public life is subject to state control (total state society) nor a society in which all of public life is regulated by market mechanisms (total market society) meets the requirements of a democracy in which every citizen can meaningfully pursue her life plans free from economic or political (in a narrow sense) coercion. A constitutive definition of civil society rejects the assumption that the three spheres (state, market and civil society) stand in a competitive relation. Instead it aims to ensure a system of checks and balances amongst them.

The danger of disregarding the constitutive function of civil society in modern democracies derives from the difficulty of providing a "positive" definition of civil society. Most definitions focus on what civil society is not (Gray, Bebbington, and Collison, 2006: 322). They thus leave civil society only a residual role. The same is true for NGOs which are perceived to be distinguished best by what they are not: "not government, not business, and not for profit or political office" (Spar and La

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[5] Neo-Marxist thinkers admit the connections between the three sectors but frame them as dependency-relations rather than as mutually enabling relations. Chandhoke for example acknowledges that civil society is not autonomous of either international politics or markets but concludes from this that we must not let our *normative* expectations of civil society blind us to the *nature of real civil societies* which for her are characterized by their lack of transparency and accountability and by Chandhoke (2002: 35, and 47ff.).

Mure, 2003: 79). An example of a "negative", *residual definition* is provided by Thompson: he defines civil societarians as those theorists who want to reduce the role of government at all levels (Thompson, 1999: 113).[6] If civil societarians were to assign civil society a constitutive, positive role, one would have to define them as theorists who critically reflect on and monitor government activities and ensure their transparency.

As a consequence of the degree of negative definitions civil society is prone to appear as a residual category that absorbs everything which cannot be regulated by either the state or the market.[7] In such definitions, civil society assumes a subordinate status: only *after* an issue is not assigned to the state or the economy is it then allocated to civil society.

Hence both the subordinate status of civil society as a residual concept and the competitive concept of civil society as a force that is a priori against the state or the economy are irreconcilable with a constitutive function.

Let me now assess whether liberalism and/or deliberative democracy assign civil society a constitutive role and discuss how one would have to interpret them in order to arrive at such a result.

The Liberal View: Civil Society as a Residual Category?

If we consider three different strands of liberalism – namely classical liberalism, economic liberalism, and political liberalism – we see that none of them assigns civil society a constitutive role.

With respect to *classical liberalism* (in the Hobbesian sense), Lomasky quite frankly admits a neglect of civil society in its contemporary sense. He justifies this neglect by arguing that liberalism is a minimal philosophy and as such decentralizes questions of choice and value onto individuals acting in their private capacity

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[6] Among civil societarians Thompson distinguishes between two strands which differ with respect to the liberties that they regard as most important: "One group favours social institutions because they believe they provide more opportunities for individuals to develop their various talents and interests, and therefore promote the free pursuit of a diverse range of activities. A robust civil society makes it more likely that all citizens (...) will find greater support in pursuing their life plans whatever they may be. For the other group, the liberty that matters most in civil society is economic freedom, and the social institution that matters most is the market" (Thompson, 1999: 117). This distinction precisely articulates the difference between communitarians who want to strengthen social institutions in order to strengthen the community and radical liberal theorists who are driven by their mission to maximize economic freedom and to spread the economic functioning logic across the borders of the market system. One could even say that the market-oriented strand of civil societarianism works towards a renewed reunion of market and civil society – but in contrast to the Hegelian and Marxist concepts, in this case the market would comprise civil society and not vice versa. Thompson reproaches both strands for neglecting governmental institutions. In my view, this criticism is only justified with respect to the liberal strand of civil societarianism.

[7] For an argument against perceiving civil society as a substitute for government, see Edwards (2000: 15).

(2002: 50). In its classical form, liberalism at best mobilizes civil society as a counterpart to the anarchy of the state of nature, to act as a zone of civility, as mentioned in the historical overview.

Economic liberalism overcomes this blind spot and offers its own distinctive view of civil society, which it perceives as a bulwark against an overly powerful state or even as a substitute for the state. Consequently, civil society in this model is seen to be composed of a market of NGOs (Kaldor, 2003b: 106). Globalisation, understood as the spread of global capitalism, is seen as a positive development, specifically as a vehicle which is supplemented by global civil society so as to achieve "the end of history" (Fukuyama, 1992). NGOs serve to smooth the path of economic globalization (Kaldor, 2003b: 9ff.). According to Thompson, "market-oriented civil societarians" embrace a notion of civil society in which economic freedom is the liberty that matters most, and in which the central social institution is the market (1999: 117). Hence, economic liberalism seeks to instrumentalize the concept of civil society for its mission to promote maximum economic liberty. Civil society in this perspective is not a sphere of action that is equivalent to the state and the market; rather, it assumes a subordinate position.

Political liberalism takes a more differentiated perspective and does not explicitly place civil society in the service of the market. The finer points of the political liberal conception of civil society will become evident in the chapters on the public sphere and on public reason (Chapters 6 and 7). For the moment, suffice to say that Rawls defines civil society as the background culture. However indispensable and probably even constitutive such a background culture might be for the functioning of modern democratic societies, the terminology as such supports the impression that civil society is not of foremost concern to political liberalism (Rawls, 1993: 220).

Even though this is a very brief characterization of the liberal concept of civil society, it suggests that, in general, liberalism does not assign civil society a constitutive role but rather a role subordinate to the market (economic liberalism) or just a background function (political liberalism). The liberal notions of civil society in relation to the public sphere will be examined in more detail in the section "Liberal Versus Deliberative Views of the Relation Between the Public Sphere and Civil Society" (Chapter 6).

The Deliberative View: Identifying the Constitutive Core of Civil Society

The deliberative conception of civil society differs quite significantly from the liberal conception. In general, deliberative conceptions attempt to provide a positive definition of civil society and to assign civil society a constitutive role. By emphasizing the normative weight of civil society in *mediating* between the particular and the general (Cohen, 1999b: 215, emphasis added), the deliberative conception assigns civil society a constitutive, non-competitive, non-subordinate role. NGOs

are acknowledged to be important intermediating forces in this context.[8] Moreover, as mentioned in the section "Facing the Challenge: Assigning Civil Society a Constitutive Role" (Chapter 4), in order to conceptualize civil society as a sphere where civil associations can thrive, the autonomy of associational life needs to be protected not only from the coercive powers of the state but equally from the coercive power of the economy.[9] According to the deliberative model, civil society circulates not just information about the state and the economy, but "establishes a forum for criticism in which the boundaries of these spheres are crossed, primarily in citizens' demands for mutual accountability" (Bohman, 1999: 186). This description precisely captures the essence of a constitutive role of civil society because it assigns civil society the role of a monitoring instance which places legitimacy demands on the other spheres.

One example of a truly constitutive definition of civil society is given by Habermas. For him, civil society

> . . . comprises those nongovernmental and noneconomic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the lifeworld. Civil society is composed of those more or less spontaneously emergent associations, organizations and movements that (. . .) distill and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres. (Habermas, 1996b: 366/367)

However, deliberative democrats also sometimes fall into "residual rhetoric". Even Dryzek, who in general assigns civil society a very prominent critical role in the functioning of democratic societies, falls into the residual trap by stating that "(in) the *first instance*, it [civil society] is made up of all social interaction not subsumed by the state or the economy" (Dryzek, 2000: 23, emphasis added).

Cohen offers an interesting justification of the difficulty of defining civil society in constitutive terms. According to her, the state and the economy can be more or less clearly differentiated by their dominant organizing principles of political power (state) and money (economy). By contrast, the dominant organizing principle of civil society is not as unmistakable: money and power play a role not only in the economy or in the state, but also in civil society; and deliberation, which one could take as the most distinctive organizing principle of civil society, is not reserved for

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[8] The deliberative model thus shares the republican assumption that there is a force other than the state on the one hand and the market on the other hand, namely civil society. But compared to the republican model the deliberative model does not make particularly strong demands on civic virtues. It concentrates instead on the process of opinion-formation which occurs in civil society (Benhabib, 2002: 106; Habermas, 1996b: 27).

[9] Noonan points out that while modernization promoted the ideas of equality and individuality and "established a space within which a free life could be led, the evolving capitalist economy created a new form of material dependence on economic dynamics that were judged rational not relative to whether they satisfied fundamental needs for all citizens, but according to how rapidly they allowed capital to grow" (Noonan, 2005: 102). On the force of economic imperatives, see also Dryzek (1999: 49) and Ulrich (2008: 191ff.).

civil society alone. It thus seems that the state, the economy and civil society have organizing principles that differ in degree only, not in kind, which means that a focus on factual organizing principles does not yield an unmistakably constitutive conception of civil society. Instead, arriving at a positive, constitutive definition of civil society depends on arguing from a normative point of view: whereas the state and the economy pursue strategic, instrumental action such as the exercise of state power, collective goal-setting, and efficient administration or profit, civil society could be characterized as the sphere dominated by "patterns of normative integration that generate solidarities or collective identities" (Cohen, 1998: 370).[10]

Moreover, and more important for this book, civil society in principle adheres to the ideal of open-ended communication as opposed to the pressures of decision-making under which state and economic actors operate (Cohen, 1998: 370/371).[11] The "institutionally 'unbound' qualities of publics" in which civil society actors play a prominent role are an indispensable requirement for promoting public discourses and for protecting them from most immediate consequences for collective decisions and actions (Warren, 2001: 77). Since public spheres do not have the power of collective action, they can only exist if they can generate distinctive communicative resources.

With this view of the normative core of civil society, we have mastered the task, set out at the beginning of the section, of assigning civil society a constitutive role (in the section "Facing the Challenge: Assigning Civil Society a Constitutive Role" (Chapter 4)). This view spells out a distinctive core of civil society and thus meets the requirement for a constitutive definition of civil society. Moreover, the fact that the distinctive core can only be perceived from a normative point of view proves what has been stated at the beginning of this chapter, namely that civil society is an inherently normative concept which cannot be deployed without articulating political-philosophical presumptions on which it is based. Together with Cohen, let me thus define the distinctive normative logic of civil society, in contrast to the market and the state, as follows: civil society operates according to the ideal of open-ended communication without the pressures of decision-making. It will be argued later that the absence of this pressure prepares the ground for conceptualizing the interaction between NGOs and economic actors as an inherently political interaction.

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[10] Korten makes a similar distinction with respect to the dominant modes of resource acquisition in the three spheres of action: he states that NGOs primarily acquire resources through the "integrative power" of the citizen, whereas governments primarily rely on "threat power" and business organizations primarily rely on "economic power" (Korten, 1990: 97, quoted from Murphy and Bendell, 1999: 6).

[11] Another way to define civil society positively and constitutively would be to emphasise its role as "an arena in which people come together to advance the interests they hold in common, not for profit or political power, but because they care enough about something to take collective action" (Edwards, 2000: 7).

Chapter 5
Insights from Part II

As a new paradigm for political action on a global scale, the postnational constellation has given rise to new political actors. States and international institutions share the global arena with NGOs and multinational corporations. All of these actors assume political roles in the postnational constellation because their actions impact on issues that are undeniably public but not (yet) regulated. From this new set of political actors we can conclude that the interaction between NGOs and corporations is an inherently political interaction: NGOs address companies with public claims and in doing so aim to fill the political gaps that arise in the globalized economy. It is thus only fitting to address the question of NGOs as legitimate partners of corporations from a political-theoretical perspective.

However, even though there is shared agreement across ideological borders that NGOs and civil society act as (potentially) democratic forces in the postnational constellation, the overview of two political models, namely liberalism and deliberative democracy, has revealed considerable differences with respect to their conceptualization of "the political". Whereas the liberal model represents a state-bound conception of politics, the deliberative model extends the meaning of democracy beyond the state by recognizing civil society as well as certain sectors of the economy as sites of association and public deliberation.

As a consequence the two schools of thought also advocate very different conceptions of civil society. It has been argued that the liberal tendency to confine civil society to a role subordinate to the market and substituting for the state fails to assign NGOs a distinctive *raison d'être*. By contrast, the deliberative model exhibits greater sensitivity to civil society as a distinctive sphere of action with an intermediary role between the market and the state. At the same time, it has also become evident that the struggle to arrive at a constitutive definition of civil society crosses ideological borders. However, in general the deliberative model provides a better basis for understanding civil society as a sphere equivalent to the state and the market. Moreover, with its broad notion of "the political", the deliberative model opens the door to conceptualizing the interaction between NGOs and corporations as a political interaction.

These preliminary conclusions prepare the groundwork for Part III, which will undertake an in-depth review of the institutions and processes that are central to setting up a normative framework for legitimate partner NGOs. The analysis will again take the form of a systematic critical comparison of liberal and deliberative conceptions of the terms in question.

Part III
Institutions and Processes: A Normative Framework for Legitimate Partner NGOs

What institutions and processes build the cornerstones of a normative framework for NGOs that strive for legitimacy as partners of corporations? What central notions of the research question are open to different justifications from different political models?

The first term to be assessed is one that is not explicitly contained in the research question. Nevertheless, the "public sphere" is probably one of the most essential terms that need to be clarified. From clarifying the public sphere I will proceed to discussing different conceptions of "public reason", thereby differentiating between substantive and procedural restrictions on public reason. This will lead me to an assessment of the political process as such. The central term of the research question, namely "legitimacy", rests on the political-philosophical examination of all the other terms and will therefore be assessed at the very end of this theoretical part.

The systematic point of this procedure is to assess all of these terms from a liberal and a deliberative point of view so as to determine which of the two models offers a more meaningful conceptualization of the legitimacy of NGOs as partners of corporations against the background of the postnational constellation.

Chapter 6
The Public Sphere

Importance of the Public Sphere

Before examining the liberal and deliberative conceptions of the public sphere, it is worth making a few remarks about the general importance of the public sphere for the research question of this book.

It might come as a surprise that one of the cornerstones to be examined in light of liberalism and deliberative democracy is a term that is not explicitly contained in the research question. There are two reasons for this. First, the relevance of the public sphere to the research question is directly linked to the assumption that NGOs represent public concerns or at least claim to represent public concerns. With such public claims they position themselves as actors in the public sphere and, as will be argued, inevitably as political actors because the conception of the public sphere always has a bearing on the definition of "the political". We thus need a conception of the public sphere which acknowledges NGOs as political actors and which provides for a normative, emancipatory orientation in the context of the postnational constellation. It will be argued that the deliberative conceptualization of the public sphere is more appropriate to these requirements than the liberal conceptualization and that the deliberative model lays the groundwork for a political conception of the role of legitimate partner NGOs.

The second reason for the relevance of the public sphere is that no political-philosophical reflection can avoid dealing with the question of what is public and what is private. The approach one chooses for distinguishing the "public" from the "private" has a variety of normative implications for other political-philosophical distinctions, such as that "between a common public political conception of justice and various comprehensive views within society, between 'political' and 'ethical' virtues, between persons qua citizens and persons qua persons" as well as that between "the modes of reason appropriate to the public sphere (i.e., public reason) and those appropriate to other 'spheres'" (Charney, 1998: 98).[1] The conception of the public sphere that one advocates is necessarily related to a normative political theory of democracy because the public sphere is seen as the space where public

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[1] See also Benhabib (1992: 107) and Chapter 7 of this book.

opinion is generated discursively in ways that claim at least some degree of moral-political validity (Fraser, 2005: 1). It is because of this claim for moral-political validity that we must carefully apply critical standards whenever we use the public sphere as a normative concept. We should by no means succumb to the temptation to portray everything that occurs in the public sphere as praiseworthy and to blank out any negative aspects (Dryzek, 2000: 23).

In fact, the distinction between public and private has been one of the central concerns in Western thought since classical antiquity and has for a long time served as a springboard for a broad variety of the topics central to social and political analysis, to moral and political debate, and even to the "ordering of everyday life" (Weintraub, 1997: 1). Moreover, as has become evident in the previous chapter on civil society, the dialectic and tension between public and private are constitutive of civil society (Seligman, 1992: 5).

Before examining the normative horizon of the public sphere in the liberal and deliberative model, I will quickly sketch out the difference between the public sphere on the one hand and civil society on the other hand. This is important because the terms abut closely to each other; they are sometimes even used interchangeably (Hendriks, 2006: 488). However, I want to show that their exact relation depends on the political-philosophical perspective which one takes.

Liberal Versus Deliberative Views of the Relation Between the Public Sphere and Civil Society

There is a significant difference between the liberal and the deliberative view of the relation between the public sphere and civil society: whereas the liberal model sees the two conceptions as separate, the deliberative model claims that they are mutually linked. Put briefly, although the details will come later (in the section "The Liberal View: Confining the Public Sphere to Constitutional Questions" (Chapter 6)), the liberal model defines the public sphere as the political sphere in which questions that concern constitutional essentials are discussed and decided. Civil society is seen as the background culture and has a *nonpublic* character that contrasts with the public political culture (Rawls, 1993: 220, my emphasis). In contrast to the liberal view, the deliberative model conceives of the public sphere as a network of communications, not of organisations; as such it is a means for achieving rational will-formation. The associational network of civil society grounds the communicative structure of the public sphere in the lifeworld:

> ... the lifeworld is, so to speak, the transcendental site where speaker and hearer meet, where they can reciprocally raise claims that their utterances fit the world (objective, social, or subjective), and where they can criticize and confirm those validity claims, settle their disagreements, and arrive at agreements. (Habermas, 1987: 126)[2]

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[2] See also Habermas (1996b: 359/360), Palazzo (2002: 57ff.), and Cortina (1995: 54).

Moreover, systemic actors that do not themselves belong to civil society can appear in the public sphere. Yet their arguments must conform to the discursive logic of civil society; they cannot rely on bargaining or on nonpublic attempts at pressure. They must advertise their claims in a language of convincing reasons. As a consequence, interest groups in particular are vulnerable to criticism because public opinions that only become visible because of hidden money infusions or organizational power "lose their credibility as soon as these sources of social power are made visible" (Habermas, 1996b: 364). The public sphere must adhere to the discourse-ethical requirement that norms are only legitimate if all who are potentially affected agree to them (Habermas, 1990b: 38).

The deliberative model orients itself "to the ways in which political processes and the 'background culture' interact" (Benhabib, 2002: 109). The public sphere and civil society are mutually linked: civil society depends on the existence of a public sphere in order to function because it requires freedom of the press, of opinion and of association, as well as civil behavioural norms like tolerance, understanding and public spirit (Adloff, 2005: 8). At the same time there is no critical public sphere without a civil society (Habermas, 1996b: 369). Only if citizens have the means for self-organization, "outside" the state and the economy, can a public sphere arise that has the capacity to critically monitor the behaviour of the state and the economy. Opinion-forming associations around which autonomous publics arise are a precondition for a public sphere untainted by power.[3]

An explicit expression of the direct link between civil society and the public sphere in the deliberative model stems from Dryzek. He defines the public sphere as "civil society in its politicized sense" (Dryzek, 2000: 23). As a consequence he defines actions that arise from the public sphere, such as the actions of NGOs directed at corporations, as paragovernmental (Dryzek, 2000: 23). This notion of the relation between civil society, political action and the public sphere fits well with the normative premise of this book, whose task is to conceptualize the interaction between NGOs and companies as political action.

As will become evident in the next section, the difference between the liberal and the deliberative view of the relation between civil society and the public sphere originates from their different connotations of the word "public". For liberals the word public denotes "belonging to government or the administrative state"; it is a "sphere of coercion" and restriction of freedom and thus should only apply to a very limited field (Weintraub, 1997: 11). For deliberative democrats, by contrast, the public sphere has a positive, emancipatory meaning: it is an essential *source of democracy*, of collective decision-making, of "political and moral learning" (Benhabib, 2002: 106). Deliberative democrats thus include in their concept of the public sphere all parts of society involved in will-formation and/or collective decision-making. Forst calls the public sphere the most important institution for enabling deliberative

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[3] Such a public sphere, untainted by power, can change the judgement of values and reasons that is dominated by different institutions like political parties, the mass media and interest groups, and filter such values and reasons critically (Habermas, 1990b: 32).

democracy, and he calls the public sphere not a narrow political institution but an "institution of civil society" (Forst, 2001: 369).[4]

The difference in perspective between liberal and deliberative theorists also extends to the use of the term "non-governmental". For liberals, non-governmental denotes private, and thus, for them, economic. The non-governmental is essentially conceived in terms of the market (Weintraub, 1997: 8). For deliberative theorists, non-governmental does not mean private or nonpublic, but denotes a "third category" beyond the state and the market, namely the sphere of "the civil" which is subject to the rules of democracy. It is not, however, subject to democracy in a formal sense, i.e., not in a majoritarian way where voters make their decisions in formal democratic processes, but rather – as a consequence of the discursive focus of deliberative theory – to a discursive conception of democracy. For deliberative democrats, inclusion in politics is not the same as inclusion in the state. The deliberative model advocates a broad notion of "the political" (Dryzek, 2000: 87).

Hence, in contrast to the liberal model the deliberative model presumes that the public sphere extends beyond the state and the economy and that it includes the "civil". The deliberative model acknowledges NGOs as part of civil society and defines civil society as part of the public sphere. Civil society for the deliberative model denotes a sphere of action that is subject to norms of publicity and that is equally critical towards the state and the economy. Thus, if we follow the deliberative logic and define NGOs as civil society actors with public claims, we hold NGOs not only apart from the state but also from the economic sphere. The liberal model in contrast assigns civil society a nonpublic role and thus potentially gives civil society over to the logic of the economy.

The Liberal View: Confining the Public Sphere to Constitutional Questions

Historically, liberalism has prioritised private over public autonomy. In contrast to deliberative democracy, liberalism sees private autonomy as a natural property of human beings (Noonan, 2005: 107; see also Cohen, 1999a: 390). In their endeavour to protect private autonomy as one of the highest goods, liberals want to keep the public sphere – as a residual complement to the private sphere – as narrow as possible. Only the liberal constitutional state can be entrusted with public matters; vice versa, only constitutional matters can be subject to public debate. As mentioned above, the conception of the public sphere in this model ties the public sphere to the state; Rawls, for example, confines the idea of public reason to the political, constitutional sphere (Rawls, 1993: 212). The public sphere extends only to the formal political sphere, and since civil society does not belong to the formal political

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[4] Similarly, Dryzek defines the public sphere as "the most important location for deliberation" (2001: 652).

sphere, it is considered nonpublic (Benhabib, 2002: 109).[5] The liberal restriction of the public to the constitutional sphere gives the conception of publicity either "an overly restrictive content" or results in an "overly strong distinction of the public sphere and civil society" (Bohman, 1999: 179). According to the liberal model, NGOs are a priori to be located in the private sphere, which is where private interests are pursued. They are not perceived as political actors, because the liberal notion of the political holds it separate from the private sphere; for liberals, NGOs are acting in the nonpublic and thus non-political sphere.[6] Only if their claims concern questions of basic justice or other constitutional issues, do they belong to the public sphere. This distinction between public and nonpublic yields a restricted agenda of public debate (Benhabib, 2002: 108). However, whether an issue refers to matters of "justice" or of "good life" often only becomes evident in the course of a public dialogue (Benhabib, 1992: 98).

Due to its narrow political conception of the public sphere, the main public actors in the liberal model are voters, that is, citizens of the state, who appoint their representatives in free and fair elections. Democratic legitimacy is conferred through elections and the act of voting. Thus, in the liberal model the public sphere is necessarily linked to a political unit, usually in the form of the nation state.[7]

The reason for restricting the public sphere to constitutional questions lies in the critical attitude that liberals assume towards the state. Liberals want to limit the range of the state because they associate the state with coercive power. Deliberative theorists reproach liberals for their "fixation on the question of how one controls the state's monopoly force" (Habermas, 2001: 122). By arguing in favour of a limited conception of the public sphere, liberals aim to protect the "autonomy of associational life within civil society and its independence from the coercive powers of the state" (Charney, 1998: 97). The confinement of public reason to constitutional matters reflects the *limited ends of government* and defines what can be a matter for legislation (Charney, 1998: 99f.). The quest "for a just, stable and tolerant political order" has generated in contemporary liberalism an excessive focus on the limits and the public justification of state power and other public agencies (Benhabib, 1992: 100). As a consequence, other, *civil* dimensions of political life, like engagement in citizens' groups and public fora, have been neglected by liberal political theory (Benhabib, 1992: 100; see also Manin, 1987: 338f.). The liberal

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[5] As mentioned above, the nonpublic character of civil society *contrasts* with public political culture. Rawls further differentiates between the public-private and the public-nonpublic distinction (Rawls, 1993: 220); he avoids the former "because of the individualistic non-associational connotations of the word 'private'" (Charney, 1998: 98). For Rawls "there is no such thing as private reason" (1993: 220).

[6] Rawls would reject this interpretation. For him civil society belongs to the nonpublic sphere, not to the private sphere. However, the tripartite distinction between public (political), nonpublic (political) and private is hard to defend: how would we envision nonpublic politics? Nonpublic politics is irreconcilable with the notion of democratic politics. On Rawls' problematic distinction between public and nonpublic uses of reason, see also McCarthy (1994: 50).

[7] On the liberal model of the public sphere, see for example Charney (1998: 99ff.) or Weintraub (1997: 8ff.); for a critical perspective, see Benhabib (1992: 95ff.) and Habermas (1996a: 26ff.).

equation of "public" with "governmental" or "legislative" or "regulatory" fails to take into account the sphere of the "civil" considered as public but not legislated.[8] Civil publics, as will become evident in the section on the deliberative conception of the public sphere (in the section "The Deliberative View: The Public Sphere as a Site for Critical Reflection" (Chapter 6)), are those publics where people can "discuss matters of mutual concern as peers and learn about facts, events, and others' opinions, interests, and perspectives" (Cohen, 1999b: 215); eventually, "discourse on values, norms, laws, and policies generates politically relevant public opinion" (Cohen, 1999b: 215). Unlike the liberal publics of state citizens, civil publics are by no means a priori restricted to discussing only constitutional or governmental matters.

Thus, the liberal model a priori locates NGOs in the nonpublic sphere (of civil society) and it does not conceive of the interaction between NGOs and companies as belonging to the public sphere. Instead, the interaction between NGOs and corporations is subject to the functional logic of the private sphere – as conceived in terms of the market – rather than the logic of political action. If NGOs want to influence the scope of public issues, then they – at least according to the liberal model – need to do so with reference to the "constitutional sphere". This conception is not "against" NGOs, but it assigns them a relatively narrow political role: the NGOs' scope of political action comes down to a close interaction with states or international organizations with legislative powers, because these are the actors that act either in a constitutional sphere or in a partially globally regulated sphere that comes closest to a constitutional sphere on a global level. NGOs exemplarily assume roles which the liberal model would define as political in their engagement as "partners of decision-making activities" in international institutions such as the World Bank, the IMF or the WTO (Chandhoke, 2002: 44).[9]

The point that is relevant for this work is that by not assigning the civil sphere an intrinsic value apart from the state and the market, the liberal model fails to conceive of a way for representing interests beyond the market and the state. By confining public debates to constitutional questions, it moreover restricts the scope of public conversation in a manner that is inimical to the interests of oppressed groups (Benhabib, 1992: 100).[10] It either assigns these movements to the sphere of private interests or it severely limits the range of claims which can be admitted to

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[8] Other schools of thought offer a more differentiated view. In republicanism for example, the state and the market are not the only sources of social integration; instead, solidarity and the orientation to the common good offer a third source. This third source of social integration is meant to have an autonomous basis in civil society, independent of the state and the market (Habermas, 1996a: 21f.). There is thus a public sphere beyond the state-market dichotomy and making something public does not mean locating it in the legal sphere and its institutions.

[9] See section "Three Contexts for NGOs as Representatives of Public Claims" (Chapter 2) of this book for different contexts of institutionalization in which NGOs operate.

[10] Yet Rawls allows public reason to encompass new variations of conceptions of justice. He acknowledges that otherwise "the claims of groups or interests arising from social change might be repressed and fail to gain their appropriate political voice" (Rawls, 1997: 775).

the public sphere (namely, claims that refer to questions of constitutional essentials or basic justice). Consequently, the liberal model prevents a debate about the public-private divide. It thus freezes the public-private divide. To assume that the range of shared political ideas and convictions is predetermined or that theorists can fix that range means freezing the ever-changing processes of public communication. The outcomes of such processes cannot be determined in advance by political theory (McCarthy, 1994: 61).[11]

The liberal model, because it relies on the state-market dichotomy, promotes (negative) liberty as the "core value", and understands the state in terms of coercive power,[12] fails to protect NGOs from the potentially equally coercive power of the economy. A "pure liberal" would reject the statement that associational life needs to be protected not only from the state but also from the economy, since for liberals the economy is the sphere that guarantees liberty and is thus opposed to the idea of coercion. As will be argued in more detail in the next chapter, it is blind to the emancipatory potential of the public sphere. Because it does not perceive the economic sphere as liable to discursive legitimation, it leaves no room for the interaction between NGOs and economic actors. I will now look at the implications that the liberal conception of the public sphere has in the postnational constellation.

The Liberal Conceptualization of the Public Sphere in the Postnational Constellation

The strand of liberalism which takes into account the postnational constellation is called cosmopolitanism. The main representatives of this school of thought are David Held, Daniele Archibugi and Anthony McGrew.[13] Cosmopolitanism particularly faces the challenge that the liberal restriction of the public sphere to the constitutional sphere has very limited normative power as long as there is no world republic or at least no global constitutional sphere. Cosmopolitan democrats address this challenge by promoting government-like structures on the global level which should strengthen the rule of law on a global scale (Held, 1995: 279f.). While they do not exactly recommend a world government or a world state, they still focus on international regimes, international law, and international organizations (Thompson, 1999: 114; Dryzek, 2000: 121; Scheuerman, 2002: 439ff.). However, trusting in the capability of a "network of regional and international agencies and assemblies that cut across spatially delimited locales" (Held, 1995: 237) to create or stand in for a

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[11] More about this will be discussed together with the implications of the substantively constrained conception of public reason in the section "Implications of Restricting the Content of Public Reason" (Chapter 7).

[12] Negative liberty can roughly be defined as the absence of obstacles, barriers or constraints. The distinction between positive and negative liberty goes back to Isaiah Berlin (1979).

[13] See, for example, Archibugi and Held (1995), Held (1995), McGrew (1997), Archibugi (2000); for more sources, see Scheuerman (2002: 439).

global constitutional sphere and as a consequence also a global public sphere takes no account of the fact that "such a network does not give those citizens outside particular agencies or assemblies any significant control, and does not provide any way for citizens within them to deal with the effects of the uncoordinated decisions of other agencies and assemblies" (Thompson, 1999: 115f.).[14]

Deliberative democrats criticize cosmopolitan thinkers for their "excessive constitutionalization" (Dryzek, 2006: 137) and "excessive administration" (Dryzek, 2006: 140ff.). With its narrow conception of the public sphere, the liberal conception fails to consider that there is a "rapidly emerging global public" which "has emancipated itself from the bonds of the nation state, and therefore also has been *deconstitutionalized*" (Brunkhorst, 2007: 109). This deconstitutionalized global public represents the global *civil* sphere which partly compensates the missing global *political* public sphere. The civil sphere in the postnational constellation encompasses the wide range of issues that are undeniably public but not (yet) regulated. In the postnational constellation, NGOs play a major role precisely in this sphere that is "public but not regulated", that is, the civil sphere (as self-proclaimed watch dogs).

Liberals tend to ignore the discursive sources of international order which play an important role "in the light of the prospects for democratization" (Dryzek, 2000: 121). They ultimately disregard the question of what transnational public debates, in which NGOs often act as a driving force, are supposed to look like. In particular, the liberal model fails to grasp the democratizing potential of transnational public discourses, which have no decision-making features, or which do not operate under the same amount of decision-making pressure as discourses within institutionalized contexts.[15]

This leads us back to the type of NGO action which has been presented as the "wild model" in the section "Three Contexts for NGOs as Representatives of Public Claims" (Chapter 2), namely NGO action which takes place in the extraconstitutional sphere. Fraser ascribes practices that only consist in opinion-formation without including decision-making to "weak publics" (Fraser, 1990: 75). Deliberative practices that include both opinion-formation and decision-making and which lead to binding, sovereign decisions are ascribed to "strong publics" (Fraser, 1990: 75). The liberal model can only conceive of the public as strong. But NGOs rather belong to a weak public sphere, on a national as well as on a global scale, since their discourses generally do not result in binding decisions.

Even though there are "strengthening" tendencies of a global public, such as the official admission of NGOs as registered observers to international organizations and their resulting access to political and expert meetings (Nanz and Steffek, 2004:

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[14] Thus, the liberal model exhibits exclusionary tendencies. More about this will be said in Chapter 7.

[15] On the insensitivity of the liberal approach to the importance of non-governmental discursive sources on a global scale, see Dryzek (2000: 115ff.).

327ff.),[16] when it comes to their interaction with economic actors, NGOs only participate in deliberative but not decision-making processes.[17] In general, we can state that liberals have not yet come up with a convincing way of conceptualizing the public sphere in the postnational constellation so as to accommodate the forces of civil society that act outside formal institutions.

The Deliberative View: The Public Sphere as a Site for Critical Reflection

Deliberative democracy portrays the public sphere as a site for critical reflection among free and equal citizens. The critical public sphere, "understood as the ideal communicative community", is the site where free, equal and politically mature citizens "debate and regulate public affairs relating to their living together by way of argument" (Ulrich, 2008: 288). This idea goes back to Kant who assigned the public sphere a double role: he portrayed it not only as a site of morality where publicly relevant actions have to be justified but also as the site of the (self-)enlightenment of free citizens (Ulrich, 2008: 288ff.; see also Cortina, 1995: 49ff.).

Particularly as a site for the (self-)enlightenment of citizens, the public sphere plays an important emancipatory role (Kant, 1970; Ulrich, 2008: 77).[18] In order for the critical element of the public sphere to unfold it needs to undergo what Dryzek calls "reflexive modernization", which denotes the tendency to increasingly question obedience in relation to the tradition into which people are socialized (Dryzek, 2000: 143). The protection of the critical public sphere ensures that responsible citizens can create the critical pressure of legitimation which requires political instances to respect the public interest instead of solely promoting their own particular interests (Ulrich, 2008: 290). In the discursive public space, perceived as "the essential sociological correlate of the discourse concept of legitimacy", dialogues of legitimacy expire (Benhabib, 1992: 103).

If we conceptualize the interaction between civil society actors and economic actors as a political interaction, we can conclude that the protection of the critical public sphere is necessary not only for the free exercise of criticism by citizens vis-à-vis the state but also vis-à-vis the economy. The public sphere is supposed to serve

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[16] On the roles of NGOs in international organizations see also Scholte (2004: 213ff.).

[17] A strong notion of publics is also attractive for radical democrats; for them, weak publics are just "irrelevant epiphenomena or instruments of co-optation" (Fung, 2003b: 365). In contrast to radical democrats, this work starts from the assumption that the interaction between NGOs and corporations can be political, and democratic, without pertaining to a strong global public. My aim is not to promote a strong global public but rather to explore the democratic legitimacy of a weak global public (to which NGOs belong).

[18] In his "principle of publicity", posited in the second appendix to his work "Perpetual Peace", Kant claims that "[all] actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity" (Kant and Humphrey, 2003: 37). As we will later see, this implies that legitimacy is conferred through the public use of reason.

as a vehicle for mobilizing public opinion as a political force; it should not only permit citizens to exercise influence over the state but also empower them vis-à-vis private powers (Fraser, 2005: 1). This insight lays the basis for a truly emancipatory notion of the public sphere and thus also of NGOs.

By ascribing to the public sphere a more encompassing, balanced role as a site of mediation that not only refers to the state but also towards the economy, deliberative democracy offers a "thicker, wider and more directly political notion of publicity" than the liberal model (Bohman, 1999: 179). Whereas the liberal model, because it equates public with constitutional and because it is sceptical of the state, defines belonging to the public sphere as a restriction, the deliberative model perceives it as an opportunity and thereby provides for an emancipatory conception of the public sphere (and civil society as has been argued above).[19] It avoids the liberal model's problem of exclusion because it does not reserve the political sphere to political citizens that belong to an electorate. For deliberative democrats exclusion from the public sphere entails the risk of oppression. A coercive and narrow conception of the public sphere cannot ascribe NGOs an emancipatory role, since coercion and emancipation are opposites. It deprives "those who are excluded" of voice. And these play an important role in the "NGO world": all needs that are either neglected by the state or the market, or that cannot or should not – for reasons that have to be justified – be regulated by legislative or market processes can be addressed in the public sphere.[20] Hence, in order for NGOs to realize their emancipatory potential, they must be accepted as actors in the public sphere which represent claims that are subject neither to the functional logic of markets nor to the regulatory power of states. Only actors with access to the public sphere can credibly voice their claims. In the economic sphere the influence of actors depends on their possession of resources, whereas in the public sphere, ideally – if we adhere to the discourse model of the public sphere – the "force of the better argument" counts (Habermas, 1990a: 158f.). If one excludes civil society associations from the public sphere, one does not in fact free them from the coercive powers of the state but rather frees them from credibly legitimizing their claims.

In contrast to the liberal model, the deliberative model keeps the public-private divide fluid. As a consequence it allows for struggles against oppression that begin with a re-definition of what hitherto has been considered "private", nonpublic or non-political into public concerns which need discursive legitimation. It is precisely the very role of a variety of social movements to bring such issues to debate.[21]

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[19] On the reasons why Habermas' conception of civil society in deliberative democracy does not realize this emancipatory potential, see section "Two-Track Model of Deliberative Democracy" (Chapter 8).

[20] Again, as with civil society, the public sphere is not considered to be a residual category which simply absorbs claims that are not attractive for the state or the market. The public sphere and civil society are both constitutive of a democratic society.

[21] Examples for movements that formed in the course of such re-definition processes are the women's movement, the peace movement, the ecology movement, and new ethnic identity

It is important to note, however, that not all deliberative democrats agree that the connection between the public sphere and the economy is relevant or fruitful. Habermas, for example, does not believe that economic activities need to be publicly legitimized.

The Habermasian concept of publicity goes further than the Kantian one by demanding that the claims raised by public opinion be institutionalized or that they at least to some extent be "converted into an authentic communicative power by way of political power" (Cortina, 1995: 55). But with respect to the role of the public sphere vis-à-vis the economic system, Habermas has never considered it necessary to legitimize economic activity by subjecting it to public discourse (Cortina, 1995: 55). He assigns actors in the public sphere the dual role of influencing the political system and at the same time reflexively revitalizing and enlarging civil society and the public sphere, but he never conceives of the interaction between civil society and the economy as subject to public justification (Habermas, 1996b: 370). His concept of the public sphere thus only extends its intermediating capacity to one side, namely the state. According to Habermas, he seeks to understand the deliberative procedure "as the core structure in a separate, constitutionally organized political system, but not as a model for all social institutions (and not even for all government institutions)" (Habermas, 1996b: 305). He criticizes Joshua Cohen who favours an extension of deliberative politics to as many social institutions as possible (Cohen, 1989: 21), by reproaching him for neglecting the role of decision-making powers as a reference point. For Habermas, the deliberative mode of sociation can only work within the legal system; it cannot be expanded into a self-organization of society because any democratic procedure – and that is what deliberation is – must be embedded in a constitutional context which cannot be regulated by deliberation itself (Habermas, 1996b: 305/307).

Gutmann and Thompson present a middle way between Cohen and Habermas: they also criticize Cohen's call for an extension of deliberative principles and argue that such an extension to all of civil society could threaten the freedom of citizens and the associations that they choose to form. They set themselves against requiring internal deliberative structures for civil society associations.[22] But at the same time they admit that deliberation at the interface between civil society and the economic sector is necessary because corporations are institutions that affect the basic liberties and opportunities of citizens by exerting "a kind of control that is properly considered political, not only economic" (Gutmann and Thompson, 2004: 33ff.). The same view is put forward by Cortina, who states that a critical public opinion is indispensable for business ethics and should be exerted upon all activities and institutions that have social goals and effects (Cortina, 1995: 57/8).

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movements. All these movements follow a similar logic. The liberal model leaves little room for thinking about the logic of social movements (Benhabib, 1992: 100).

[22] More about the problem of requiring internal democratic structures will be said in the section on the constraints on public reason (in the section "Implications of Restricting the Content of Public Reason" (Chapter 7)).

Gutmann and Thompson's perspective supports the goal of this research project, which conceptualizes the interaction between NGOs and companies as a political interaction, and which, as a consequence, must draw on a political-philosophical perspective which assigns the public sphere a critical role not only with respect to the state but also, and especially, with respect to the market. I will expand on the differences between the model of deliberative democracy, as advocated by Habermas, which is also known by the term two-track model, and what is called the critical strand of deliberative democracy in Chapter 8. I now briefly point out the implications that the deliberative conception of the public sphere has in the postnational constellation.

The Deliberative Conceptualization of the Public Sphere in the Postnational Constellation

Since NGOs that address companies with stakeholder claims often act across borders and thus are not bound to a unitary constitutional space, we need to find a political model whose normative orientation is not confined to the national level. I argue that the deliberative model lays an adequate basis for a transnational conceptualization of the public sphere and consequently of civil society. Deliberative democracy is able to deal with fluid boundaries while taking transnational communication into account because it defines political interaction not by the locus or by the actors involved but rather by the discursive character of interaction, which expands the scope of democratic accountability beyond the nation state (Besson and Martí, 2006: xxi; Gutmann and Thompson, 2004: 36ff.; Thompson, 1999: 120f.).[23] If one defines deliberation as the essence of democratic legitimacy, rather than voting or the representation of persons or interests, such a discursive or communicative model of democracy is particularly conducive to international society because the exercise of democracy is no longer restricted to political units and its narrow electorates (Dryzek, 1999: 44). The demand that democratic legitimacy be decoupled from formal political units such as nation states arises in the condition that in a deliberative dialogue "all whose interests are actually or potentially affected by the courses of action and decisions which may ensue from such conversations" must have the right to equal participation (Benhabib, 2002: 36). From this condition we can conclude that citizens of a democratic community might have to enter into a practical transnational dialogue, if an issue concerns citizens from different countries (Benhabib, 1994: 31). A public dialogue that crosses borders with respect to

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[23] It must be noted that this is only true if we conceive of deliberative democracy as a normative concept of leading public discourses, which implies a particular conception of legitimacy. If we perceive deliberation as a formal decision-making mechanism, the conditions that make deliberative democracy attractive in small-scale contexts seem to be absent in the international arena. This view of deliberative democracy as a collective decision-making mechanism hinges upon the possibility of face-to-face meetings which are of course inappropriate to most regional and national, and certainly to all global, decisions (Fung, 2003a: 52).

questions that are not constitutionally regulated, is indicative of the emergence of a transnational public sphere (in a civil sense).[24]

Like on the national level, the public sphere and civil society also relate on a transnational level. The distinction between the public sphere and civil society that has been introduced in the section "Facing the Challenge: Assigning Civil Society a Constitutive Role" (Chapter 4) also applies to the transnational level: if transnational civil society is perceived as a network of organizations, then the transnational public sphere is a network of communications or discourses in which transnational civil society plays an important role. Transnational civil society is consequently characterized by "highly reflexive forms of communication and boundary crossing and accountability typical of developed public spheres" (Bohman, 1999: 196). If we assign NGOs the role of being a driving force in the formation of a transnational civil society, they can be judged by the extent to which they enter and promote such transnational discourses. Following Kant, as mentioned in the overview of the historical uses of the term civil society (in the section "Historical Uses of the Term 'Civil Society'" (Chapter 4)), one could even go so far as to say that it is their responsibility to contribute to the formation of a cosmopolitan state, in which "a transgression of rights in one place is felt in the world is felt everywhere" (Kant and Humphrey, 2003: 18). In order to achieve legitimacy as actors that promote public claims in the postnational constellation, it must thus be possible for NGOs not only to lead public discourses across borders but they must also be willing to enter such discourses.

In reality, some signs of a transnational civil society can already be discerned, for example in the domain of human rights: violations of human rights have the power to generate a "whiff of cosmopolitan solidarity" as Habermas calls it (Habermas, 2005: 358). In general, cosmopolitan values such as tolerance, respect for others, emphasis on human rights, and so on have gained considerable importance over the past decades (Kaldor, Anheier, and Glasius, 2003: 16; see also Chandhoke, 2005: 358).

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[24] According to Bohman, a transnational or cosmopolitan public sphere, as he calls it, is created when at least two culturally rooted public spheres start to overlap and intersect (Bohman, 1999: 195). Moreover, a transnational public sphere "requires the development of a complex set of critical abilities and practices, which, however egalitarian and wide in scope, have certain entry requirements best fulfilled by participation in a particular background public culture" (Bohman, 1999: 187). According to him, a global public sphere requires the development and expansion of transnational civil society (Bohman, 1999: 195). But as Dryzek rightly points out, there is little lost by treating transnational civil society and transnational public spheres as covering similar territories (Dryzek, 2000: 130). Moreover, in this work, the public sphere and civil society are rather seen as *mutually* enabling than as one being dependent on the other.

Chapter 7
Public Reason

The Importance of "Public Reason" in Light of the "Fact of Reasonable Pluralism"

Having sketched out a normative conception of the public sphere that (a) ascribes NGOs an important role as actors in the public sphere and (b) maintains its normative force in the context of the postnational constellation, it is important to clarify the term "public reason". As a matter of course, public reason is closely linked to the public sphere. However, the grounds for considering the two terms differ with respect to the research question: the aim of looking at the public sphere has been to find a conception that ascribes NGOs an important role as actors in the postnational constellation, but, assuming that NGOs are actors that belong to the public sphere,[1] we now need a conception of public reason that meaningfully specifies what can be put forward by public reason (substance) and how it can be put forward (procedure). In the following section, I will argue that if we want to take NGOs seriously as public actors that promote a broad range of claims and often claim to represent oppressed or marginalized groups, we need a conception of public reason that promotes an unconstrained public dialogue (with respect to substance). Only in such a public dialogue can participants bring "any and all matters under critical scrutiny" (Benhabib, 1992: 110) in a way that allows the emancipatory potential of NGOs to unfold. At the same time we need to ensure that NGOs which participate in public debate and claim to represent public claims or interests do in fact publicly justify their claims. In order to ensure this we need to establish procedural guidelines for the use of public reason. I will argue that the deliberative model offers such an unconstrained conception of public reason and provides procedural guidelines for this public justification of claims; it thus offers normative orientation for the research question at hand.

The differences between the liberal and the deliberative notions of public reason are not merely terminological (McCarthy, 1994: 50). The main difference can

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[1] Even though it has been stated above that liberalism does not assign NGOs to the public sphere in a broad sense, in a liberal-constitutionalist analysis NGOs are part of the public sphere if they are embedded in an institutional context.

be summarized as follows: whereas the liberal model defines public reason as a substantive set of principles to be used when answering fundamental questions, the deliberative approach limits itself to establishing procedural restrictions on the use of public reason.[2] This is not to say that liberals do not have any opinion about appropriate procedures or that deliberative democrats do not reflect on the appropriate content of public reason. The liberal model in particular does impose restrictions on method as well as on content (McCarthy, 1994: 50f.). But it is a question of priorities: should the content of public reason be defined a priori (as the liberals tend to advocate) or should public reason primarily be perceived as a process (as the deliberative democrats tend to advocate)?

With respect to the content, the overarching difference concerns the question of whether only issues of basic justice and constitutional essentials should be subject to public reason or whether there should not in fact be any constraints on public reason. These questions necessarily touch upon many aspects of the public sphere that have been discussed in the previous chapter. However, it is my goal here to point out that the conceptualization of public reason has an essential impact on the claims which NGOs as *emancipatory civil society actors* can meaningfully advance and on the methods by which they advance them.

In the previous chapter the public sphere has been conceptualized in light of the postnational constellation. The paradigm under which public reason must be examined is "the fact of reasonable pluralism" (Rawls, 1993; McCarthy, 1994; Bohman, 1995; Cohen, 1996; Cooke, 2000; Gaus, 2003; Moon, 2003). This term describes the circumstances of modern societies in which there is no shared comprehensive moral or religious view, in which citizens are understood as free and equal, and in which the exercise of practical reason by people who are willing to live with others under conditions that those others can accept does not mean that their views converge on one particular conception of the good life (Cohen, 1996: 96). However, the fact of reasonable pluralism must not be confused with the fact of pluralism as such: the diversity of reasonable comprehensive doctrines is not a simple result of self- and class interests as purely economic or pluralistic theories of democracy would allege.[3] Reasonable comprehensive doctrines do not follow the logic of power, but are rather the work of free practical reason (Rawls, 1993: 36f.). As a consequence we cannot dismiss the views of people, who do not share our own beliefs as irrational

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[2] See Moon (2003) on the exemplary difference between Rawls' and Habermas' conceptions of public reason. See also Habermas (1996b: 313) on the importance of distinguishing the procedural and the substantive dimension and Gaus: "Political liberalism stresses justification of [substantive] basic political principles that can be the focus of an overlapping consensus among irreconcilable comprehensive doctrines, while deliberative democrats stress an open-ended discourse that validates political claims" (Gaus, 1997: 197).

[3] Pluralistic theories of democracy "emphasize the role of democratic negotiation and bargaining among citizens or among groups of interest" (Besson and Martí, 2006: xviii). The most prominent representative of pluralistic accounts of democracy is Dahl (1956; 1978).

or dogmatic, if we acknowledge that their convictions are reasonable in the sense that they have defensible grounds for holding them (Moon, 2003: 261f.).[4]

Any meaningful conceptualization of public reason must take into account the fact of reasonable pluralism as a basic condition of modern societies. Particularly on a transnational level where identities are very diverse and cultural differences cannot be ignored, the "fact of reasonable pluralism" is a "determining factor" for any meaningful conceptualization of public reason. The more diverse an environment is, the more important it is that public debates be open to a wide range of issues as well as accessible to a diversity of actors. Thus, we could say that empirically we have a "fact of pluralism" on a global scale. The "fact of *reasonable* pluralism" serves as a normative requirement that has to be met if we want to arrive at a meaningful conceptualization of public reason on a global level.

Both the deliberative model and the liberal model share the fundamental premise that there is and can be no need for a consensus on specific conceptions of the good life in modern pluralistic societies (Ulrich, 2008: 296ff.; Benhabib, 2002: 108ff.). This shared view distinguishes them from communitarianism. However, liberal and deliberative theorists differ in their interpretations of what the "fact of reasonable pluralism" implies:

- *Liberal interpretation*: Because of the "fact of reasonable pluralism" it is impossible to reach consensus on questions of the good life. Public reason needs to be restricted to matters of basic justice or constitutional essentials (Rawls, 1993: 223ff.). Rawls' idea of an "overlapping consensus" serves to base the possibility of democracy on already existing agreements and antecedently shared values (Bohman, 1995: 254).[5] An overlapping consensus comprises all reasonable doctrines in a society. The reasonability of the doctrines in turn is defined by their acceptance of the principles, ideals and standards of a constitutional democratic society which satisfy the criterion of reciprocity (Rawls, 1997: 801). With the notion of overlapping consensus Rawls strives for a compromise between ethical pluralism and moral consensus; all reasonable doctrines share the basic principles of justice, but the grounds for accepting these principles depend on their comprehensive views (Forst, 2001: 350).
- *Deliberative interpretation*: Because of the "fact of reasonable pluralism" any substantive restriction of public reason discriminates in favour of certain conceptions of the good life against others. Consensus can only be achieved with respect to "good procedures" of public reason, not with respect to content. Public reason needs to be unconstrained and open to any subject in order to guarantee

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[4] Rawls actually makes *free institutions* responsible for the diversity of reasonable comprehensive doctrines. He says that the diversity of reasonable comprehensive doctrines in a modern society is the result of free practical reason that operates in a society *with free institutions* (Rawls, 1993: 36f.).

[5] On public reason and liberal overlapping consensus see also Benhabib (2002: 108ff.) and Horton (2003).

equal access for all. In a culturally pluralistic modern society there are any num-
ber of occasions for political dissent and ideological disagreement. It is naïve to
expect that such differences can be settled by means of a comprehensive agree-
ment achieved by argument. It is therefore essential to agree on fair and binding
rules for dealing with political dissent and to maintain a "civilized culture" of
debate. A basic political consensus on the formal principles and procedures for
regulating conflict shall therefore suffice (Ulrich, 2008: 297f.).[6]

It is important to note, however, that the boundaries between the two models are not
as clear-cut as they might seem. Compromises also occur, such as when Cohen
argues for a view that combines an assumption of reasonable pluralism with a
more substantive conception of democracy; this demarcates a deliberative under-
standing of the collective decisions that constitute democratic governance (Cohen,
1996: 96).[7] More will be said about this in the section on the problem of pure
proceduralism (see section "Deliberative Principle of Legitimacy" (Chapter 9)).

The Content of Public Reason

As noted in the section "The Liberal View: Confining the Public Sphere to
Constitutional Questions" (Chapter 6) the liberal model advocates a restricted
version of the public sphere compared to the deliberative model. Consequently,
the same is true for their respective conceptualizations of public reason: whereas
deliberative democrats hesitate to put substantive limits on public reason, liberal
thinkers restrict the content of public reason to constitutional essentials and ques-
tions of basic justice (Rawls, 1993: 225f.; 1997: 767; Charney, 1998: 98). Rawls
and Ackerman prescribe a "method of avoidance" or a "conversational constraint"

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[6] Similarly, Jean Cohen claims that "[a] relatively thin conception of national identity, together
with political processes that accommodate diversity and acknowledge the equal claim of all to
participate and to live openly according to their evaluations, could foster rather than undermine
social inclusion, trust and social solidarity" (Cohen, 1999b: 228).

[7] Joshua Cohen first contends that "the fact of reasonable pluralism *appears* to require a procedu-
ral conception because it deprives us of a background of shared moral or religious premises that
could give determinate content to the idea of popular authorization or constrain the substance of
genuinely collective choices" (Cohen, 1996: 96, emphasis added). But in a further step he criti-
cizes this assumption and sketches a view that combines the assumption of reasonable pluralism
with a more substantive conception of democracy. This includes among other principles, freedom
of expression and religious freedom (Cohen, 1996: 103, 105). Yet, by defining these principles as
substantive restrictions to public reason, commitments based on these principles become immune
to public reason and to public policy (Dryzek, 2000: 11). Besides such attempts to justify lib-
eral rights through deliberative principles, Dryzek names two other ways in which deliberative
democracy converges with constitutional liberalism: the claim that liberal constitutions promote
deliberation on the one hand, and the view that constitution-making is itself a deliberative process
on the other hand (Dryzek, 2000: 10ff.).

as precommitment (for persistent moral disagreement in modern society) (Rawls, 1987: 12ff.; Ackerman, 1989: 16; see also Bohman, 1998: 408).[8]

A conversational restraint, like that put forward by Ackerman, means that practical questions that are *prima facie* controversial should be excluded from public discourse. The problem with such a conversational restraint lies in its implications: if ethical questions are not admitted to political discourse in general, then such discourse loses its power to rationally change prepolitical attitudes, interpretations of needs, and value orientations (Habermas, 1996b: 309). One could say, then, that the liberal conception of public reason is static. Only existing political (in a narrow sense) problems are subject to public reason. Moreover, it is actually *conservative* or conformist, in the sense that it loses any critical capacity (Cortina, 1995: 53). As a consequence, questions of the good are treated as "private affairs" (Habermas, 1996b: 309).

The imposition of substantive restrictions on public reason reflects the constant liberal fear of encroachments on the private sphere. Yet liberals fail to see that the mere thematization of "boundary questions" does not by itself pose a threat to existing powers and responsibilities.[9] Substantive restrictions inhibit the *public justification* of reasons. In contrast to the liberal model the deliberative model extends the function of public reason to include not only public criticism but also public justification.

Social-political critique is seen as an important means of addressing basic rights, principles and values in order to challenge existing understandings and to persuade citizens to view fundamental issues in a different light. Yet social-political critique sometimes requires transgressing an established overlapping consensus (McCarthy, 1994: 51). According to the conception of deliberative democracy the main function of public reason is to discover legitimate reasons for the privatization (i.e. depoliticization and legal transfer to the field of private law) of certain areas of action. Hence, a priori restrictions on the content of public reason are impossible (Habermas, 1996b: 312ff.; Benhabib, 1992: 95ff.; see also Forst, 2001: 369); they inhibit the emancipatory and critical potential of public debate.

What other substantive constraints does political liberalism impose on public reason? In his essay "The Idea of Public Reason Revisited", Rawls claims that political liberalism does not reduce public reason to one specific political conception of justice but instead admits diverse views as long as they are expressed in terms of political values (Rawls, 1997: 773). For Rawls, the distinctive characteristic of political values of public reason is that they characterize political institutions, though he hastens to add that this does not mean that "analogous values cannot characterize other social forms" (Rawls, 1997: 776).

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[8] As Benhabib states, with his "conversational restraint" on public dialogue Ackerman confines public dialogue to "productive ends" and thereby excludes certain conceptions of the good life from the agenda of public debate, which in effect become privatized (Benhabib, 1992: 97).

[9] Habermas states that substantively delimiting "a sphere for a privately autonomous pursuit of individual interests and life plans (...) once and for all from the public sphere oriented to the 'common weal'" is just as impossible as delimiting "the 'intimate sphere' (...) like a core inside the wider private sphere" (Habermas, 1996b: 314).

He specifically distinguishes political values from moral doctrines and secular reason. For Rawls, moral doctrines are on a level with religion, while secular reason is too broad (Rawls, 1997: 775); both are comprehensive doctrines. Examples of comprehensive moral doctrines, that is, doctrines that claim validity beyond political values, are perfectionism and utilitarianism. These doctrines are comprehensive because they claim applicability to all subjects, "ranging from the conduct of individuals and personal relations to the organization of society as a whole, and even to the law of nations" (Rawls, 1987: 3/4). Thus, perfectionist or utilitarian doctrines share with liberal conceptions the fact that they all impose substantive constraints on the content of public reason. But they differ because the first two apply their substantive constraints to a much wider range of issues, in particular to issues that are not political.

Political liberalism instead focuses on principles "that all citizens have reason to accept as a basis for governing the basic institutions of their society (. . .)" (Moon, 2003: 262). Its principles can be accepted regardless of moral, philosophical, and religious disagreements (Moon, 2003: 262).

Yet, even though Rawls, in contrast to advocates of comprehensive moral doctrines, does not raise an encompassing claim, his emphasis on the political character of public reason, together with his liberal constitutionalist understanding of the public sphere, deprives public reason of its emancipatory and critical potential.[10] Rawls explicitly claims that arguments such as those adduced by civil rights activists (in reference to religious traditions), feminists (appeals to controversial forms of inquiry), democratic socialists (appeals to comprehensive views) and most other social movements agitating for social change should be excluded from public reason (Rawls, 1993: 248 and 251; McCarthy, 1994: 53).[11] Again, as with the conversational restraints mentioned above, restricting the range of legitimate arguments in public discourse to political arguments (in a narrow sense) results in a predetermination of the content of public reason (Forst, 2001: 352). However, the question that arises with respect to such a substantive restriction of public reason is "who decides whether there are 'basic injustices' that have to be protested or whether political struggle belongs to the 'necessary historical conditions to establish political justice'?" (McCarthy, 1994: 53, FN 15).

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[10] Rawls concedes that proving that the liberal conception of public justice is not too restrictive is an intractable task. But he claims that this is not a serious problem because most of the questions on which a well-ordered constitutional democratic society needs to find agreement can be settled by reference to political values alone (Rawls, 1997: 803). He cites as an example the debate whether school prayers should be admitted in public schools. He admits that it might be thought that a liberal position would deny the admissibility of prayers in public schools, but he then demonstrates that this question can be addressed with exclusively political arguments (Rawls, 1997: 794f.).

[11] Rawls claims that forms of nonpublic reason "belong to the internal life of the many associations in civil society. . . Since we seek a shareable public basis of justification for all citizens in society, giving justifications to particular persons and groups here and there until all are covered fails to do this" (Rawls, 1997: 800). Benhabib criticizes Rawls on this point and states that "the constitutional-democratic state and the institutions of civil society are (. . .) not as sharply separable as some of Rawls' formulations suggest" (Benhabib, 1996b: 76).

Even though Rawls seems to be reluctant to subject the claims of NGOs to public reason, there are nonetheless liberal-constitutionalist arguments for doing so. Charney, for instance, states that "the distinction between the reasoning of associations within civil society and the public domain subject to the limitations of public reason is an untenable one, inasmuch as many civil society associations are also public bodies – such as churches or universities – and therefore must comply with some of the same legal and constitutional restrictions to which other more obviously public (i.e. governmental) institutions are subject" (Charney, 1998: 100). However, the justification is a rather "legalistic" one and does not argue with the emancipatory function of NGOs. Rather, it reveals the incoherence of the liberal approach and the arbitrariness of the liberal boundaries between public and nonpublic reason.

Implications of Restricting the Content of Public Reason

I will argue that the liberal restriction of the content of public reason yields three implications that have an impact on how we judge the legitimacy of NGOs vis-à-vis corporations: first, the liberal conception of public allows for "divided selves" of actors, second, it entails the risk of oppression, and third, it prevents us from assessing whether an association has internal democratic structures.

Implication 1: Divided Selves

First, the liberal restriction on the content of public reason implies that individuals operate in two different modes; they are "divided selves" who vary the kinds of reasons that support their views depending on "where" they are discussing them. In official forums in which issues are subject to public reason they might offer different reasons than within civil society organizations, which, according to Rawls, belong to the nonpublic sphere, that is to the background culture (Rawls, 1993: 220; McCarthy, 1994: 52; Charney, 1998: 100ff.; Cooke, 2000: 960).[12] The background culture is not subject to the idea of public reason but is rather a "nonpublic political culture" (Rawls, 1997: 768, FN 13; see also Horton, 2003: 10). Nonpublic reasons comprise the many reasons of civil society, a plurality which derives from the fact that every civil society can choose its own way of reasoning which is public with respect to its members, but nonpublic with respect to society in general.[13] The

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[12] The impression that the locus of political interaction plays an important role for liberalism fits well with the observation, made in the section on the deliberative conception of the public sphere in the postnational constellation (see section "The Deliberative Conceptualization of the Public Sphere in the Postnational Constellation" (Chapter 6)), that the deliberative model does not define political interaction by the locus or by the actors involved but rather by the discursive character of the interaction.

[13] Yet we must not equate nonpublic reasons with private reasons; nonpublic reasons of civil society are "social, and certainly not private" (Rawls, 1993: 220).

criteria for and methods of nonpublic reasons vary depending on how one under-
stands the end and point of an association and the circumstances under which it
pursues its ends (Rawls, 1993: 220f.)

   The problem with Rawls' separation between public and nonpublic use of reason
is that in non-governmental venues we are allowed to defend our views on basic
issues of justice with the aid of any possible argument. Thus, according to Rawls,
the reasons appropriate for defending a view would have to be altered depending on
the venue where the discussion takes place.[14] This inevitably raises questions about
whether political values and principles can be separated from the environments that
nourish them and whether individuals can be reasonably expected to split their pri-
vate from their public values. And this, according to McCarthy, holds especially
true for "discussions within the numerous voluntary associations and movements
that are characteristic of healthy democratic life", hence, also for NGOs (McCarthy,
1994: 51).[15] The same criticism is also put forward by communitarians. For them,
moral questions (questions of the good) cannot be separated from political questions
(questions of the right) simply according to the context of reasoning (Forst, 2001:
353/360).

   With regard to the research question at hand this points to the problem of NGOs
remaining true to their "style", and to their "culture", not letting themselves be
co-opted when defending their claims to economic actors. A liberal conception of
public reason would legitimize the reliance on totally different styles of reasoning
for NGOs: in their interaction with official institutions they would have to fulfil the
requirements of public reason, but in their interaction with economic actors they
would be free to use purely strategic or instrumental types of reasoning.[16]

Implication 2: Oppression

A second and related implication that is especially relevant for the research ques-
tion is that the sharp distinction between the domain of public reason and the private

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[14] Whereas Rawls states that public reason holds for citizens when they "vote in elections when
constitutional essentials and matters of basic justice are at stake" and "when they engage in political
advocacy in the public forum" (Rawls, 1993: 215), Charney suggests an expansion of the applica-
bility of public reason to "those venues where debate or advocacy occurs on matters of potential
legislation concerning citizens in general and the arguments – the reasons invoked – are intended
to apply to any and all citizens." He thus widens the range of venues which are subject to public
reason (Charney, 1998: 101).

[15] As McCarthy points out, in "Political Liberalism" Rawls connects public uses of reason
with governmental and quasi-governmental venues which include political campaigns and vot-
ing (Rawls, 1993: 215–6). He connects nonpublic uses with non-governmental venues such as
churches, universities and voluntary associations in civil society (Rawls, 1993: 213, 220). He thus
assigns nonpublic uses of reason explicitly to the unofficial networks in which people debate public
matters. These are the networks which Habermas in turn considers to be the nervous system of the
political public sphere (McCarthy, 1994: 50).

[16] More about different styles of reasoning will be said in Chapter 14.

sphere would assign many issues that pertain to the cultural lives of groups to privacy and a priori exclude them from public debate. This distinction leads to the exclusion of all NGOs representing primarily cultural claims from the domain of public reason because the values that they portray do not characterize political institutions (Rawls, 1997: 776). As has been mentioned, exclusion from the public sphere on the one hand deprives them of the opportunity to voice their concerns credibly in public, while on the other hand it frees them from the duty of publicly legitimizing themselves. As we will see when assessing whether substantive criteria can provide a meaningful definition of legitimate NGOs (Chapter 12) an a priori definition of what claims should be admissible as public claims risks being dominated by Western patterns of thought that are at best irrelevant when confronted with the claims of indigenous stakeholder groups. Conversational restraints are "too restrictive and frozen in application to the dynamics of power struggles in actual political processes" (Benhabib, 1992: 100). One type of conversational constraint that reveals this rigidity very clearly is the principle of dialogic neutrality which expresses the concern that in a pluralistic society, modern law should primarily provide the space within which autonomous individuals can pursue their own conceptions of the good life (Benhabib, 1992: 99; see also Bohman, 1999: 180f.). Yet the openness of a debate is an indispensable requirement for deliberation. Its fulfillment is not only influenced by norms of fairness and civility but also by other factors such as "conflict histories, degrees of hostility, more or less open or closed belief systems" (Peters, 1997: 36). As soon as arguments are rejected as nonsensical, incomprehensible or not worthy of serious consideration, public communication closes down (Peters, 1997: 36).

Actually, Rawls himself admits that political liberalism is not primarily concerned with the kind of conflicts that arise when NGOs address companies with claims. Rawls distinguishes between three main kinds of conflicts: those that derive from irreconcilable comprehensive doctrines; those that derive from differences in status, class position, or occupation, as well as differences in ethnicity, gender or race; and finally those that derive from the burdens of judgment (Rawls, 1997: 804).[17] Very often, the claims with which NGOs address companies correspond to the second type of conflict, but liberalism is primarily concerned with the first kind of conflict. By not subjecting the type of conflicts in which NGOs and corporations are often involved to reconciliation by public reason, political liberalism backs down from meaningfully conceptualizing the interaction between corporations and NGOs as a political interaction.

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[17] Yet Rawls expresses his belief that a well-ordered constitutional democratic society "can resolve the second kind of conflict, which deals with conflicts between citizens' fundamental interests – political, economic, and social". This belief rests upon the hope that if reasonable principles of justice are accepted and recognized as reasonable and if the political and social institutions satisfy them, then the "second kind of conflict need not arise, or arise so forcefully" (Rawls, 1997: 805). The problem is that the interaction between NGOs and corporations in the postnational constellation characteristically occurs in the institutional vacuum where there are no (or not yet) political and social institutions that could satisfy reasonable principles of justice.

Implication 3: No Democratic Structures

A third implication of the liberal restriction of the content of public reason is that associations that do not belong to the public sphere need not be organized democratically as long as they guarantee the basic rights and liberties of all members (Cooke, 2000: 960; Rawls, 1997: 787–94). For Benhabib this implies, for example, that as long as a group upholds the autonomy of persons publicly, i.e. as long as it guarantees their basic rights and liberties, their private practices do not matter for political liberalism (Benhabib, 2002: 110) and are not subject to public debate. This aspect has been addressed when introducing the deliberative conception of the public sphere as a site for critical reflection (in the section "The Deliberative View: The Public Sphere as a Site for Critical Reflection" (Chapter 6)) and in fact, on this point, the majority of deliberative democrats agree with political liberalism that there is no need to require internally democratic structures in civil society associations. The difference lies in their argumentation: for political liberalism civil society associations need not be internally democratic or deliberative because they do not belong to the political public sphere; for deliberative democrats, internal deliberative structures should be optional in "more personal and voluntary relationships" where "people should be freer to follow their own distinctive callings" (Gutmann and Thompson, 2004: 35). Even though they do not want to externally mandate deliberation, they admit that it may still be desirable in many voluntary associations. This stance reflects the shift of deliberative democracy away from the subject to a "higher-level intersubjectivity of processes of reaching understanding that take place through [formal] democratic procedures or in the [informal] communicative network of public spheres" (Habermas, 1996b: 299). Deliberative democracy does not depend on citizenry which acts collectively – which is the goal that motivates advocates of internal democratic structures – but instead on the institutionalization of the conditions of communication (Habermas, 1996b: 298; see also Palazzo, 2002: 96ff.).

Criticism of the Liberal Constraints

The most radical proponents of unconstrained public reason and public dialogue are feminist thinkers. They strongly criticize excluding questions of the good life from public debate.[18] According to feminist arguments, the exact distinction between

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[18] The conventional occlusion of matters of the good life from public debate reflects the domination of "male voices" in drawing the boundary between public and private, because assigning these issues to the private sphere legitimizes women's oppression and exploitation in the private realm (Benhabib, 1992: 110). As feminists have consistently argued, areas in life that are not being subjected to the principles of public reason are potential sites of injustice (Cooke, 2000: 960). The initial criticism of feminist thinkers was aimed not only at the liberal model but also at Habermas' earlier restrictions of public reason. They reproached Habermas for relying on "overly rigid boundaries (. . .) between matters of justice and those of the good life, public interests versus

matters of justice and matters of the good life should be clarified in the process of discursive will formation. Deliberation ought to clarify the interests of participants even if these interests conflict (Fraser, 1990: 72). This line of reasoning is diametrically opposed to the liberal argument that public reason needs to be restricted because certain issues cannot be discussed publicly due to a lack of agreement on questions of the good life in a pluralist society (as has been spelled out in the section "The Importance of 'Public Reason' in Light of the 'Fact of Reasonable Pluralism'" (Chapter 7)).

McCarthy supports the feminist position by concluding that there is something "intuitively wrong" with the constraints that political liberalism imposes on public reason (McCarthy, 1994: 53). The reason for this overly narrow conception of public reason lies for him in Rawls' inclusion of problems of political stability into the normative theory of justice. Rawls mistakenly assumes that political stability in a democratic society solely depends on an overlapping consensus. McCarthy suggests instead that some dissensus on basic political principles can be balanced by unity in other spheres (McCarthy, 1994: 53f.; Bohman, 1995: 254).

However, certain deliberative theorists also suggest substantive restrictions on public reason. Gutmann and Thompson want to exclude arguments from public reason that deny political equality (such as racist arguments), and arguments that do not respect principles of human integrity (such as arguments for unrestricted police powers). Moreover, they claim that participants must be committed to the central deliberative principles of reciprocity, publicity, and accountability. They argue that reciprocity rules out sectarian arguments while publicity avoids narrowly self-interested arguments; accountability serves to justify arguments vis-à-vis those people on whose behalf they are made (Gutmann and Thompson, 2004: 133ff.). However, as with the liberal restrictions on the content of public reason, the principles put forward by Gutmann and Thompson also lead to a conservation of the status quo of the public debate. An example which makes obvious the ambiguous effect of such principles is the slavery example: arguments in favour of slavery deny political equality and would as such be excluded from public debate according to the preconditions specified by Gutmann and Thompson (and also Rawls, of course). But then a deliberative resolution of the slavery issue would have been precluded, even though the defenders of slavery were not entirely uncivil persons but could be "men of deliberative honour" who also had a reasonable side to them (Dryzek, 2000: 46).[19] Fact is, that if one applies substantive restrictions as preconditions on public reason, they themselves must always be subject to deliberative scrutiny (Dryzek, 2000: 45 f.; see also Johnson, 1998: 168–70). Moreover, this point makes it evident that the range of issues acceptable in deliberation can vary across time and space: admitting pro-slavery arguments to public debate in a liberal democratic society nowadays is

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private needs, privately held values and publicly shared norms" (Benhabib, 1992: 111). However, in the meantime Habermas has revised his conception of public reason and emphasises that every topic should be subject to deliberation (Habermas, 1996b: 312f.).

[19] It is important to note though that this argument is open to criticism. After all, it took the Civil War to end slavery in the US, which suggests that a deliberative outcome with these "Southern gentlemen" was not likely.

unimaginable because the people who argue in favour of slavery in such a society cannot be expected to be engaged in a productive debate.

Having outlined the most prominent substantive constraints of liberal thinkers on public reason and the arguments of deliberative democrats (and feminists) against them, I will now proceed to sketching out the procedural guidelines for the use of public reason. This will be done as part of comparing different conceptualizations of the political process as such.

Chapter 8
The Political Process

The liberal and deliberative models differ not only in their definition of the content of public reason, but also in the procedural characteristics that they ascribe to public reason.

The procedural aspects of public reason are a main characteristic of the political process as such. I therefore address them by the term "political process". Equating procedural characteristics of public reason with the political process is justified because neither the liberal nor the deliberative model would hesitate to use the terms public and political synonymously – with the difference that the liberal model advocates a rather narrow, state- or institution-centred conception of the two terms, while the deliberative model relies on a much broader variant, as has been argued above. Hence, procedures for the use of public reason are tantamount to political procedures.

As has been mentioned before, the deliberative model's preoccupation with procedural characteristics of public reason is much more intense than the one of the liberal model. Nevertheless, I will start with the liberal model first.

The Liberal View of the Political Process: Aggregating Preferences and Voting

The central characteristic of the economic liberal conception of the political process is the similarity between political and economic processes. This liberal view of political processes is most prominent amongst proponents of the economic theory of democracy, as first advocated by Schumpeter (1947) and Downs (1957), and has its roots in neoclassical economics.[1] The economic theory of democracy understands the political process in terms of preference aggregation on markets and compares voters to consumers who make decisions based on their self-interest (Manin, 1987:

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[1] Follesdal opposes contrasting deliberative democracy with this special type of rational choice theory because even Schumpeter and Downs "assumed that voters are somewhat altruistic" (Follesdal, 2006: 64).

355; see also Weintraub, 1997: 8ff.; Elster, 2003; Besson and Martí, 2006: xvii).[2] Political participation thus boils down to the act of voting. This theory of democracy is based on the provocative assumption that citizens do not act politically out of a desire for communication but only out of self-interest. Consequently, the commitment of citizens according to the economic theory of democracy is purely instrumental, that is, "a kind of continuation of private business with public means" (Ulrich, 2008: 291).

According to Barber, liberalism has a preference for "thin rather than strong versions of political life in which citizens are spectators and clients while politicians are professionals who do the actual governing" (Barber, 1988: 18). According to Benhabib, this observation shows why the concept of public space, as a space of political deliberation, action and exchange, plays such a minimal role in contemporary liberalism:

> It is as if once the "constitutional assembly" in which we select principles of a just political association is over, the citizens of the liberal state retire into their private abodes and quit the democratic arena of political give and take. (Benhabib, 1992: 101)

Or as Dryzek puts it:

> Schumpeterians require that ordinary people do no more than vote and then sleep between the elections. In contrast, discursive contestation can accept, even welcome, the participation of the many at any time. (Dryzek, 2001: 663)[3]

Obviously, people who engage in NGOs cannot be considered Schumpeterians.

Political liberalism, as advocated by Rawls, offers a more differentiated view of the political process than economic liberalism. Rawls lists the procedural characteristics of public reason by the term "guidelines of inquiry". These include for him "principles of reasoning and rules of evidence in the light of which citizens are to decide whether substantive principles properly apply" (Rawls, 1993: 224).[4] The liberal limits on the methods of public reason are for example "adherence to general principles of reasoning, criteria of relevance, and rules of evidence" (Charney, 1998: 99) For liberals, the motivation for imposing restrictions on method consists in providing a public basis of justification that is accessible to citizens generally. So once again, liberals are driven by the desire to avoid controversial justifications of basic issues:

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[2] For a critique of modelling the ideal political process on the market process, see Rawls (1971: 359f.), who states that the market – in contrast to the political process – generates an optimal result in cases where everybody just acts according to his/her own interests. Moreover, market and political processes serve different objectives: the market is designed to achieve efficiency, while the objective of a political process must be justice.

[3] See also Manin (1987: 355f.).

[4] Rawls also takes into account the role of political virtues: "Political virtues as reasonableness and a readiness to honour the (moral) duty of civility (. . .) help to make possible reasoned public discussion of political questions" (Rawls, 1993: 224).

> We are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial. (Rawls, 1993: 224)[5]

Public reason aims at creating a common ground of public-political justification for citizens in a pluralist society, which provides an acceptable basis of legitimation. But as stated above, the common ground is created by limiting the field to political values and to ways of reasoning that are available to citizens (Charney, 1998: 99).

One important difference between liberal and deliberative theorists concerns the status which they ascribe to interests. The "privatized understanding of the political process" (Young, 1996: 121) reflects the liberal perception that interests are pre-determined, hence formed in a private context which is not subject to public justification. Deliberative theorists, by contrast, perceive interests as the result of public reasoning:

> Liberal politics is therefore mostly and properly about the reconciliation and aggregation of predetermined interests under the auspices of a neutral set of rules: that is, a constitution. (Dryzek, 2000: 9)[6]

The deliberative criticism of the liberal notion of the political process is very well articulated by Cohen. He states that the mere fact that one has a preference, a conviction or an ideal, does not provide a reason per se for supporting a proposal. My preferences might present a sufficient reason to me for supporting a proposal, but under conditions of pluralism, deliberation requires that one finds reasons which make a proposal acceptable to others. I cannot expect others to regard my preferences as sufficient reasons for agreeing to a proposal. Hence, in a deliberative political process, one cannot argue solely with preferences. Reasons must go beyond preferences (Cohen, 1989: 24).

Taking preferences as sufficient reasons leads to a confusion between "empirical acceptance" and legitimacy. The legitimacy of a political outcome is given if we believe that it is justified because it is reasonably acceptable to others in general, and not only because it is acceptable to us in particular. Consequently, we can consider the political outcome justified even if we do not accept it ourselves (Besson and Martí, 2006: xvi). But it is not enough to agree in fact upon political decisions. Beyond that, we must make our reasons for supporting them manifest. As a consequence, we must design the political process so that the outcome is not just factual agreement, but publicly justified agreement (Lafont, 2006: 8).

An exclusive reliance on preferences instead of reasons in political processes is typical for cases when questions of interest are concerned (in contrast to political processes, which are mainly about the formation of opinions in public and open discussions). Reliance on preferences is a typical strategy of pressure groups and lobbies to exert influence so that their wishes and interests are fulfilled instead of those of other groups. The primary concern of actors involved in this type of process

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[5] See also McCarthy (1994: 50).

[6] See also Hendriks (2006: 490).

is their own private life and well-being, not the public interest. The power that they hold "resembles the reckless coercion with which a blackmailer forces his victim into obedience" (Arendt, 1963: 273, quoted from Mansbridge, 2006: 114). It does not have anything in common with power that arises out of joint deliberation.

In the context of this book the distinction between arguing with preferences and arguing with reasons is important because, as previously mentioned, NGOs can be characterized by the fact that their claims refer to public interests. I will argue that groups who claim to represent the public interest cannot rely on preferences when advocating their claims. Preferences refer to an individual level and are not compatible with the notion of a public good; if one could determine the public good based on preferences, this would involve a mere aggregation of individual preferences. In contrast to private interests, public claims require a justification that goes beyond preferences. Liberalism, or "economic and elitist theories of democracy", "deny the significance of the public good (or the public interest) and apply social choice theory to the study of politics and democracy" (Besson and Martí, 2006: xiii, FN 2).[7]

Is Rawls a Deliberative Democrat?

Let me just add one brief note on the political process as perceived by political liberalism. The fact that the liberal conception of legitimacy centres on public reason, and not on preference aggregation, leads Rawls to call himself a deliberative democrat (Rawls, 1997: 771/2).[8] But as Cooke notes, Rawls conceives of a "monological process of public reasoning in which citizens work out for themselves whether the advocated political principles are reasonable in the sense of capable of being reasonably accepted by all" (Cooke, 2000: 958). A dynamic, transformatory dimension is

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[7] The difference between social and rational choice can be outlined as follows: the central assumption in rational choice theory is that individuals behave strategically in seeking their goals. By contrast, social choice theory gets by without making any behavioural assumptions of this sort. It is exclusively concerned with the question of which alternative mechanisms (such as voting systems) possess the logical properties and the normative desirability for aggregating individual preferences. What both approaches share, however, is the assumption that individual preferences remain unchanged in the process of political interaction (Dryzek, 2000: 33f.; see also Elster, 2003: 139).

[8] According to Rawls, the defining feature of political liberalism is that it allows for a variety of political conceptions of justice, including, for instance, Habermas' discourse conception of legitimacy. Thus, for Rawls, deliberative democracy is inherently part of political liberalism (Rawls, 1997: 774). But the fact that both the liberal and the deliberative strand of thought allow for a variety of political conceptions of justice is outweighed by their different definitions of what is public and what is private, as well as by their ensuing definitions of what is subject to claims of political legitimacy and what is not. The fact that the main difference between the two models lies in their conceptions of the public and the private underlines the need to carefully assess their different conceptions of the public sphere and of public reason in this book even though these terms are not explicitly contained in the research question. These different conceptions of the public sphere and of public reason build the basis for the models' different conceptions of legitimacy.

thus missing from the Rawlsian conception of public reasoning. Rawls does not perceive public reason as a dynamic process of reasoning that generates normative (as opposed to empirical) agreement through the transformation of preferences. Instead, public reason for Rawls is an idea that imposes constraints on publicly acceptable political principles. Similarly, Dryzek concludes that if Rawls restricts the range of arguments acceptable in public discourse, deliberation in the arena boils down to affirming conclusions that have already been drawn in advance, which means that nothing new can be discovered in the process of deliberation (Dryzek, 2001: 655). By and large, Rawls remains relatively close to the "standard" liberal conception of the political process in which people enter into public debate with predetermined preferences (Ulrich, 2008: 299, FN 94).

The Deliberative View of the Political Process: A Non-voting-centric Conception of Democracy

Deliberation describes the process of opinion formation and decision-making in whose course initially blurred preferences become more explicit and finally result in a reasoned will (Manin, 1987: 357). In contrast to liberalism, deliberation focuses on the transformation of preferences; not on their mere aggregation (Besson and Martí, 2006: xvii). Political participation in a deliberative sense assumes a much wider notion than voting, which is the act in which preferences are aggregated; by defining political participation as deliberation, not just as voting, we can conceive of political participation on a transnational scale. In contrast to voting, participation in deliberation does not depend on decision-making competencies or on a constitutional framework which unites citizens. In the deliberative model, participation is not only possible in a narrowly defined political sphere but can be realized in cultural and social spheres as well.[9] There is a clear difference between participation in the communicative action of the public sphere and voting as a form of interest aggregation (Dryzek, 2000: 54).

Deliberative democracy turns away "from liberalist individualist or economic understandings of democracy and toward a view anchored in conceptions of accountability and discussion" (Chambers, 2003: 308). It is organized around an ideal of political justification and requires the free public reasoning of citizens. This implies that citizens need to go beyond the self-interests that are typically found in preference aggregation. Instead, they need to orient themselves to the common good (Bohman, 1998: 402). The interests, goals and ideals which constitute the common

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[9] By focusing not on "political" participation but on "a much more inclusively understood concept of 'discursive will formation'", the discursive model of public space generates a new conception of such space (Benhabib, 1992: 104). Public space is not portrayed agonistically (i.e. as a space where the political elite competes for acclaim and immortality); instead, public space is seen as the place where procedures are generated and where those affected by "general social norms and by collective political decisions" actively participate in their "formulation, stipulation and adoption" (Benhabib, 1992: 105).

good are those which survive deliberation. These are the interests which we have come to find legitimate in public deliberation (Cohen, 1989: 25). While liberalism tends to perceive "tussle between different interest groups in which numbers matter more than the arguments" as a central element of democracy, the deliberative model does not reduce legitimate arguments to those which "voters conduct in an attempt to determine where their private or sectional advantage lies" (Pettit, 2006: 93). At the same time, the deliberative model also differs from communitarian views by stating that – even though it may be facilitated by a common national identity – deliberation does not presuppose such an identity (Dryzek, 2000: 129).

Consequently, the deliberative model acknowledges the importance of discourses with respect to the content and transmission of opinions (Dryzek, 2000: 56). In accordance with Chambers we can distinguish between liberalism as a "voting-centric democratic theory" and deliberative democracy as "talk-centric" (Chambers, 2003: 308). The difference between deliberating and voting lies in their logic of argumentation:

> The logic of argumentation that prevails in democratic deliberation presupposes the ideal aim of convincing others, while the logic of pure voting remains indifferent to any interaction or communication among voters. (Besson and Martí, 2006: xvii)

Deliberative theory, moreover, explicitly opposes the liberal emphasis on aggregation and strategic behaviour as being central elements of the political process. It develops "the distinctive rationality of 'the forum' rather than 'the market'" (Bohman, 1998: 400) and replaces compromise or a bargaining equilibrium with consensus, "the agreement of all those affected by a decision" as the goal of political processes (Bohman, 1998: 400).[10]

Instead of focusing on voting as the decisive mechanism in democracy, the critical strand of deliberative democracy conceives of democracy in terms of inter-subjective communication within the public sphere. It thus yields a new perspective on public policy. Public policy would not be legitimated only by the results of votes in the parliament. Instead it would have to be made "responsive to public opinion through non-electoral means" (Dryzek, 2000: 47).[11]

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[10] Yet as we will see section "In Favour of a Moderately Procedural Justification of Deliberation" (Chapter 9), consensus must not necessarily be defined as the goal of deliberation. In this book it will be argued that setting consensus as a goal relies on an overly harmonious account of deliberation. Consensus on the procedures of deliberation is considered to be more adequate.

[11] If we conceive of democracy in such different terms, however, we might wonder whether we are still talking about democracy at all. Dryzek argues that we are, even if we advocate a relatively narrow understanding of democracy as the process of generating public opinion and translating it into state action. He claims that deliberative democracy can be conceptualized so that it "has communicative parallels to *all* of the mechanisms that theorists of aggregative democracy (...) regard as necessary components for a full democracy" (Dryzek, 2000: 54).

Central Elements of the Deliberative Political Process

The procedural focus on "the political" by deliberative democracy becomes obvious if one looks at the four central ideas that characterize the deliberative conception of the democratic process according to Ulrich (2008: 296ff.):

- The *argumentative clarification of preferences*: this stands in contrast to the satisfaction of preferences by non-discursive means, such as lobbying, pressuring or cajoling other people to serve one's interests (Young, 2001: 674). Deliberation takes place in argumentative form; it is inclusive and public, which means that all who are affected by the decisions have an equal opportunity to enter and take part. Deliberative processes are free of internal coercion; the equality of participants is an indispensable requirement and "the taking of yes/no positions is motivated solely by the unforced force of the better argument" (Habermas, 1996b: 305/6; see also Cohen, 1989: 22).
- *Deliberative procedural legitimation*: "the source of legitimacy is not the mere representation of the predetermined will of individuals, but rather the process of its formation that is, deliberation itself" (Manin, 1987: 351/2; see also Benhabib, 1994: 33). Whereas liberals focus on the outcome of decision-making processes, namely the act of voting, deliberative theorists focus on their procedural aspects. More on the deliberative principle of legitimacy will be said in the section "Deliberative Principle of Legitimacy" (Chapter 9).
- *Consensus-based regulation of dissent*: as previously mentioned, the fact of reasonable pluralism can be interpreted differently. While the liberal model excludes issues of dissent from public debate, the deliberative model adheres to the conviction that, even though in a highly diverse society one cannot expect agreement on substance, agreement can be reached on fair and binding rules that allow a fair culture of debate to be maintained. However, just as the liberal notion of the overlapping consensus tends to exclude conflicting interests from public reason and thus "artificially" creates a substantively harmonious sphere of public reason, the deliberative model must be equally careful not to rely on an overly harmonious account of decision-making processes (see section "In Favour of a Moderately Procedural Justification of Deliberation" (Chapter 9)). This is especially true with respect to the research question at hand: the interests of companies and NGOs often conflict and it is sometimes hard to see a ground for consensus.
- The *public constitution of the private sphere*: this refers to one of the central ideas of deliberative democracy, as the distinction between private and public serves to define and guarantee legitimate free space for the pursuit of private interests (Habermas, 1996b: 28). Truly private actions are only those "whose social and ecological acceptability is guaranteed" (Ulrich, 2008: 299); this can only be ensured by regular control and a sufficient degree of public transparency with respect to those issues that citizens regard as private. As Cortina states, critical public opinion is indispensable for business ethics and:

  > [C]riticism must be exercised upon all activities and institutions that have social goals and effects, and therefore upon the economy also, in such a way that political publicity must be enlarged to form an economic publicity. (Cortina, 1995: 57)

Any attempt to base claims on a pre-political definition of the private sphere or to deny the role of public deliberation as a mechanism for accountability and control is a sign of arbitrary privatism (Ulrich, 2008: 299). Freezing the public/private divide, as liberals do, misses the deliberative point of discovering legitimate reasons for privatizing certain areas of action (Habermas, 1996b: 312ff.; and also Benhabib, 1992: 95ff.). It is this characteristic in particular that allows the deliberative model to ascribe an emancipatory function to public reason. By basing modern democracy in "the deliberative genesis and justification of public policies or decisions deeply affecting the public in political and civil public spaces", the deliberative model ensures the provision and protection of public spaces that involve criticism, the articulation of alternatives, and counterpowers (Cohen, 1999b: 216).

Given these central ideas, deliberative democracy tries to ensure that decision-making processes are as reasonable as possible. The method suggested might be imperfect but it makes the "realization of reasonable results (...) more likely, especially if one takes into account the dimension of time and the educative effect of repeated deliberation" (Manin, 1987: 363). These characteristics provide for social inclusion, equality of the participants and publicity, as well as avoiding internal and external coercion (Habermas, 1996b: 305; Cohen, 1989: 22f.). The legitimating force of deliberative politics hinges essentially on the discursive level of public debates (Habermas, 1996b: 304).[12]

Let me now compare two different strands within deliberative democracy, namely the so-called two-track model, which represents the liberal-constitutionalist variant, and the critical strand, which represents the discursive variant of deliberative democracy. The difference between these two strands lies in the importance that they assign institutions. In the two-track model, deliberation is connected to decision-making while the critical strand does not necessarily rely on institutions in their conceptualization of "the political".[13] As a consequence, I will argue that only the critical strand provides the grounds for conceptualizing the interaction between NGOs and corporations outside any institutionalized context as a political interaction.

This perspective is novel because so far business ethics has not explicitly pointed out the specific justificatory deficit of the conventional two-track model for the interaction between business and civil society. It has confined itself to criticizing Habermas on a more general level for not subjecting economic activities to discursive legitimization (Noonan, 2005; Cortina, 1995).

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[12] Yet it should be noted that criticism of the emphasis on procedural fairness in deliberative democracy states that demanding free and equal access for all will precisely unbalance or subvert any shared understanding of the dimensions of political conflict (Knight and Johnson, 1994: 289).

[13] Instead of talking about the two-track model and the critical strand, Chambers refers to the former as "theories of democratic deliberation" and to the latter as "theories of deliberative democracy" (Chambers, 2006: 9).

Two-Track Model of Deliberative Democracy

Deliberative democracy typically relies on two tracks, on the "informal track of free public communication, founded on the dispersed associations of civil society, and on a formal track of deliberative decision-making by conventional political institutions that are responsive to the informal discussion of the first track" (Cohen, 1999a: 389; Habermas, 1996b: 304ff.). The informal track comprises the "discussion of issues in an unorganized, 'wild', decentered (not centrally coordinated) public sphere that does not make authoritative collective decisions" (Cohen, 1999a: 399). For the research question at hand, the informal track is of special relevance, since the unregulated public sphere is the primary sphere of action for NGOs and other civil society actors. Moreover, the interaction between NGOs and corporations happens precisely in this informal track.

The informal track typically assumes the form of an unregulated arena that provides the ground for detecting new problems. Due to its uncontrolled flow of information and its unrestricted forms of communication, the informal public sphere exhibits more sensitivity for discovering new problems than the specialized arena of formal political institutions (Cohen, 1999a: 400; Habermas, 1996b: 308). The foundation of the informal track is provided by associations that constitute the nodal points in a communication network. These voluntary associations "specialize [. . .] in discovering issues relevant for all society, contributing possible solutions to problems, interpreting values, producing good reasons, and invalidating others" (Habermas, 1996b: 485).

The formal political track, by contrast, includes the political process with its official elements such as elections and legislative decision-making. Its role is to provide institutionally regulated ways to assess ideas that have emerged from open-ended public discussion in the informal public sphere. It conducts a disciplined testing of proposals through reason (Cohen, 1999a: 401).

The two-track model shows that politics is not exclusively state-centred and nor does it necessarily consist of pure bargaining between groups that represent well-defined predetermined interests. Instead, in the deliberative model, the basic terms of association are themselves a central subject of public reasoning (Cohen, 1999a: 389, 401). The principal locus of participation is displaced from formal politics to the informal public sphere (Cohen, 1999a: 389).

For Habermas, these tracks are both indispensable elements of deliberative democracy; and they must constantly interpenetrate each other (Cooke, 2000: 959). On the one hand, democratic opinion- and will-formation depends on the supply of informal public opinions that ideally arise within an unsubverted political sphere. On the other hand, the informal public sphere must enjoy the support of a societal basis where equal rights of citizenship are socially effective. Habermas ascribes to the general public of citizens a "context of discovery", in contrast to the public of parliamentary bodies which are primarily structured as a "context of justification" (Habermas, 1996b: 307f.). He sees this "weak public" (Fraser, 1990: 75) as a vehicle of public opinion:

> The opinion-formulation uncoupled from decisions is effected in an open and inclusive network of overlapping, subcultural publics having fluid temporal, social, and substantive boundaries. Within the framework guaranteed by constitutional rights, the structures of such a pluralistic public sphere develop more or less spontaneously. (Habermas, 1996b: 307)

For most representatives of deliberative democracy, the main transmission between the two tracks predominantly occurs in the form of elections or votes: they perceive the ways in which public opinion can affect state action as dependent on elections. As Besson argues, deliberations need to be brought to a close with a vote because – given the pervasiveness of deep and generalized disagreement – there is no reason to expect that deliberation necessarily yields consensus (Besson and Martí, 2006: xvii).

Habermas, for example, tends to ignore the extraconstitutional influences of public opinion on the state[14] and is particularly vague on the role of specific types of civil society actors such as interest groups and activists (Hendriks, 2006: 496; see also Chambers, 2003: 311). Habermas essentially binds law and legitimacy together, understanding the common space of political life to be demarcated by laws (Wheeler, 2001: 177). But, obviously, the conceptualization of political life as a space that is demarcated by laws has its limitations, if we think of political life on a global scale where there are many gaps in regulation.

It should be obvious that deliberative democracy, as described so far, fundamentally relies on the interplay between the two tracks, namely between the open-ended exploration of problems and their possible solutions (Cohen, 1999a: 401). Only if these two different phases of reasoning are linked, will the political process generate rational outcomes. If deliberation is not complemented by a formal decision-making procedure, but only takes place in unregulated forums, then participants may be motivated to behave more strategically because they have learned to fully rely on their rhetorical skills to convince their discussion partners. Hence, only if there are mechanisms that link informal deliberation to the arenas of formal political powers, can deliberative democracy generate rational outcomes (Kohn, 2000: 423).[15] However, as will be argued later, this argumentation has an epistemic bias: it sees the distinctive advantage of deliberative democracy in its outcomes. This argument will be contrasted with a procedural justification of deliberative democracy.

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[14] Dryzek criticizes that extraconstitutional activities, in contrast to "formal political activities", are freed from the duty of discursive legitimization (Dryzek, 2001: 656f.). However, one could just as well argue that only if extraconstitutional activities are not subject to discursive legitimization, that is, only if the informal track (i.e. civil society) is strictly separated from the formal track (i.e. the state), as advocated by Habermas, can civil society assume its critical, utopian function: only by locating extraconstitutional forces at the periphery of society, they can preserve their radical potential because the risk of co-optation is minimized (Grodnick, 2005: 399f.). More on co-optation will be said in Chapters 13 and 14.

[15] A converse interpretation is given by Bohman. He argues that if every discourse operates under the pressure to lead to a decision (typically in the form of votes), participants in the discourses that precede the decision-making act, are tempted to use whatever tactical means to gain more votes (Bohman, 1996a: 204).

All in all, this strand of deliberative democracy portrays "regular" political interaction, namely the interaction between NGOs and states or international institutions, as an instance in which the public use of reason in weak publics (see Fraser, 1990: 75ff.) is translated into the legitimate administrative power of the state via legally institutionalized decision-making procedures (McCarthy, 1994: 49).[16] According to this conception of the political process, the scope for the political action of NGOs is inextricably linked to their ability to influence the formal arena of institutionalized decision-making. Actions that happen within the informal track are not ascribed an intrinsic value but only an instrumental value.[17]

Critical Strand of Deliberative Democracy

So far it has been argued that only the interplay between the formal and the informal track generates rational outcomes according to deliberative democracy. How can we nevertheless conceptualize the interaction between NGOs and companies, which occurs exclusively within the informal track of the public sphere, as a political interaction that is subject to the measures of deliberative democracy?

It seems that we may have encountered the limit of how the political-theoretical model of deliberative democracy can provide normative orientation for the research question, since it cannot be denied that the interaction between NGOs and corporations, and the legitimization of NGOs vis-à-vis corporations, takes place within the informal public sphere. Unless they interact within a statutorily regulated forum that exhibits quasi-constitutional features – that is in a semi-regulated context which has been introduced as the "hybrid model" with respect to the degree of institutionalization in which NGOs interact with political or economic partners[18] – their exchange is exclusively subject to discussion in an unorganized, "wild", decentered public sphere.[19] There is no decision-making institution which receives the bundled flows of public communication and translates it into administrative power. Hence, the second track, namely the formal track of deliberative decision-making is occluded.

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[16] Similarly, according to Habermas, "... the communication structures of the public sphere relieve the public of the burden of decision making; the postponed decisions are reserved for the institutionalized political process" (Habermas, 1996b: 362, original emphasis excluded).

[17] This restricted focus of liberal-constitutionalist deliberative democrats is illustrated very well by Thompson's definition of deliberative democracy: "The fundamental premise of deliberative democracy is that *laws and policies* imposed on individuals must be justified in terms that they can accept" (Thompson, 1999: 120, emphasis added). Thompson does not mention the need to deliberatively justify public actions outside the political arena.

[18] See section "Three Contexts for NGOs as Representatives of Public Claims" (Chapter 2).

[19] One example of such a statutorily regulated forum is the Forest Stewardship Council (FSC), which was established in 1993 with the goal of overseeing the role of the timber trade in tropical deforestation. In the FSC different stakeholders from business and civil society, as well as from North and South, meet on issues of social, environmental, and economic importance. Moreover, the FSC is democratically accountable to its membership (Bendell, 2005: 369; Murphy and Bendell, 1999: 13).

The non-state-centeredness of the interaction between NGOs and corporations (in the "wild" model) is further emphasized by the fact that it often occurs in the international arena, where "the conditions that make deliberative democracy attractive in other contexts seem to be absent" (Fung, 2003a: 52). It is in the international context that the absence of decisive public power is most obvious.

Fung recognizes this as a problem, because without public power there is no addressee for deliberative decisions or criticism. However, in this book, it is assumed that NGOs represent a part of public power in the sense that NGOs are perceived to be political actors that need to legitimize their public power discursively. Hence, NGOs are the addressees for deliberative criticism. But Fung is right insofar that there is no functional equivalent to the formal track of deliberative decision-making by conventional political institutions in the interaction between NGOs and corporations in the "wild" model; even though there is public power, it is not (yet) institutionalized (Fung, 2003a: 52).

In order to distinguish deliberation outside formal political venues from the liberal-constitutionalist strand of deliberative democracy, which only looks at the interaction between the informal track of public will-formation and the formal track of institutionalized political decision-making, Fung considers the deliberative conceptualization of the interaction between NGOs and corporations that remains within the boundaries of the informal public sphere to be a "decentralized participatory deliberation" (Fung, 2003a: 56). Yet in these decentralized deliberative processes, the absence of a decision-making authority is not without a problem. Without any decision-making authority, decentralized deliberation is "haphazard in its focus and inequitable in its decision processes, and its impacts are difficult to assess or utilize" (Fung, 2003a: 61). Even though there are a variety of agents in the intergovernmental sectors, such as standard-setting organizations which can be found among nonprofits and even among consulting firms, no actor has so far managed to present itself as a neutral arbiter. Thus, the idea of official legitimization in the informal public sphere is still utopian; most actors that offer themselves as instances of legitimization are suspected of being either committed to business or at least business-friendly, or they are reproached of being bound to particular interests. Thus, the construction of authority in decentralized deliberation is an unfinished project (Fung, 2003a: 61).

Another implication that arises from assessing interaction in the informal track of the public sphere based on deliberative principles is that the possibility to resort to majority decisions in cases where no consensus can be built discursively is ruled out. Thus, the important concept of majority rule, which serves as a "supplement" in deliberative democracy, loses its meaning if we adopt a deliberative perspective on the interaction between NGOs and corporations in the informal public sphere. This implication reflects one of the standard criticisms of deliberative democracy, namely that deliberative democracy is radically incomplete as a model because it specifies no mechanism for collective choice. Even Dryzek raises the question:

We deliberate, and then what? (Dryzek, 2000: 78)

But do we really need a decision-making instance? How much is the legitimization of NGOs vis-à-vis corporations really about decision-making? I would argue that the absence of a formal track of institutionalized political decision-making does not severely inhibit the validity of the deliberative model in this context because – as has been spelled out in Chapter 4 – the constitutive core of civil society as the main actor in the informal track of public communication is reflected by the fact that it does not operate under the pressure of decision-making. This sets civil society apart from the state and the economy. Thus, even though the interaction between NGOs and companies is not a political interaction in a liberal-constitutionalist sense, it is a political interaction in a deliberative sense because the deliberative model is centred on the procedures of raising public claims in an open-ended discourse.[20]

The idea of deliberative democracy in a context that is not dominated by decision-making is represented quite well by the so-called *critical strand of deliberative democracy*, as put forward by Dryzek. The critical strand opens up a more meaningful perspective for assessing interaction which happens exclusively in the informal public sphere, such as the interaction between NGOs and corporations, based on deliberative principles. Even though it still acknowledges the importance of the two tracks and the interplay between them, it equally assigns an *intrinsic value* to the discursive interplay *within* a public sphere that is autonomous from the state. This intrinsic value derives from the fact that discourses that happen outside the formal track of political decision-making are likely to be less constrained than those in the formal political arenas (Dryzek, 2000: 79).

The critical strand puts less emphasis on the role of institutionalized decision-making procedures than the liberal-constitutionalist strand. It states that collective decision can be democratic without electoral inputs, and as a consequence, it does not perceive elections to be the central mechanism for transmitting public reason. Instead, it acknowledges the role of less formal means, such as rhetoric, which can affect the content of public policy (Dryzek, 2000: 50, 79).[21] Hence, in the critical strand of deliberative democracy, non-electoral means such as those on which NGOs rely for their public action, receive considerable attention. The critical strand of deliberative democracy thus overcomes the blind spot of the liberal-constitutionalist strand: by taking into account non-electoral means for transmitting public reason, it opens up a meaningful role for different types of actors, such as interest groups, activists and non-governmental organizations that all act outside the formal political venues.

By acknowledging the intrinsic value of public communication in the informal public sphere, the critical strand of deliberative democracy makes possible a meaningful perspective on the research question at hand. The liberal-constitutionalist strand would not want to subject the interaction between NGOs and corporations to deliberative principles because deliberative principles, according to this strand,

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[20] Decision-making mechanisms such as voting risk cutting off such open-ended discourse prematurely; as Gaus puts it, "voting means cutting off discussion before rational consensus is achieved" (Gaus, 2003: 134).

[21] However, the term "rhetoric" is not without controversy. More about rhetoric will be said in the section "Distinguishing NGOs and Activists According to Procedural Criteria" (Chapter 14).

should apply only to "those governmental institutions that are responsible for the basic laws that bind people" (Gutmann and Thompson, 2004: 32). The critical strand of deliberative democracy, by contrast, assigns deliberative democracy a value also outside governmental institutions and favours an extension of the deliberative principles to civil society.

With this premise the critical strand of deliberative democracy prepares the ground for conceiving of NGO action independently of governmental institutions as democratic in two respects:

Firstly, with respect to NGO action in general: since NGOs tend to operate outside the narrow political channels where voting is a central mechanism, non-electoral means play a central role in their political actions. If NGOs want to make public policy responsive to public opinion (i.e. *to public claims*), they must in effect resort to non-electoral means.

Secondly, with respect to the action of NGOs toward corporations specifically: by assigning the informal public sphere an intrinsic democratic value, we can also conceive of the interaction between NGOs and corporations, which happens in this informal public sphere, as political. This sets the critical strand of the deliberative model apart from the liberal model and the liberal-constitutionalist (two-track) model of deliberative democracy. The liberal model acknowledges the democratic role of NGOs only as long as they operate within the public context, which liberalism recognizes as political. Yet action or interaction that takes place outside the formal political arena cannot be conceived of as political and is thus not subject to measures of democracy according to the liberal theory. The liberal-constitutionalist strand of deliberative democracy also fails to justify the interaction between NGOs and corporations in the informal public sphere as a political interaction because it relies on the presence of legally institutionalized processes, that is, on deliberation that includes decision-making procedures.

Table 8.1 illustrates the political process according to the three different political models, namely liberalism, the liberal-constitutionalist strand of deliberative democracy and the critical strand of deliberative democracy.

Table 8.1   The political process from three different political-philosophical perspectives

	Starting point	Central transmission mechanism	Result
Liberalism	Public opinion (aggregated preferences)	Elections: voting as act of aggregating preferences	Public policy (state power)
Liberal-constitutionalist strand of deliberative democracy	Public opinion (created by deliberative processes)	Legally institutionalized procedures, incl. deliberation	Public policy
Critical strand of deliberative democracy	Public opinion (created by deliberative processes)	Deliberation, not necessarily legally institutionalized	Public policy

Chapter 9
Legitimacy

The fact that the various institutions and processes in the previous chapters, from civil society to the public sphere to public reason, have in one way or another touched on the term "legitimacy" reminds us of its central positioning in political theory.

When dealing with the conception of legitimacy we must be aware that there are two fundamentally different conceptions of legitimacy, namely the descriptive and the normative. In its descriptive version, legitimacy depends on the support of the people for existing structures of authority. As an example, we can look at Weber's definition of legitimacy as describing a social order that has "the prestige of being considered binding" (Weber, Roth, and Wittich, 1978: 31).[1] Weber's definition reminds us of the fact that modern theories of political legitimacy base the rightfulness of domination on the consent of the governed citizens (Palazzo and Scherer, 2006: 80). But as we have seen in the section "The Liberal View of the Political Process: Aggregating Preferences and Voting" (Chapter 8), consent can be understood in two different ways: as factual agreement on the one hand and as publicly justified legitimacy on the other hand. Descriptive or cognitive conceptions of legitimacy tend to equate legitimacy with empirical acceptance.

As mentioned in Part I the question at hand in this book, however, "what makes NGOs legitimate partners of corporations?", is a normative question. We thus need to develop a political-theoretical perspective that is adequate to the role of NGOs as partners of corporations. Hence, what interests us is obviously the normative version of legitimacy.[2] The normative conception of legitimacy scrutinizes the conditions

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[1] It is interesting to note that the descriptive conception of legitimacy can often be found in stakeholder theory. In their seminal article, Mitchell et al., for example, define legitimacy as "loosely referring to socially accepted and expected structures or behaviours" (Mitchell, Agle, and Wood, 1997: 866). Such descriptive conceptions of stakeholder legitimacy can be related to cognitive conceptions of legitimacy. Cognitive legitimacy is seen to emerge "when the societal context regards an organization and its output, procedures, structures and leader behaviour as inevitable and necessary and if acceptance is based on some broadly shared taken-for-granted assumptions" (Palazzo and Scherer, 2006: 72; see also Suchman, 1995: 582).

[2] Normative conceptions of legitimacy are equally relevant in a general moral context and in a political context. In a *general moral* context, legitimacy could be defined as a characteristic of actions or claims which do not impinge on the moral rights of another person. This implies that,

that need to be met in order to make a state of affairs legitimate; in so doing, it grasps the normative core of the idea of democracy (Peter, 2007: 330). In the normative version of legitimacy, consent takes on a different meaning than in the descriptive version: legitimacy and the consent of the governed are linked via the criterion of general justification rather than factual agreement. General justification means that all those to whom the norms in question apply must have equal chances to advance their claims and arguments (Forst, 2001: 362).

I first want to approach this question from a political-philosophical point of view by comparing the kinds of measures deemed appropriate by the liberal and the deliberative model to judge the legitimacy of NGOs. This shows that the two political models emphasize different aspects of the three dimensions of legitimacy introduced in the section "The Triple Legitimacy Deficit of NGOs" (Chapter 1). I argue that the liberal model has an affinity for a structural or substantive conception of legitimacy, whereas the deliberative model promotes an inherently procedural conception of legitimacy. Among deliberative theorists we can distinguish those who justify deliberation on an epistemic account and those who favour deliberation because of its procedural aspects. In this book, I will argue in favour of a moderately procedural approach to legitimacy.

Liberal Principle of Legitimacy

When introducing the postnational constellation in Chapter 2 I claimed that the emergence of new political actors on a global scale such as NGOs or corporations leads to gaps of legitimization. I further posited that the most obvious remedy for closing these gaps lies in the democratization of these new political actors.

According to the liberal model, as has been discussed (see section "The Liberal View: Confining the Public Sphere to Constitutional Questions" (Chapter 6)), the main mechanism for conferring democratic legitimacy is the decision-making act, which in democracies is typically cast as voting. Legitimacy is thus sought in the *output* of decisions made in the form of elections. The *procedural input* that precedes the decisions, however, is neglected (Scherer and Palazzo, 2007: 1107), and the source of legitimacy is seen to be the predetermined will of individuals (Manin, 1987: 351/352). The possibility or the importance of changing preferences through discourse is foreclosed. Voting is perceived as a private, non-discursive act (Elster, 1998: 6).

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if someone cares about the legitimacy of his actions, he or she will not enforce his or her power against weaker persons. Instead, he or she will try to do justice to their moral rights because of interpersonal commitment (Ulrich, 2008: 21). This means that he or she is aware of the moral community that he or she shares with people who need protection. A person who cares about the legitimacy of his or her actions feels committed to solidarity with those who need protection. Even though we are explicitly to look at legitimacy in a political context in this book, the fact that this book is based on a very broad notion of the political makes it at times difficult to distinguish between moral and political contexts.

Moreover, liberals confine the relevance of democratic legitimacy to a rather formal understanding of the political sphere. The liberal political sphere acts as the formal framework in which decision-making takes place. A typical example of such a formal framework is a constitution. Perceived from such a narrow perspective, the liberal conception of legitimacy at first sight seems irrelevant to the question of how NGOs can prove their legitimacy as partners of corporations, because the interaction between NGOs and corporations does not take place within any constitutional or otherwise statutorily regulated context. According to the narrow liberal view of the political, NGOs are not even subject to the demand of establishing their political legitimacy.

But let us imagine that liberals acknowledge NGOs as official political actors and subject them to the demand of political legitimacy. This could, for example, be the case if the official admission of NGOs to decision-making arenas in international organizations is discussed. How would we then have to define their legitimacy? In order to acknowledge them as legitimate political actors, a liberal conception of legitimacy would favour an extension of democratic decision-making procedures to civil society actors, which means that they would be subjected to some kind of voting procedures.

Surprisingly and even paradoxically, taking the liberal conception of legitimacy to its logical conclusion, i.e. making NGO legitimacy dependent on voting procedures, brings us closer to visions of radical participatory democracy, which are typically put forward by neo-Marxist or socialist thinkers.[3] Cosmopolitan democracy, that is, the modern strand of liberalism in the postnational constellation "favours democratic institutions from both above and below" (Fung, 2003a: 67). The latter preference (potentially) overlaps with radical participatory democrats. Holistic participatory projects of radical democracy envision a hegemony of democratic values which requires a multiplication of democratic practices that are institutionalized into ever more diverse social relations (Mouffe and Holdengraber, 1989: 41). Such visions aim at enabling the articulation of the greatest possible number of democratic struggles. Thus, the liberal remedy for overcoming the legitimacy deficit of NGOs seems to focus primarily on the structural dimension, namely on the legitimacy deficit that derives from the role of NGOs as non-elected representatives of civil society.[4]

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[3] According to Cohen and Fung radical democrats join two strands of democratic thought: on the one hand the participatory strand in the tradition of Rousseau, which aims at widening participation in public decision-making, and on the other hand the deliberative strand, which prefers public reasoning over politics of power and interest (Cohen and Fung, 2004: 23f.). Rousseau's conception of collective decision-making exclusively focused on voting (Elster, 1998: 6). Thus, by radical participatory democracy I refer to proponents that emphasize the participatory strand of radical democracy and consequently aim at expanding the sphere of applicability of participatory mechanisms to new social relations (see also Mouffe and Holdengraber, 1989: 41). However, the similarities with the liberal model end when radical democrats insist "that the major economic institutions must be brought under the democratic decision making power of associated citizens" (Noonan, 2005: 113).

[4] More on the structural dimension will be said in Chapter 13.

Another strand of democratic theory which promotes the extension of democratic decision-making procedures to new actors is associative democracy. Associative democrats want to encourage civil society actors to extend their influence to formal deliberation with the state. They see it as a means for implementing special representation for oppressed and disadvantaged groups (Young, 2002: 191/2). Yet, by giving selected groups in civil society access to the state, they tend towards a form of "hyper-corporatism" (Hendriks, 2006: 496/7; see also Grodnick, 2005: 399).

It is true that adapting formal decision-making processes for selecting NGOs as partners of the state or of corporations would address their legitimacy deficit; but it would only address the *structural dimension* of their legitimacy deficit. Moreover, making NGO legitimacy dependent on democratic voting procedures in order to overcome their deficit as non-elected representatives of their "constituency" misjudges their status as organizations that explicitly act outside the formal political venues. If NGOs were to be democratically elected representatives of civil society, this would force them into formal ties of decision-making, which exactly contradicts what has been identified as the constitutive normative core of civil society, namely, its operation free from the pressure of decision-making.

In business ethics, or more specifically, in stakeholder theory, such a structural approach to overcoming the legitimacy deficit of stakeholders is often named by the term "stakeholder democracy" (Driver and Thompson, 2002: 124ff.). Stakeholder democracy denotes "an ideal system of governance of a society where all stakeholders in an organisation have the same opportunity to govern that organisation or activity" (Bendell, 2005: 372). Stakeholder democracy seems particularly appropriate for equalizing the bargaining power of stakeholders, and for eventually pushing decisions into forums that are more democratic than would otherwise be the case (Warren, 2001: 119). But it becomes obvious that the stakeholder democracy approach envisions a formal say for stakeholders in the governance of a corporation. This sets it apart from the goal of this book, whose aim is not to assess deliberation under the pressure of collective decision-making or to develop a conceptual framework in which NGOs could be ascribed a formal say as partners of corporations, but instead to assess deliberation as a particular conception of legitimacy, that is, as a procedure for achieving and conferring legitimacy.[5]

Moreover, the output represented by votes is not necessarily legitimate; the results of voting procedures in general reflect the social acceptance of issues or actors but this must not be confused with the rational validity (legitimacy) of moral claims (Ulrich, 2008: 20). The fact that the majority accepts a suggestion does not automatically make it rationally valid. Hence, linking legitimacy to voting or to constitutional or statutory requirements in general represents a one-sided focus on the structural dimension of the legitimacy deficit.

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[5] See the remark in the section "Deliberative Democracy" (Chapter 3) on the difference between approaches that assess deliberation primarily as a means for reaching collective decisions and the approach chosen here, namely the assessment of deliberation as a particular conception of legitimacy.

Another liberal conception of democracy is put forward by contractualism. Normative legitimacy, according to liberal contractualism, holds that "standards of legitimacy are specified by consideration of what interests and principles no one could reasonably reject as a basis given their mutual interest in acting on such non-rejectable grounds" (Follesdal, 2006: 58/59; see also Moon, 2003: 261). The problem with such a conception of legitimacy – as we will see in more detail in comparison with the deliberative conception the next section – is that it considers "mutual interest" to be a morally valid reason for action. But, as has been argued when sketching out the political process (in the section "The Liberal View of the Political Process: Aggregating Preferences and Voting" (Chapter 8)), interests or preferences are not sufficient reasons for public action. Mutual interest is not necessarily public interest; it can also be the result of two particular interests that coincide. Liberalism in fact always connects public interest to the aggregation of individual interests (Bonardi and Hillman, 2005: 398), or as Buchanan states:

> In the absence of individual interest, there is no interest. (Buchanan, 1987: 246)

Again, this conception of legitimacy obviously defines the predetermined will of individuals as the main source of legitimacy (Manin, 1987: 351/352). As we will see in the next section, in contrast to this view the deliberative conception sees the source of legitimacy in the process of will-formation itself (Manin, 1987: 351/352). Moreover, the contractualist notion of legitimacy presupposes that we can substantively define standards of legitimacy. With respect to the research question at hand, it would mean that the reasonable substance of an NGO's claims determines its legitimacy.

However, reducing the liberal model to such a simplistic and formalistic conception of democratic legitimacy or equating it with the contractualist notion ignores the discursive component which *political liberalism* takes into account. Political liberalism acknowledges the public debate that takes place before legitimacy is conferred through a formal act of decision-making. Yet, again, the problem with the liberal principle of legitimacy is its limited scope of validity because only issues that refer to constitutional essentials or questions of basic justice are admitted to public debate (Rawls, 1995: 224).[6] Thus, before anything else, it is the substance of claims that decides whether they should first be subject to public debate and then to voting procedures.

Deliberative Principle of Legitimacy

Whereas the liberal model proposes structural or substantive measures in order to overcome the legitimacy deficit of NGOs, the deliberative conception of legitimacy is unambiguously procedural. The deliberative model sets itself apart from the liberal conception by making legitimacy dependent on deliberative procedures, and

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[6] This idea has been spelled out in the section "The Content of Public Reason" (Chapter 7).

not on the outcome of collective decision-making processes such as voting or on the substance of the issue in question. Nonetheless, with respect to the *justification* of deliberative procedures there is disagreement among deliberative theorists. While some argue in favour of epistemic legitimacy, others advocate procedural legitimacy of deliberative procedures. However, the justification of deliberation must not be confused with the deliberative conception of legitimacy as such. All deliberative theorists agree that deliberation is a legitimate procedure; their differences refer only to the reasons for deeming deliberation a legitimate procedure. Thus, I base my comparison of procedural and epistemic conceptions of legitimacy on the shared assumption among deliberative theorists that legitimacy must be conceptualized procedurally. It is worth, though, considering *why* deliberation is a legitimate procedure.

Procedural and Epistemic Accounts of Deliberative Legitimacy

The epistemic interpretation values democratic processes as knowledge producing processes.[7] Epistemic deliberative theorists for example argue that public deliberation improves the formation of individual preferences because it facilitates the exchange of reasons and information about the correct outcome (Peter, 2007: 338). Epistemic conceptions of legitimacy provide instrumental justifications to the model of deliberative democracy: they see deliberation justified.

> (...) in terms of its capacity to produce just outcomes, that is, in terms of its epistemic reliability (...) (I)n this sense its outcomes may be regarded as substantively legitimate. (Besson and Martí, 2006: xviii)

In epistemic conceptions, the deliberative procedure is instrumental to discovering the correctness of outcomes.

The *procedural variant* defines fair procedures as the main characteristic of legitimate political processes. It provides *intrinsic justification* for the procedure and justifies deliberative democracy "as a procedure valuable for its intrinsic fairness and its respect for autonomy, equality and the dignity of participants, and, as such, it may be said to provide its outcomes with procedural legitimacy" (Besson and Martí, 2006: xviii; see also Martí, 2006: 27ff.). As a consequence, proceduralists typically do not link the value of deliberation to the results of voting.

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[7] Epistemic arguments in favour of deliberation are also called substantive arguments (Besson and Martí, 2006: xviii; Knight and Johnson, 1994: 289) because they take the supposedly positive substance of the outcomes as a justification for deliberative procedures. However, I will here strictly refer to them by the term "epistemic" in order to avoid confusion with the substantive dimension of NGO legitimacy, which will be addressed in Chapter 12. The epistemic interpretation as portrayed here refers to the *substantive justification of deliberation* (output-oriented focus) whereas the substantive dimension of NGO legitimacy refers to defining the legitimacy of an NGO's claims substantively (input-oriented focus). The latter dimension is not related to but rather stands in opposition to deliberation.

The difference between the procedural and the epistemic variants of deliberative democracy thus relates to the principal aim of deliberation. For proceduralist deliberativists, the principal aim of public deliberation is to ensure procedural fairness; for epistemic deliberativists, public deliberation generates democratic outcomes that are rational, wise, and even true (Talisse, 2005: 187).

Even though the procedural and the epistemic justifications seem conceptually compatible, there are tensions between them that throw the coherence of the deliberative democratic ideal into question. The tensions can be summarized as follows: not every procedure that is deliberative is democratic, and not every procedure that is democratic is deliberative (Lafont, 2006: 1). It could happen that the best decision-making procedures from an epistemic point of view do not satisfy deliberative principles, such as ensuring equal access for all people affected or public justifiability of claims. It could also happen that the best decision-making procedures from a deliberative point of view do not generate the "best" outcomes. If deliberative democracy is justified by an ideal procedure, it cannot guarantee its epistemic claims; if it is justified based on epistemic claims, then determining the content of these claims must occur not only procedure-independent, but also independent of deliberation (Bohman, 1998: 403).

I will now provide a brief overview of the main epistemic and procedural arguments as the grounds for arguing in the next section that a procedural conception of legitimacy is best for assessing the legitimacy of NGOs as partners of corporations.

Epistemic Legitimacy of Deliberation

In accordance with Fung we can distinguish three different kinds of epistemic justification (Fung, 2003a: 52):

- *Developmental effects* refer to the effects of deliberation on the individuals involved. Proponents of developmental effects claim that deliberative processes make the individuals more knowledgeable. In their eyes, the arenas of deliberation function as "schools of democracy", whereby deliberation in civil society promotes policy learning and strengthens the willingness of citizens to embrace a reasoned consensus (Cohen, 1989: 24f.; see also King, 2003: 36f.; and Montpetit, Scala, and Fortier: 2004, 138). Sen calls this the "constructive function" of deliberation in that it promotes the formation of values and priorities (Sen, 2001: 8).
- *Policy effects* refer to the outcomes of deliberation. Proponents of such effects believe that deliberation increases the wisdom and efficacy of standards and rules. In their eyes, these effects arise because additional information is introduced, which in turn diversifies the perspectives considered (Fung, 2003a: 52). Using a vocabulary that seems to be closer to the liberal view of politics as an aggregation of preferences than as reasoned public deliberation, advocates of this view argue that deliberative practices encourage "a convergence of policy preferences among participants" (Montpetit, Scala, and Fortier, 2004: 138). Such practices therefore enable policy-makers to design policies based on the authentic preferences of the citizens.

- Advocates of *legitimacy effects* claim that deliberation not only enhances the legitimacy and credibility of standards and rules, but also of the entities that set them as well as of those that follow them. Such effects arise because standards and rules that result from deliberative processes are subjected to the scrutiny of public debate, review and determination (Fung, 2003a: 52; see also Cohen, 1989: 23ff.). Making explicit reference to the value of public deliberation in the interaction between civil society actors and corporations, Fung states that if the claims of civil society actors can be checked, then not only do these claims become more reasonable but so do the responses of corporations. The reason for this is not that the actors involved are motivated by ethical considerations but that they adapt to the demands of public credibility (Fung, 2003a: 56).

Procedural Legitimacy of Deliberation

Procedural arguments are less diverse than the epistemic arguments. They basically state that the basis for legitimacy is the process by which citizens form their will (Manin, 1987: 364).[8] In a strict sense, procedural views reject any non-procedural standards of fairness and only permit standards that are internal to the procedure to count in judging the legitimacy of deliberation (Cooke, 2000: 950; see also Bohman, 1998: 401ff.). According to procedural deliberativists, the primary focus must be on the contestability of claims, not on the (temporary) consent which might result from deliberation. Moreover, they believe that the more varied and lively the social network of formal institutions and informal public arenas is in the open space of the public sphere, the better the development of ethical-political deliberation and public reason will be (Ulrich, 2008: 297/8). In such a process and environment, "views that claim to be based on grounds that any reasonable person could rationally accept need not be privatized and tolerated" (McCarthy, 1994: 63).

Yet there is a problem with purely proceduralist accounts of deliberation. Habermas, who is considered one of the "strictest" proceduralists when it comes to deliberative democracy (Benhabib, 1996a: 7), faces criticism from Joshua Cohen. Cohen insists that certain substantive presuppositions need to be taken in account for in deliberative democracy. We need to restrict our account of reasons admitted in public discourse to political argument in a democracy of equal members. If we do not make any substantive restriction on what reasons are admissible in public debate – that is, if we allow for the full range of pragmatic, ethical, and moral reasons to be put forward – we then have to accept anything that arises from public discourse (Cohen, 1999a: 395). Baynes warns of a tyranny of the majority (Baynes, 1988: 304), which Benhabib wants to avoid by introducing the normative constraints of universal moral respect and egalitarian reciprocity (Benhabib, 1992: 106).

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[8] In the first instance, Manin made this statement in order to mark his distance from liberalism. He said that legitimacy does not lie in the predetermined will of citizens, but in the process by which they form their will (Manin, 1987: 364).

It soon becomes obvious that most procedural arguments at least implicitly contain some epistemic aspects. One example is given by the argument, introduced in the section on the central elements of the deliberative process ("Central Elements of the Deliberative Political Process" (Chapter 8)), that even though the deliberative procedure does not guarantee the quality of the outcome, it does at least offer the chance of reasonable political debate by keeping the legitimation process open. That is, deliberative procedures make the "realization of reasonable results (…) more likely, especially if one takes into account the dimension of time and the educative effect of repeated deliberation" (Manin, 1987: 363; see also Ulrich, 2008: 297/8). This claim mixes procedural and epistemic arguments. In fact, maintaining a strictly proceduralist argumentation is almost impossible: as soon as we want to argue that some procedure is in a normative sense fairer than another, we need additional, non-procedural arguments that justify why we prefer this particular normative conception of fairness (Cooke, 2000: 951).[9] Yet, as Forst argues, procedural criteria of legitimacy do not necessarily have to be supplemented by substantive presuppositions. For him, the criteria of legitimacy such as reciprocal and general justifiability are not substantive in an epistemic sense or even in a liberal sense, "for their 'substance' only derives from a recursive reflection on what normative justification means, and it is only as criteria of justificatory procedures that they can be applied and have a certain content" (Forst, 2001: 373).[10] Regardless of whether it is viewed as an epistemic or a procedural criterion, the requirement of reciprocal and general justifiability is especially important: reciprocity means that no one may claim a right or a resource that he or she would deny to others and that the formulation of the claim must be open to questioning and not be predefined by one party only. This criterion precludes the possibility of individual beliefs, interests and reasons being projected onto others (Forst, 2001: 362). Without the criterion of reciprocal and general justifiability, even if the procedure is fair and outcomes are good, we cannot know whether the reasons presented in the course of deliberation are also *good* reasons (Bohman, 1998: 402).[11]

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[9] This statement receives support from Gutmann and Thompson who claim that "… conclusions of purely procedural theories sometimes converge with the claims of the substantive standards that reciprocity requires" (Gutmann and Thompson, 2004: 106). Gutmann and Thompson embrace this problem and suggest complementing deliberative procedural criteria (reciprocity, publicity, accountability) with liberal principles (equality, liberty, fair opportunity) that relate to the outcome (substantive principles that elaborate its constraints). Yet, as Kohn remarks, with this "compromise" they give up any normative priority to the process of deliberation. By granting that they cannot empirically claim that deliberation generates more just or more effective outcomes, "it is unclear why deliberation should play a central role in democratic theory and practice" (Kohn, 2000: 421).

[10] Generality means that all those to whom the norms in question apply must have equal chances to advance their claims and arguments. This implies that the community of justification is identical with the community of validity (Forst, 2001: 362).

[11] This leads us back to Cohen's claim that choices need to rest on mutually justifiable reasons (Cohen, 1989: 22; see also Lafont, 2006: 8).

In order to clarify the extent to which procedural approaches contain epistemic aspects, one might need a more refined classification of the approaches. Peter, for example, distinguishes not only between epistemic and procedural variants of deliberative democracy but also between "pure proceduralist" and "rational proceduralist" strands within these two variants. The pure proceduralist strand of deliberative democracy defines an outcome as legitimate if the political process satisfies certain conditions, such as political fairness or political equality.[12] The rational proceduralist strand emphasizes the ability of fair procedures to generate outcomes that satisfy certain rationality constraints (Peter, 2007: 332). This view is still procedural, but it adds to the requirement of political equality the requirement that the outcome of collective decision-making be rationally justified. With her fine distinctions between different degrees of procedural or epistemic orientations, Peter acknowledges that procedural arguments often at least implicitly contain epistemic aspects (Peter, 2007: 335) and thus they do not in any case totally ignore the outcomes of deliberation.

As I will argue now, it is precisely such a "moderate proceduralism" that is most meaningful for justifying deliberative democracy as a political model for the legitimacy of NGOs vis-à-vis corporations.

In Favour of a Moderately Procedural Justification of Deliberation

As has become evident from the overview of procedural and epistemic justifications of deliberation, neither purely proceduralist nor purely epistemic arguments in favour of deliberative democracy are sustainable. As long as they are reconcilable, they need to be combined (Bohman, 1998: 403ff.; and also Martí, 2006: 28).

However, since some tensions between the two perspectives are irreconcilable, one might be forced to take a stand on which perspective one favours. For the project at hand, I favour the proceduralist variant of deliberative democracy over the epistemic variant. I derive this stance not only from convictions but also from pragmatic considerations about the relevance to the research topic. Within Peter's fine distinction between pure and rational proceduralism, I would position myself to be an advocate of something like a "moderate proceduralism" which may be summarized as follows: Deliberative legitimacy shall not be valued only in instrumental terms of generating "better outcomes". Deliberation does have an intrinsic value but the chance that the procedure yields better outcomes is not ruled out a priori. Outcomes as such are not the primary criteria for political legitimacy and thus neither are they primary for the legitimacy of NGOs. An exclusive justification of deliberative procedures based on positive outcomes entails the risk of relying on overly harmonious

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[12] In a deliberative setting, political equality means that all people have the same opportunity to participate in the process of public deliberation. In an aggregative sense, political equality assumes the requirement that equal consideration be given to all expressed preferences (Peter, 2007: 332).

expectations.[13] It would be naïve to think that the deliberative process only creates harmony. On the contrary, depending on the setting, deliberation is very likely to generate disagreements that cannot be reconciled. In such cases the hope for "perfect outcomes" may thus be quite utopian.

In this book, however, I argue that substantively conflicting views do not necessarily rule out procedural consent. As long as there is procedural consent, we can expect the outcome of deliberation to be workable agreement or reasonable disagreement that is, disagreement that relates only to "conflicts not between views that are clearly right and clearly wrong, but between views none of which can be reasonably rejected" (Gutmann and Thompson, 2004: 28). This stance can be related to what Gutmann and Thompson call "pluralists" who promote a "thin conception of the common good" (Gutmann and Thompson, 2004: 27). Pluralists aim to live respectfully with moral disagreements – or rather to achieve moral disagreement by reasonable means.[14] Advocates of a "thick common good" as the goal of deliberation are termed "consensus democrats". Consensus democrats believe that a common good is indispensable for "a community in which citizens find a common ground at the deepest level of their social identities" (Gutmann and Thompson, 2004: 27).[15] In any case, the consensual attribute is only applied to procedural aspects of deliberation and not with respect to the outcomes. As we will see in the fourth part of this work, adopting this attitude towards NGOs means that their actions may very well generate disagreement, but as long as they do not violate the procedural consent (on deliberative methods), this disagreement will be reasonable.

Hence, in cases where agreement about the best solution is unlikely, the only justification for an action or a claim is that it has been justified in a fair process (Gaus, 1997: 234, quoted from Peter, 2007: 335). This is the purely procedural argumentation. But at the same time I would contend – in accordance with Manin and Ulrich (as noted above) – that the deliberative procedure offers at least the chance for reasonable political debate (Manin, 1987: 363; Ulrich, 2008: 297). I would especially agree with the advocates of developmental effects of deliberative democracy, namely that regular involvement in public deliberation processes promotes the willingness to achieve reasoned consensus. This argument is rather epistemic, but if asked which justification of deliberation is more meaningful for the context of NGO legitimacy I would favour the procedural justification.

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[13] Moreover, such a focus blurs the difference between the deliberative model and the liberal model because then they both make legitimacy dependent on the outcome of decision-making processes, even though their conceptions of the decision-making processes of course differ.

[14] A pluralist account is also put forward by Mansbridge, who acknowledges both adversarial and consensual ideals as regulative ideals, that is, as standards which should be aimed at, not as thresholds below which any act is illegitimate. As a consequence, legitimacy is not a dichotomy but rather a spectrum – decisions will always be only more or less legitimate (Mansbridge, 2006: 124).

[15] Rescher equates thick consensus with "the rational uniformity of a harmonious consensus" while he ascribes to thin consensus the "creative diversity of a limited dissensus" (Rescher, 1995: 196ff.).

The moderate proceduralist approach presented here addresses different relevant aspects of the question of NGO legitimacy. It admits the probability that a discursive legitimization of NGOs can very well generate conflicting views about their claims. But it also acknowledges that a reasonable debate between an NGO and a corporation about an NGO's claims or about its mission is much more likely if the NGO is willing to discursively legitimize its goals in public.

Another reason for my preference for a moderate proceduralist justification of deliberative democracy refers us back to my argument in favour of assessing the interaction between NGOs and corporations based on the critical strand of deliberative democracy: the decision-making component of deliberative democracy plays a subordinate role for the research question at hand. The legitimization of NGOs vis-à-vis corporations happens exclusively within the informal track of public communication; it is not linked to any decision-making institutions. The "outcome dimension" thus cannot be identified conclusively. As a consequence, the primary focus must be on the procedure of how NGOs legitimize themselves. What means do they use for their public legitimization? What public behaviour do they exhibit? All procedural aspects of NGO legitimacy must at least conform to the deliberative principle of procedural fairness. But we cannot expect NGOs to generate agreement about their claims because there is no means to determine this agreement. We cannot claim that their discursive legitimization generates better outcomes as long as this legitimization is not linked to any decision-making institutions and hence does not generate tangible or measurable outcomes.

More specifically, for the following reasons it is hard to say whether the adherence to deliberative principles in the public legitimization of NGOs actually generates better outcomes:

- *Presuming a substantive notion of the (common) good*: judging the quality of an outcome presupposes a substantive notion of desirable states of affairs.[16] It moreover presumes that there is a notion of the *common* good which all people affected by it could accept as a best outcome. Yet, as has been argued in the chapters on the public sphere and on public reason (Chapters 6 and 7), substantive definitions always entail the risk of imposing a static view on society. In the worst case, setting a standard for the correctness or desirability of outcomes independently of procedural criteria can lead to anti-democratic conclusions (Peter, 2007: 338). Epistemic conceptions of deliberative democracy involve a certain danger of elitism (Lafont, 2006: 8f.). But even if deliberation is as inclusive as it should be, judgements about correctness tend to be fallible as well as historically and socially situated (Peter, 2007: 345). The substantive presumption of a common good results in claims of unity that "often bias the interpretation of a common good in ways that favour dominant social groups" (Young, 2002: 81). If we know beforehand what state of affairs we wish to achieve, we risk marginalizing groups

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[16] More on the problem of presupposing a substantive notion of the common good will be said in Chapter 12 in the context of substantively defining the legitimacy of an NGO's claims.

that "think outside the box" in the public sphere and in public debate. We thereby not only deprive them of their right to discursively legitimize themselves, but we also free them from their duty to do so. A substantive notion of desirable outcomes of public deliberation undercuts the emancipatory potential of public debate. Moreover, under such circumstances, it becomes easier as well as more attractive to resort to propaganda in order to achieve the desired outcome: if we predominantly define deliberation by its outcomes and if we allow all kinds of procedures that generate these outcomes to count as deliberation, then in the most extreme case propaganda as well as rational debate count as deliberation (Elster, 1998: 8).

- *Presuming an overly harmonious account of deliberation*: as has been mentioned above, presuming an outcome that is considered good by all people affected by it means ignoring the strong possibility that deliberation might not lead to a consensus. Disagreement may persist (Mansbridge, 2006: 116ff.).[17] Hence, epistemic approaches tend to insist on an overly harmonious potential of deliberation which can hardly be justified given the extent of pluralism in modern society.

- *Determining reference points of deliberation*: A specific difficulty with epistemic conceptions is the determination of possible reference points for the "best outcomes". Advocates of epistemic deliberative democracy relate the better outcomes to a variety of reference points: some arguments refer to the subjects involved in deliberation (developmental effects on citizens), and others to the objects of deliberation (policy effects that enhance for example the efficacy of standards or rules), while sometimes deliberation is presented as a kind of panacea for the benefit of all kinds of reference points (legitimacy effects that enhance not only the legitimacy of rules, but also of the entities that set them as well as of those that follow them). It thus becomes obvious that defining a better outcome is difficult not only with respect to substance but also with respect to reference points. From an epistemic perspective, better outcomes arising from a discursive legitimization of NGOs vis-à-vis corporations could in principle equally refer to citizens, to NGOs themselves, to corporations, and even to the interaction between NGOs and corporations. In this context, to argue in favour of epistemic effects seems to be a rather arbitrary venture. Moreover, to require that the discursive legitimization of NGOs, as representatives of public claims vis-à-vis companies, yields epistemically valuable results would impose output-oriented pressure on their interaction, which in turn contradicts what has been identified as the constitutive core of civil society, namely that it operates free from the pressure of decision-making. A procedural perspective, by contrast, seeks not the good results but rather the kind of behaviour by which an NGO proves its legitimacy in accordance with the deliberative principles of procedural fairness as well as general and reciprocal justifiability. A procedural perspective on NGO legitimacy vis-à-vis corporations focuses on the emergence of their interaction, not on the potential output of such an interaction.

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[17] More about the role of consensus in deliberation will be said in the Chapter 14.

All in all, a moderately procedural focus avoids the risks associated with an epistemic justification of deliberation: it does not presume a conception of a common good; it takes into account that deliberation does not necessarily yield consent; and it escapes the difficulty of determining reference points to which the "good outcomes" are supposed to apply.

Especially in the context of NGO legitimization in their interaction with corporations, it is important to avoid elitism, i.e. discursive domination by powerful groups, which includes avoiding propaganda, and to design public debates so that emancipatory forces are guaranteed access. If we define the outcomes that should be reached by their interaction a priori, then the public interaction between NGOs and corporations risks winding up as a pure demonstration of power and propaganda. In such an interaction, NGOs would have no means of setting themselves apart from other, sometimes competing stakeholders of corporations, such as interest groups and activists. In the fourth part of this book, I will argue that the intrinsic value of the deliberative procedure consists in providing NGOs with a stage on which they can set themselves apart from interest groups and activists.

Chapter 10
Insights from Part III

In this part, the normative framework for legitimate partner NGOs has taken shape and made evident the distinctive advantages of the deliberative over the liberal model when conceptualizing the role of NGOs as political actors in the postnational constellation. By ascribing to the public sphere and civil society mutually enabling, constitutive roles and by widening the scope of the public sphere from the political to the civil sphere, the deliberative model posits a normative horizon for a society in which NGOs assume an important role as political actors. In fact, NGOs assume the role of a driving force in public debates.

In the postnational constellation in particular, this "feature" of deliberative democracy enables it to cope with fluid boundaries and hence allows us to conceive of a model of democracy that extends beyond the borders of the nation state. Furthermore, with its substantively broad approach to the public sphere and its procedural approach to public reason, the deliberative model prepares the ground for an emancipatory role of NGOs in the postnational constellation. A public sphere that extends beyond the state and includes civil society allows for an emancipatory role of the public sphere and its central actors, that is, civil society organizations. It overcomes the conservative bias of the liberal model by making extraconstitutional claims subject to public reason. Moreover, the deliberative model, at least according to some of its advocates, includes the economic sector and its actors in the public sphere, and thus subjects them to discursive legitimization. In the deliberative model, NGOs assume a critical function towards both the state and the economy. As a consequence, the deliberative model commits NGOs to a public justification of their claims. NGOs need to prove that their claims are grounded in public rather than particular interests and that they clarify their claims argumentatively. This makes them distinguishable from pure interest groups.

It has also become obvious, though, that the "standard deliberative approach" as represented by the liberal-constitutionalist strand of deliberative democracy, while providing a meaningful conceptualization of NGOs as political actors in the postnational constellation, stops short of ascribing them this same political role in their interaction with corporations. In order to assess the specific political role of NGOs as legitimate partners of corporations we need to turn to the "critical strand of deliberative democracy". This strand provides the grounds for conceiving of

NGO activities as political action even if they occur within the informal track of public communication without being coupled to the formal track of public decision-making. By assigning an intrinsic value to the discursive interplay within a public sphere that is autonomous from the state, the critical strand supports the notion that civil society comprises actors who, in contrast to state and economic actors, do not operate under the pressure of decision-making. On the question of what notion of legitimacy is adequate for judging NGOs as political actors in the postnational constellation, I have argued that liberalism primarily focuses on structural and/or substantive aspects of NGO legitimacy while the deliberative model suggests a procedural conception. However, I argued that we need to take a differentiated look at the *justifications* of deliberation because neither of the two predominant justifications of legitimacy in deliberative democracy, that is, neither purely epistemic nor purely proceduralist justifications, are adequate for judging the legitimacy of NGOs as partners of corporations. Instead, acknowledging that pure proceduralism is hard to sustain, I have advocated a moderate proceduralist approach which, in contrast to an epistemic approach, does not presuppose a conception of the common good, admits that a discursive legitimization of NGOs can generate conflicting views about their claims, and does not impose output-oriented pressure on the interaction between NGOs and corporations.

In the fourth part of this book a typology of legitimate partner NGOs and related actors will be set up based on the normative framework established in Part III. It will be argued that, based on a deliberative conception of legitimacy, one can meaningfully distinguish legitimate partner NGOs from interest groups and from activists. As will become evident in this tripartite distinction, a procedural approach as proposed by the deliberative model is once again the most meaningful way to distinguish legitimate partner NGOs from interest groups and activists.

Part IV
Drawing a Typology for Legitimate Partner NGOs

Chapter 11
NGOs, Interest Groups and Activists

This part addresses the question of how to differentiate between legitimate partner NGOs and other, related actors, namely interest groups and activists, which raise claims on corporations. The centrepiece will be a typology which rests on the assumption that has been introduced in Part I, namely that NGOs are special stakeholders. In this typology substantive, structural and procedural criteria for differentiating between NGOs, interest groups and activists will be compared.

Let us briefly recapitulate what makes NGOs special as stakeholders of corporations. I claimed that the least common denominator of most definitions and characterizations of NGOs consists in the fact that they implicitly or explicitly relate NGOs to the public, whether by portraying them as promoters of the public good or the public interest (Fries, 2003: 235; Brown and Jagadananda, 2007: 4; Fowler, 2000: 12; Gray, Bebbington, and Collison, 2006: 337) or by assigning them public sphere effects (Warren, 2001: 61; Bohman, 2004: 351). It is precisely this relation between NGOs and the public that provides the ground for deriving the special status that NGOs assume as stakeholders vis-à-vis corporations. If we take what we know so far and make it useful for defining NGOs in explicit distinction from other stakeholders, two related characteristics suggest themselves that constitute the uniqueness of NGOs: firstly, NGOs have their origins in civil society, and secondly, they represent public claims. Whereas most stakeholder groups, such as consumers, suppliers or employees, are rooted within the economic sphere, NGOs are representatives of civil society. They claim to promote "the public interest against the power-driven interests of the state and the profit-driven interests of the economy" (Chandhoke, 2005: 359). This sets them apart from other stakeholder groups, which raise largely particularistic claims. The connection between the NGOs' origin in civil society and the public character of their claims occurs because civil society is characterized by its devotion to the public interest and, on those grounds, civil society raises its claim to a privileged status (Fries, 2003: 233). NGOs are ideal-typically fully embedded in civil society. With respect to companies, NGOs act as self-appointed watchdogs for a company's "overall social behaviour", i.e. they scrutinize a company with respect to activities that affect the "stakes" that civil society has in the company. NGOs thus aim to alter the system from without (Warren, 2001: 117).

Even though these characteristics are seemingly unambiguous, NGOs need to continuously prove their legitimacy. From their origins in civil society and their representation of public claims, we can conclude, in line with the findings from the first three parts, that NGOs must be willing to discursively legitimize their claims. I would argue that by orienting themselves towards this requirement, they can specifically distance themselves from radical activists on the one hand and from interest groups on the other hand. NGOs share certain characteristics with both of these stakeholder groups; the boundaries between them are blurring. But in contrast to NGOs, activists and interest groups both strive for power and they do not feel the need to legitimize their actions. I will take a closer look at the differences and commonalities between NGOs and interest groups first, and then between NGOs and activists.

Yet before doing that it is important to note that the terms NGOs, interest groups and activists are used in an ideal-typical way here. The method of building ideal-typical classifications has a long-standing tradition in organization theory (Meyer, Tsui, and Hinings, 1993). In line with Max Weber, an ideal type is defined here as a mental construct which "in its conceptual purity, . . . cannot be found empirically anywhere in reality" (Weber, 1963: 398). It is formed by "the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified thought construct" (Weber, 1963: 398). The ideal type "is not a description of reality but it aims to give unambiguous means of expression to such a description" (Weber, 1963: 396). The main purpose of classifications in organization theory is to generalize and to abstract (Meyer, Tsui, and Hinings, 1993: 1180). Hence, the typology deployed here acknowledges that in practice there are no clear-cut delineations between the different types; hybrid forms exist. In practice, NGOs might exhibit features that are characteristic of interest groups or activists, or they might resort to behaviour that is associated with one actor type or the other. The terms NGOs, interest groups and activists are meant to denote the dominant characteristics rather than to demarcate mutually exclusive categories. To put it precisely, one would have to talk about "activist-type NGOs", "interest-group-type NGOs" and "legitimate (partner) NGOs". However, to simplify matters, I will use the terms NGOs, interest groups and activists, keeping clearly in mind that these terms describe ideal types.

Raison d'être of All Actor Types

One important remark needs to be made beforehand: despite my focus on the normative core of NGO legitimacy, I do not mean to deny the *raison d'être* of either interest groups or activists. Both of these actor types have an important role to play in democratic societies. In any democratic society it must be possible for individuals to set up associations in order to represent their particular interests to the economy or the state. And it must be just as possible for citizens to engage in civilized

protest against perceived injustices. Protest against governments and corporations is crucial for the empowerment of civil society (Murphy and Bendell, 1999: 51). All three actor types must be allowed and secured in a democratic society because they all relate to the freedom of association, which is a basic human right guaranteed by Article 20 of the Universal Declaration of Human Rights. What interests us here, however, is the blurring of boundaries between the three actor types. I will argue that NGOs have overlapping characteristics with interest groups and activists and will seek to clarify these characteristics, but this does not mean that I deny the importance of activists and interest groups in democratic societies. We need to make sure, though, that they do not adorn themselves in borrowed clothes by pretending to be NGOs. For me, NGOs, interest groups and activists do stand neither in a substitutive nor in a competitive relationship to each other. They ideally co-exist in a democratic society.

Commonalities and Difference Between NGOs and Activists

With activists, NGOs share the content of their claims: radical activists also raise public claims that have societal relevance. They claim to be "committed to a universalist rather than partisan cause" (Young, 2001: 675). In general, their claims are socially well accepted. This becomes evident if we look at NGOs and activists that engage in the field of animal rights. Both animal rights NGOs and animal rights activists raise claims that few people would find entirely repulsive. Their claims – even if they are not shared by the majority – are certainly not deemed entirely unreasonable (Humphrey and Stears, 2006: 403). However, NGOs and activists in general differ with respect to their behaviour. Activists prefer protest over policy-level advocacy (Murphy and Bendell, 1999: 6). Attac for example strictly rejects collaboration with business because they see it as a threat to their independence and engages in "confrontative dialogues" instead because they see themselves as being active "in a world where the neoliberalism has seized the discursive power" (Ählström and Sjöström, 2005: 232).[1] Thus, Attac's claims might be shared by other NGOs, but not all of them engage in equally confrontational behaviour. In this book I argue that since NGOs and activists agree in their claims, we should be able to analyse the procedures used to put them forward "in relative isolation from their substantive claims" (Humphrey and Stears, 2006: 403).

The inclination to engage in confrontational behaviour becomes particularly evident among *radical* activists which sometimes even cross the border into violence in order to advance their goals. Such groups cannot be considered legitimate representatives of civil society because their behaviour is literally un-civil (Fowler, 2000). The organizations behind the violent street protests at the WTO summit in Seattle

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[1] This stance leads Amnesty Business Group, a separate organization through which Amnesty International works with business, to conclude that Attac only sees "corporations as a tool to influence law-making" (Ählström and Sjöström, 2005: 232).

1999 and the G7 summit in Genoa 2001 are examples of "un-civil civil society organizations". It is thus important not to use the term civil society in a "romanticizing way" (Dryzek, 2006: 123) and to be aware of the "dark side" of civil society (Fries, 2003: 233; see also Cohen, 1999b).

This brief characterization of activists reminds us of what den Hond and de Bakker call "radical groups", namely groups that see companies as part of the problem rather than as part of the solution (Den Hond and De Bakker, 2007: 8).[2] Attac again exemplarily represents such a stance by saying "We have to keep distance to corporations to provide new solutions. We don't want to buy in on the stories of the corporations" (Ählström and Sjöström, 2005: 232). I will argue that in order to be considered legitimate partners of a company, NGOs need to be willing to see companies as part of the solution; according to the terminology of den Hond and de Bakker this means that they need to adopt a reformative ideological stance. The will to enter into a discourse with the company is a necessary prerequisite for NGOs to be granted legitimacy as partners. Yet, it is important to note that while discursive readiness is necessary, it is not sufficient (Palazzo and Scherer, 2006: 83).

The wide range of orientations among organizations that all present themselves as NGOs becomes obvious in a typology of NGOs put together by Sustainability, a consulting company in the field of corporate responsibility and sustainable development: they distinguish between polarizing NGOs and integrating NGOs. While the former want to disrupt the status quo through confrontation, the latter are willing to enter into constructive partnerships with businesses, governments and other stakeholders (SustainAbility, 2003: 14; see also Nijhof, de Bruijn, and Honders, 2008: 155). In my own terminology those NGOs that Sustainability calls polarizers are activists.

Commonalities and Differences Between NGOs and Interest Groups

Besides distancing themselves from activists NGOs also need to differentiate themselves from interest groups. The question is, "who – if anyone – do NGOs represent, or are they just unaccountable special interest groups that wear a more friendly disguise?" (Edwards, 2000: 17). This distinction receives theoretical support from discourse ethics, from which perspective values cannot simply be treated as a special type of interest. In contrast to interests, value conflicts are not typically subject to bargaining procedures (McCarthy, 1994: 56).[3] Practical evidence for this stems

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[2] These groups are in return typically also seen as too radical by corporations, who, according to a study conducted by Holzer distinguish between "'cooperation-oriented' and 'event-oriented' groups that is, those that the company can deal with and those whose demands are deemed too radical" (Holzer, 2008: 56).

[3] The difference between bargaining and deliberation will be outlined in more detail in the section "Difference Between Bargaining and Deliberation" (Chapter 14).

from the self-portrayal of NGOs. As has been stated in Chapter 1, NGOs are norm-guided actors that raise normative claims. They want to be perceived as actors that promote public values by focusing on issues that they think deserve to be addressed, and they often appeal to our solidarity. Interest groups, by contrast, can be characterized by their focus on particularistic interests, but they tend to present these particular interests as universalizable (on universalizable interests see Habermas, 1996b; and Finlayson, 2000). The functional logic of interest groups is much more conflict-laden than that of NGOs.

Moreover, interest groups are typically vested associations. Vested associations aim to reproduce a system and are therefore functionally embedded within this same system. Interest groups are typically embedded in the market and want to reaffirm the market. Nonvested associations, by contrast, aim to stimulate change and act from outside the system. "Legitimate partner NGOs" are nonvested associations, as ideal types they are fully embedded in civil society and want to make changes in the economic sphere from without (Warren, 2001: 117). More about the problem of vested interests will be said in Chapters 13 and 14.

The blurred boundary between NGOs and interest groups derives on the one hand from the danger of interest groups being disguised as NGOs. It is a fact that there are neoliberal organizations which pursue business interests under the cover of NGO legitimacy (Gray, Bebbington, and Collison, 2006: 329). On the other hand, there is also the danger that the legitimacy of an NGO will be threatened by entering into partnerships with corporations (Nijhof, de Bruijn, and Honders, 2008: 162).

We must ask ourselves how an NGO should behave as a partner of a corporation in order to still exercise its role as a corporate watchdog credibly (Murphy and Bendell, 1999: 8). The proximity between NGOs and associations that are oriented towards economic rather than public interests is also enhanced by the increasing "corporatisation" of NGOs. As Kaldor writes:

> NGOs "professionalise"; under pressure from management gurus they increasingly adopt corporate strategies. (Kaldor, Anheier, and Glasius, 2003: 9)

Obviously, an NGO that adopts corporate strategies will find it difficult to pursue the public interest because corporate strategies typically subject their decision-making to economic criteria. Hence, corporate strategies such as those outlined in the section "Structural Ties Between NGOs and Interest Groups: Co-optation and Corporate Front Groups" (Chapter 13) might serve as an indicator that an NGO is crossing the boundary to being an interest group.[4]

Last but not least, an additional hint for the proximity between NGOs and interest groups can be found in the habit of calling NGOs nonprofit organizations. Merely calling them nonprofit is not an appropriate description because then organizations that lobby on behalf of economic interests, typically interest groups, could also count as NGOs (Murphy and Bendell, 1999: 5).

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[4] This is not to say that NGOs must not professionalize themselves. I am instead arguing that the more an NGO orients itself towards corporate strategies, the greater the chance that such an NGO will lose sight of its public interest orientation.

Figure 11.1 visualizes the relation between NGOs, interest groups and activists and their respective proximity to the economic sphere and to the sphere of un-civility:
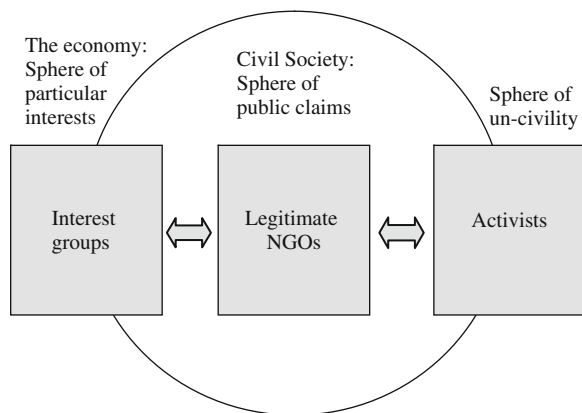
Fig. 11.1 NGOs, interest groups and activists

Three Criteria for Distinguishing Between NGOs, Interest Groups and Activists

After what has been said so far, it is obvious that NGOs face a double tension: on the one hand, they need to mark their distance from radical activists; on the other hand, they need to distinguish themselves from pure interest groups. In order to master these distinctions, NGOs need to prove their legitimacy in a continuous process of enhancement.

If we argue that NGOs need to clarify the blurred boundaries between themselves, activists and interest groups in order to be perceived as legitimate partners of corporations, the question inevitably arises about what criteria can be used to meaningfully distinguish these three types of actors. As mentioned in the section "The Triple Legitimacy Deficit of NGOs" (Chapter 1), there are three dimensions along which to judge the legitimacy of NGOs. These dimensions at the same time also provide variably meaningful criteria for distinguishing NGOs from related actors. In accordance with what has been said in the section "The Triple Legitimacy Deficit of NGOs" (Chapter 1), I characterize the essence of the different dimensions and their respective criteria as follows: The *structural criteria* primarily refer to the fact that NGOs lack a democratic mandate for representing the people whose needs they claim to represent. The *substantive criteria* point to the problem of legitimacy when it comes to the content of an NGO's claims: many NGOs claim to represent public values, but how can we know by looking at the substance of their claims whether they are public or particular? As has been argued in Chapter 7, substantive definitions of public reason are difficult to maintain. *Procedural criteria* finally refer to the

strategies NGOs choose in order to promote their claims. We must keep in mind that having, or claiming to have, their origin in civil society does not automatically make NGOs civil – and civil behaviour is one essential requirement for the accountability of NGOs (procedural problem).

I will show that structural and substantive criteria both lead to a confusion between NGOs and related stakeholders of companies, namely interest groups and activists. Instead I favour a procedural definition of an NGO's legitimacy as a partner of a corporation. I will elaborate the types of criteria and clarify the difference between NGOs and interest groups on the one hand and between NGOs and activists on the other, before focusing on the procedural dimension in more detail.

It is important to note that the output of this section of the book does not aim to produce an unequivocal checklist which corporations can consult whenever they are considering entering into a partnership with an NGO. Instead, the point is to generate orientating knowledge, that is, to provide ethical orientation that ought to guide our judgments. But of course, and this must be emphasized, even if an NGO can be more or less conclusively identified as a "legitimate NGO" – that is, even if an NGO fulfils criteria that make it clearly distinguishable from interest groups and activists – this by no means implies that it is the duty of a company to enter into a partnership with this NGO. As has been stated in the Introduction, the list of potential partner NGOs becomes nearly limitless as civil society initiatives mushroom. Thus, we cannot derive grounds for a duty on the part of companies to interact with a specific NGO from these findings. This remark is especially relevant for the substantive dimension, where it will be argued that the range of legitimate claims should not be limited substantively. It would be wrong to conclude from this that all claims, no matter what their substance, necessarily need to be fulfilled by a company in partnership with an NGO. Arguing in favour of a substantively unrestricted definition of legitimate claims merely means that an NGO must not be excluded from discourse based on the content of its claim. The content of a claim must not lead to an a priori rejection of an NGO. Instead, a company should in principle be willing to enter into dialogue with an NGO regardless of the substance of its claim, as long as the NGO is willing to discursively justify its claim and as long as it is committed to consensual behaviour. This will be spelled out in the chapter on the procedural characteristics of legitimate NGOs (Chapter 14).

Chapter 12
Substantive Characteristics of Legitimate Partner NGOs

As mentioned above, substantive definitions of legitimate NGOs judge the content of the claims an NGO represents. Substantive criteria assess the extent to which an organization appeals to certain values, such as human rights, animal well-being, protection of the environment, assistance of the needy and poor, etc.[1] However, defining a legitimate NGO by its claims is a very delicate task. The political-philosophical arguments in favour of conceiving of public reason in a way that promotes a substantively unconstrained public dialogue have already been presented in Chapter 7. Therefore, this chapter will limit itself to recapitulating the findings from Part III and illustrating them by means of two relevant substantive criteria that often can be encountered in practice, namely the NGOs' orientation to the public good and the universal character of their claims.

When comparing substantive and procedural conceptions of public reason in Chapter 7, it was argued that we need a conception of public reason that promotes a substantively unconstrained public dialogue. Only with such a conception of public reason can we take NGOs seriously as actors that promote a broad range of public claims and that represent oppressed groups or marginalized groups. In order to allow the emancipatory potential of NGOs to unfold we need a public dialogue in which participants can bring "any and all matters under critical scrutiny" (Benhabib, 1992: 110). Moreover, if we assign the claims of NGOs to the private sphere, we not only deprive them of opportunities but also free them from the duty to publicly legitimize themselves. Last but not least, a substantive restriction of public reason would allow NGOs to reason differently in their interaction with companies than in their interaction with governmental institutions.[2]

Nevertheless, in practice the legitimacy of NGOs is often derived from substantive criteria. One such substantive criterion in practice is the orientation of their claims and actions to the *public good*. Authors alternately define NGOs as "watchdogs of the public good" (Fowler, 2000: 12), "champions of the public good" (Adair,

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[1] Vedder says that substantive criteria refer to the degree to which an NGO *conforms* to such values; however, I prefer the verb *appeal* because it makes the connection to an NGO's claims more evident (Vedder, 2007: 205).

[2] See the "divided selves"-implication (in the section "Implications of Restricting the Content of Public Reason" (Chapter 7)).

1999: 26) or they assign them a "genuine concern for the wider public good" (Gray, Bebbington, and Collison, 2006: 337) and require them to prove that they "contribute to the public good" (Brown and Jagadananda, 2007: 4).

The difficulties of providing substantive guidelines that hold NGOs accountable to serving the public good are acknowledged as well in the debate on corporate social responsibility (Gray, Bebbington, and Collison, 2006: 325/326). Obviously, a substantive definition of the public good as a criterion for judging the legitimacy of an NGO severely restricts the range of eligible organizations and therefore runs into the difficulties related to substantive conceptions of public reason, as spelled out in Chapter 7.

Another substantive criterion for judging the legitimacy of an NGO's claims, namely the *universal character* of their claims, is explicitly emphasized by international human rights NGOs. They derive their mission "from a moral case based on the values of human equality, dignity, impartiality, justice, freedom and personal and collective responsibility. This moral case gives human rights organisations and NGOs an ethical legitimacy that resonates with the moral reasonableness of people across the world" (Slim, 2002: para. 26). As a consequence, human rights NGOs often appeal to the people as members of the world community (Chandhoke, 2005: 359) and state that they "have a moral right or duty to act or speak out, which is based in the universal values contained in the Universal Declaration of Human Rights, or the legitimate claims on our solidarity of vulnerable people whose rights are not being respected" (International Council on Human Rights Policy, 2003, para 52; see also Nijhof, de Bruijn, and Honders, 2008: 164). The legitimacy of the claims of human rights NGOs thus derives from the *universal character* of their claims. The opposite of a universal claim is a particularistic claim, as Michael Ignatieff states:

> Particularism conflicts with universalism at the point at which one's commitment to a group leads one to countenance human rights violations towards another group. (Ignatieff and Gutmann, 2001: 9)

The distinction between particularism and universalism suggests the grounds for a substantive distinction between NGOs and interest groups. Yet, we must consider whether we can really take the universal character of the substance of a claim or its orientation towards the public good as an indispensable requirement or as an unambiguous criterion for its legitimacy. There are cases in which this requirement seems to rest on shaky ground.

One such case is constituted by disputes between mining companies and Aboriginal communities in Australia. The claims of Aboriginal communities refer to indigenous matters. Such matters are, according to Banerjee, "epistemologically and ethically incongruent with Western notions" (Banerjee, 2000: 21), and hence also with the notions of universalism and the public good, which are clearly influenced by Western thought.[3] Banerjee concludes that Aboriginal stakeholder claims

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[3] As a matter of course, the claims of the Aboriginal communities would not meet the liberal requirement either of expressing their views in political values in order to be acknowledged as public claims.

are illegitimate if we adhere to the Western segmentation between social, economic and cultural rights, because

> . . . the construction of these categories implies that they are somehow separate, a notion that is incommensurable with the Aboriginal notions of culture: What is at stake for Aboriginal communities is their identity, their way of life, the Bininj way, an identity and culture that is derived from land itself. (Banerjee, 2000: 25)[4]

Hence, Banerjee supports the conclusion put forward in the section "Implications of Restricting the Content of Public Reason" (Chapter 7), namely that a substantive restriction of public dialogue (as put forward by the liberal model) entails the risk of oppressing minorities because the more diverse an environment is, the more important it is that public debates be open to a wide range of issues and accessible to a diversity of actors (Benhabib, 1992: 100). However, the difference between Banerjee's interpretation and the position taken in this book is that Banerjee refuses any categorization of claims, whereas in this book such a categorization is acknowledged. What is criticized, though, is the exclusion of cultural claims from public reason because this would severely constrain NGOs that represent cultural claims in their endeavour to have these claims recognized as legitimate by corporations.

Even if we could define the legitimacy of an NGO's claims substantively, would this be helpful for telling them apart from interest groups on the one hand and activists on the other hand? Obviously, a substantive definition of public claims in contrast to particularistic claims would help us tell NGOs apart from interest groups because interest groups characteristically promote particularistic claims (Young, 2001: 674). But such a distinction would not help us tell NGOs apart from activists, because – as has been mentioned above – NGOs often share the content of their claims with radical activists: both of them raise public claims with a societal relevance and claim to be "committed to a universalist rather than partisan cause" (Young, 2001: 675). Thus, even if one could distinguish public from particularistic claims, the normative orientation of substantive criteria would be limited to distinguishing NGOs from interest groups but not from activists.

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[4] Religious or cultural claims have a bigger chance of being respected if they are accompanied by environmental objections, as often happens in the case of the mining industry (Banerjee, 2000: 27). This is because the environment is recognized as an issue that affects people in common (Chandhoke, 2005: 360). Banerjee in general reproaches stakeholder theory for pushing Aboriginal interests into a capitalist colonial framework, which imposes an alien knowledge system on them and subjugates their local knowledges (Banerjee, 2000: 21).

Chapter 13
Structural Characteristics of Legitimate Partner NGOs

The Problem of Representation

As stated when introducing the three-dimensional legitimacy deficit of NGOs (in the section "The Triple Legitimacy Deficit of NGOs" (Chapter 1)), the structural dimension addresses the problem that NGOs represent the needs of a "constituency" which has not elected them. This dimension in the first instance concerns the problem of representation. It is important to note that the problem of representation affects all associations; it is not restricted to NGOs but is equally relevant for interest groups and activists. However, as we will see later, the typical non-membership structure of NGOs adds a different spin to the problem of representation.

Representation plays an important role in democratic theory. Its relevance can be divided into two dimensions: on the one hand, representation can be conceived of as a public sphere effect of associations, namely as the representation of differences and commonality through associations. This aspect of NGOs and related actors will be addressed in the section "Distinguishing NGOs and Activists According to Procedural Criteria" (Chapter 14). On the other hand, representation can also be conceived of as an institutional effect. This effect can best be expressed in the words of Warren, who states that "(a)ssociations speak on behalf of their member-voters, communicating the meanings of votes to representatives" (Warren, 2001: 83). The institutional effect of representation can best be achieved if an association is internally democratically organized. More on the institutional effect of representation will be said in the next section.

In the NGO world, the problem of representation becomes especially manifest in the context of global governance, where the question is, do northern NGOs in global institutions such as the international finance institutions offer a fair representation of the needs of poor communities in developing countries (Nelson, 2001; Kaldor, 2003b; Edwards, 2000)? But the north-south divide also plays an important role in the Corporate Social Responsibility context, since much CSR work relates to issues in the global South (e.g. child labour, sweat shops, or pollution). Very often people in the South are the intended "beneficiaries" of business-NGO collaborations (Bendell, 2005: 363). The underlying assumption is that such collaboration supports the development of the global South. While on some issues (like land mines),

there is a broad north-south consensus, which results in a unified policy position, on other issues (especially issues related to trade, labor rights, and the environment), there is no such consensus because the "short-term interests" of the people and their representatives might conflict in different parts of the world (Edwards, 2001: 6).

The most obvious means for achieving fair representation of interests are democratic elections. Yet, as has been argued in the section on the liberal principle of legitimacy (in the section "Liberal Principle of Legitimacy" (Chapter 9)), such radically democratic measures are inappropriate because they misjudge the status of NGOs as civil society organizations that operate outside classical political institutions (see also Hendriks, 2006: 496f.). Hence, we need to look at other means of ensuring that NGOs speak for their "constituency".

The demand that NGOs speak for their constituency is called "voice accountability" (Slim, 2002: para. 14). Voice accountability, according to Slim, has become

> ... the most contested area of NGO accountability and legitimacy. It seems to have replaced the old fundraising and administration ratio as the critical criteria of NGO legitimacy in the new century. (Slim, 2002: para. 14)

Slim summarizes the debate about NGO voice accountability as follows:

> Do NGOs speak as the poor, with the poor, for the poor or about the poor? (Slim, 2002: para. 17)[1]

In any case, formal democratic representation cannot be the only means for ensuring that NGOs speak for their "constituency". To put it in Edwards' words, it is not the only route to "civic legitimacy in global governance" (Edwards, 2001: 7). With respect to ensuring their voice accountability we could for instance specifically require NGOs to demonstrate the effects their activities have on their constituency, or we could demand that they involve local knowledge. We could equally focus on their engagement in partnerships (if we perceive partnerships as a means of indirect representation), and we could ask them to reveal their research methods and prove the objectivity of their analyses (Clark, 2001: 26).

However, the legitimacy deficit of NGOs extends beyond voice accountability, since voice accountability only refers to the legitimacy of NGOs vis-à-vis their constituency, that is, to the question whether they speak for their constituency. I will now outline some structural criteria that are suggested in order to overcome the legitimacy deficit of NGOs as a whole. As has been argued in the section "Addressees of NGO Legitimization" (Chapter 1), NGOs not only need to legitimize themselves and their claims vis-à-vis their constituency but vis-à-vis the public sphere which encompasses two dimensions, namely civil society (i.e. the constituency of NGOs) *and* companies.

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[1] As mentioned in the section on the addressees of NGO legitimization (in the section "Addressees of NGO Legitimization" (Chapter 1)), Slim's conception of voice accountability is termed downward accountability by other authors (Brown and Jagadananda, 2007: 24; Fowler, 2000: 63; Ebrahim, 2003: 816; Edwards and Hulme, 1996: 969).

Structural Criteria for the Legitimacy of NGOs

One possible criterion for the legitimacy of NGOs is their formal registration with governments or international organizations. One example for such a legal criterion is provided by the Internal Revenue Code of the United States. Section 501(c)(3) requires nonprofits to provide detailed information about their finances, organizational structure, and programs through an annual information return. This information seeks to confirm that the organization's "activities are primarily for educational, charitable, religious, or scientific purposes and for public, rather than private, benefit" (Ebrahim, 2003: 816). The problem with this criterion is that it may establish the legal status of NGOs but not necessarily their legitimacy.[2] Legality is only a small part of an organisation's fundamental legitimacy; the wider legitimacy of an NGO is derived morally (Slim, 2002: para. 26). Moreover, if we rely on formal registration as a criterion, we leave it up to the registration guidelines as issued by the public body in question to define NGOs. In general, it is hard to conceive of forms of registration that would exclusively apply to NGOs but not to related associations such as charities, grant-receiving bodies, community-based enterprises etc. (Gray, Bebbington, and Collison, 2006: 324; Fries, 2003: 235).

Another possibility consists in linking structural legitimacy to *internal democratic structures* of NGOs and thus in focusing on democracy as the central value for determining structural legitimacy. This criterion is certainly worth consideration given that NGOs often "have rather dubious democratic credentials" with leaders not being elected and members having little influence on the orientation of the organization (Meadowcroft, 2007: 197). One example of a clear-cut attempt to define legitimacy by means of structural criteria can be found in the UN resolution on the consultative relationship between the UN and NGOs. For the UN, the NGOs that shall be granted consultative status are defined according to mostly formal or structural criteria, such as their internal democratic decision-making process or the derivation of their basic resources (United Nations Economic and Social Council, 1996). It is evident that such a general definition does not help to distinguish NGOs from interest groups and activists, as both can easily fulfil the criteria established by the UN in its Resolution 1996/31.

In a similar way, Kovach, Neligan, and Burall (2003: 22/23) link NGO accountability to its democratic structures. They conclude that Amnesty International is particularly accountable because eight out of nine individuals on Amnesty International's executive body are elected by members. This leads to a "good overall control of the organisation". Moreover, due to its federal structure, which entitles each section to representation and votes on the governing body, "a minority of members does not dominate [the] governance".

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[2] However, if we believe Hertel, the legal constraints which the nonprofit tax status entails, seem yet to be effective in securing legitimacy in so far as "(s)ome groups leave the NGO sector entirely, forgoing the traditional 501(c)(3) nonprofit tax status under U.S. law in order to be able to gain revenue from the promotion of strategies to enhance corporate responsibility" (Hertel, 2010: 172).

Internal democratic structures, as briefly mentioned before, are thought to constitute an institutional effect of representation. But we must note that internal democracy is not a prerequisite for other democratic effects (Warren, 2001: 84). Democratic structures of associations can actually inhibit the effectivity of their public voice. This happens if the open dialogue within an association nuances or confuses the message so that its impact within a broader public is reduced. Consequently, associations with a distinctive public voice may find it difficult to resolve internal conflict through deliberation (Nijhof, de Bruijn, and Honders, 2008: 164). Yet we must not confuse the public voice to which Warren refers with the discursive orientation that interests us here. Warren refers to the empirical impact of an association's communication, regardless whether this communication meets deliberative requirements or is purely strategic.[3]

Finally, one could also derive an NGO's legitimacy from the fact that it is likely to be a *non-membership organization* (Ebrahim, 2003: 815). In non-membership organizations there are three parties involved: the organization, the donors and the constituency which the NGO claims to represent (Teegen, Doh, and Vachani, 2004; Gray, Bebbington, and Collison, 2006; Mitlin, 1998). In non-membership organizations legitimacy is typically claimed by legal compliance, effective oversight by their trustees, and recognition by other legitimate bodies that they possess valuable knowledge and skills (Edwards, 2001: 7). Since NGOs very often claim to represent the needs of disadvantaged people and since these people are most often excluded from access to global civil society organizations (because they lack financial, educational and technological resources) (Chandhoke, 2005: 362; see also Leggewie, 2003), it is only logical that NGOs assume the form of non-membership organizations. The non-membership structure of NGOs is indicative of the fact that they fight for the demands of those who do not have their own voice in global civil society.

Because of their non-membership structure, NGOs are different from interest groups which are mostly membership organizations with two parties involved, namely the organization and its members. Membership organizations typically define their legitimacy through ordinary democratic election processes and formal sanctions that warrant that an organization is representative of, and accountable to, its constituents (Edwards, 2001: 7):

> One condition of representative communication is that there exist organized communication between members and those who claim to speak for them. (Warren, 2001: 84)

Some organizations take the mere fact that they are membership-organizations operating in a democratic society as proof of their legitimacy (SustainAbility, 2003: 17). However, as Bosso observes, in most advocacy organizations with a membership structure, members hardly matter since their only activity consists in writing checks (Bosso, 2003). This, he claims, proves that there is a big gap between the "idealized active 'member'" (Bosso, 2003: 408) of the type of citizen groups that have been at the origin of political scientists' research, and "the more common passive

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[3] On why requiring democratic structures is not tenable from a deliberative point of view see section "Implications of Restricting the Content of Public Reason" (Chapter 7).

'supporter'" (Bosso, 2003: 408) of the majority of today's advocacy organizations. Bosso claims that advocacy organizations in which members play an entirely passive role after all operate as mere "nonprofit corporations" (Bosso, 2003: 408). But in a rather provocative conclusion he states that it is only logical that professional NGOs do not look "for activist members in the classic sense, nor would they know what to do with these people if they had them" (Bosso, 2003: 410), since after all "of what use are 'members' when lawyers, scientists, and policy experts are far more valuable in day-to-day policy debates at the national and international levels of discourse?" (Bosso, 2003: 410).

Leaving the challenge of assigning members in membership organizations a meaningful role aside, the main difference between a membership and a non-membership organization relates to the fact that whereas a member of an interest group pays a membership fee in order to make the interest group represent his/her interests, a donor gives money to an NGO because he/she believes in the issue the NGO claims to represent. This structural feature exonerates NGOs from the suspicion of advocating only particularistic interests. NGOs as non-membership organizations do not represent specific groups but rather ideational concerns. Yet the danger that NGOs might use donations primarily to advance the material well-being of their staff remains unaffected by the structural feature of donorship (Hilhorst, 2003: 7). Thus, the structural specificity of non-membership organizations does not demand any effort on the part of NGOs but is rather a circumstance that supports the impression that NGOs are oriented towards "public concerns".

The non-membership structure of NGOs is a double-edged sword when it comes to defining the legitimacy of NGOs. On the one hand, it inhibits NGOs from representing their members in a formal, narrow sense. But at the same time, the credibility of NGOs as advocates of ideological concerns is enhanced by the non-membership structure of NGOs because in non-membership organizations there is a solidarity component involved whereas membership organizations operate under the suspicion of advocating particularistic interests. And even though the non-membership structure helps us tell NGOs apart from interest groups, it might not be helpful for distinguishing them from activists since activists, if they are formally organized at all, surely rather have a non-membership than a membership structure.

Structural Ties Between NGOs and Interest Groups: Co-optation and Corporate Front Groups

Let me now describe two related structural phenomena, co-optation and corporate front groups, that make evident how easily the difference between NGOs and interest groups can become blurred.

Co-optation denotes the ability of a corporation to "bring the interests of a challenging group into alignment with its own goals" (Trumpy, 2008: 480). Co-opted NGOs are gradually absorbed and their organizational identity is compromised (Brinkerhoff, 2002, quoted from Selsky and Parker, 2005: 862). Co-optation

becomes manifest for example in sponsoring relationships, labelling agreements or through personal ties between NGOs and corporations (Baur and Schmitz, forthcoming).

As we will see in the section where the procedural characteristics of legitimate partner NGOs are compared to those of interest groups (in the section "Distinguishing NGOs and Interest Groups According to Procedural Criteria" (Chapter 14)), co-optation does not necessarily manifest itself structurally but can also – in a "milder" form – be a procedural phenomenon. I will thus refer to structural forms of co-optation here and treat procedural forms of co-optation in the section "Discursive Style" (Chapter 14).

The reason for co-optation is seen in an orientation towards so-called pragmatic legitimacy (Den Hond and De Bakker, 2007). This term, which stems from Suchman, denotes the kind of legitimacy that "rests on the self-interested calculations of an organization's most immediate audiences" (Suchman, 1995: 578).[4] If NGOs choose such a legitimization strategy, they risk provoking resistance, especially from activists (Palazzo and Scherer, 2006: 78; Albrow and Anheier, 2005: 12). A co-opted NGO loses sight of civil society's public interest and becomes corrupted by the particularistic interest logic of the economic system – it is "seduced into a corporate lotus-eating bliss" (Gray, Bebbington, and Collison, 2006: 328).

The most obvious source of *structural co-optation* lies in the dependence of an NGO on corporate funding (Bendell, 2005: 370) "which can range from single, small contributions to larger, ongoing contributions that bind the parties together for many years". In general "financially significant relationships" between corporations and NGOs have increased in recent years (Simpson, Lefroy, and Tsarenko, 2011). Yet, if NGOs really want to act as representatives of public claims they have to be free from corporate interests, which are typically particularistic interests. This requirement often stands in tension with the practical necessity of NGOs to find funding for their activities. Funding is often part of a trade-off where corporations offer money while NGOs "offer access to interests and ideologies that are lacking within most for-profit organizations" (Simpson, Lefroy, and Tsarenko, 2011). As a consequence, the NGO risks being pushed into the role of a service provider rather than a representative of public claims. Corporate sponsoring poses a threat to the independence of NGOs (Nijhof, de Bruijn, and Honders, 2008: 164).[5]

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[4] Suchman contrasts this conception of legitimacy with moral legitimacy, which reflects conscious moral judgments about the rightness of an activity. As a third notion he introduces cognitive legitimacy, which depends on the social acceptance of an organization and its behaviour (Suchman, 1995: 578ff.). As we will see later, the difference between pragmatic and moral legitimacy is especially relevant for the context at hand, because it is exemplary in pointing out the different notions of legitimacy that are typically associated with interest groups (self-interested calculations) and NGOs (moral legitimacy).

[5] Nijhof, de Bruijn, and Honders (2008: 164) note that the problem is further aggravated by the fact that NGOs are most likely to be sponsored or involved as partners by companies who predominantly follow a strategy of risk control. Such a strategy means that these companies only see NGO-business partnerships as a strategic tool in order to maintain their reputation or in order

Let me illustrate this threat with two examples. Some evidence on the delicate relation between corporate funding and the independence of an NGO can be gained from the following case: Save the Children, an NGO which is generally open for corporate sponsoring found itself in a harmonious relationship with corporations like Coca-Cola and Pepsi as long as it only used corporate funding for its humanitarian and development work abroad. However, when Save the Children started to include the problem of child obesity in the United States on its agenda and even supported soda tax campaigns that local organizations with an interest in child health issues mounted in various states, Save the Children leadership decided that the issue "was too controversial to continue" (Neuman, 2010: B1). Of course, it is subject to speculation whether Save the Children was put under pressure by (potential or actual) corporate donors or whether it took the decision to change its agenda on its own (Baur and Schmitz, forthcoming). However, the incident shows that the risk posed by corporate funding to an NGO's independence must not be underestimated.

Another case is reported by Hari who describes an unhealthy entanglement between WWF and IKEA. Upon the revelation that a considerable proportion of IKEA's dining room sets contained wood that stemmed from endangered forests, WWF apparently defended IKEA by claiming that "IKEA 'can never guarantee' this won't happen." This leads Hari to wonder: "Is it a coincidence that WWF is a 'marketing partner' with IKEA, and takes cash from the company?" (Hari, 2010).

Given the need for NGOs to acquire funding for their activities and given the fact that corporations are potent and often generous donors, how should an NGO counter the threat of structural co-optation that arises from its dependence on corporate sponsoring?[6] According to the SustainAbility report on the "twenty-first century NGO", we can distinguish amongst various attitudes of NGOs towards corporate sponsorship. NGOs that enter into partnerships with business and that do not discriminate between their corporate targets, but instead are keen to please, are least critical in accepting corporate funding. But due to heightened criticism from more confrontational NGOs or from activists they have been sensitized to this issue. The most critical attitude is represented by Greenpeace who follows a strict policy of not accepting any corporate donations. In fact, Greenpeace only accepts money from its members.[7] Oxfam pursues a more differentiated approached which proves of a transparent yet critical attitude towards corporate funding. This attitude becomes evident by Oxfam's declaration that it would not accept any funding for development work in Iraq from the belligerent countries (Cater, 2003). In the meantime, a number of NGOs have elaborated policies on corporate funding (SustainAbility,

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to prevent it from being damaged. Such companies should be approached especially critically by NGOs.

[6] The dependence can also assume less straightforward forms. The pressure might not directly stem from companies as funding sources but rather from foundations that make the granting of funds to NGOs dependent on the NGOs' engagement with a company (SustainAbility, 2003: 33).

[7] "Greenpeace relies on donations from generous individuals to carry out our work. In order to remain independent, we do not accept funding from governments, corporations or political parties." (http://www.greenpeace.org.uk/donate)

2003: 14). The limitation on or even prohibition of financial transactions between the parties involved in a partnership is one way in which NGOs attempt to maintain their independence (SustainAbility, 2003: 30).[8]

Another form of structural co-optation arises if NGOs enter into a labelling agreement with companies, which means that a company sells products whose label claims that they are directly or indirectly endorsed by an NGO. Involvement in labelling schemes for certain products sold by a corporation poses a problem for NGOs if the company at the same time sells other products that do not meet the ethical standards of the NGO. Apparently, many NGOs are critical of certification or labelling because they perceive these methods to be too incremental – that is too growth-oriented and therefore market-oriented (Murphy and Bendell, 1999: 52). However, well-established NGOs such as the WWF are less shy to engage in such agreements. The Dutch chapter of WWF has for example branded climate-neutral credit cards from the Dutch Rabobank with its logo (van Huijstee and Glasbergen, 2010: 608).

Recently, the Marine Stewardship Council, a nonprofit which was initiated by the World Wildlife Fund (WWF) and Unilever, has been accused of subjecting itself to the dictate of growth. According to a recent article by an internationally renowned professor for marine biology, the MSC, while originally only certifying small-scale fisheries, is now not only approving "large, controversial companies", but it in fact "has begun to measure its success by the percentage of the world catch that it certifies". Pauly ascribes this behaviour to the fact that the MSC has received a grant from the Walton Foundation. He fears that the MSC, in order to help Wal-Mart achieve its goal of selling only certified fish, is actually even considering certifying reduction fisheries. This would enable Wal-Mart, "to sell farmed salmon shining with the ersatz glow of sustainability" (Pauly, 2009).

A rather clear cut case of "selling out" can be seen in the Sierra Club's decision to endorse a "new range of 'green' household cleaners" from Clorox bleach and to accept a percentage of the sales (Hari, 2010). The willingness to subject themselves to the laws of the market is further confirmed by the Sierra Club's executive director, Carl Pope who is quoted as saying: "I won't pretend it's not internally controversial; it is. But we decided it was more important to try to create this marketplace [for green cleaning products] than to keep the peace" (Hoffman, 2009: 48).

Finally, research from the environmental movement context suggests that there is also some increase in personal ties between NGOs and corporations as well as foundations, typically occurring in the form of board interlocks where an NGO for example incorporates a corporate representative in its board, or vice versa (Hoffman and Bertels, 2009: 13; Baur and Schmitz, forthcoming).

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[8] Other means for avoiding structural co-optation are a thorough monitoring of the projects involved in a partnership and explicitly stated permission to criticize the other partner in activities that are not part of the partnership. We could extend this with a limitation on co-branding, and clear guidelines on the interplay between confidentiality and transparency in various aspects of the partnership. Moreover, both partners are usually allowed to withdraw from the cooperation any time (SustainAbility, 2003: 30).

A structural phenomenon that goes beyond co-optation is stimulated by the increasing "commodification" of certain NGO activities such as contractual service delivery and consultancy type work (Uphoff, 1996, quoted from Murphy and Bendell, 1999: 8). In fact, judging from their definitions of NGO-business partnerships, some scholars seem to see the provision of services as the very essence of such partnerships. For example Le Ber and Branzei define a "cross-sector partnership" as "voluntary working arrangements between for-profit and not-for-profit organizations (...) which involve the deliberate exchange, sharing or co-development of products, technologies or services that address an unmet need for a specific segment of society" (Le Ber and Branzei, 2010: 601). More critical voices diagnose "a whole commercial market (that) develops around shaping, assessing, and consulting on the desired dimensions of social responsibility. A new breed of strategic consultants is also emerging in this new potentially lucrative field" (Shamir, 2004: 68).

In such service-oriented arrangement, it is not the boundaries between NGOs and interest groups that become blurred but rather the boundaries between NGOs and companies. This trend happens in two directions: entrepreneurial NGOs and activist companies. Entrepreneurial NGOs can often be found among grassroots organizations in developing countries which aim to empower people through income-generating projects. On the other hand, there are also activist companies such as The Body Shop (Murphy and Bendell, 1999: 8). From this dual trend, Murphy and Bendell conclude that closer interaction between business and NGOs might not only be desirable but also inevitable. While I agree with the latter – because surely entrepreneurially oriented NGOs want to establish relations with companies from whom they expect synergetic effects – I do not consider such collaborations necessarily desirable, at least not under the label of the NGO-business partnership. Rather than a partnership such collaboration would have to be denoted as "economic cooperation". In contrast to the NGO-business partnerships that interest us here, this type of interaction serves to bring NGOs in touch with business rather than to bring business in touch with NGOs. That is, this type of interaction aims at conveying economic knowledge to NGOs, and not, as in NGO-business partnerships, to hold companies accountable for their social responsibility.

Another phenomenon that goes even further are so-called *corporate front groups*, namely NGOs that are actively set up by corporations which want to promote their business interests disguised as public concerns (for lists of front groups see Sourcewatch, 2007; or Multinational Monitor, 2006). Corporate front groups are interest groups in disguise. Another term for the same phenomenon is "astroturf NGOs", which denotes "neo-liberal business organizations which espouse a business agenda under the cover of NGO legitimacy" (Gray, Bebbington, and Collison, 2006: 329). The difference between financial structural co-optation and corporate front groups can be articulated as follows: in the first case the dependence of the NGO on the company is limited to the role of the company as a sponsor; in the second case, the "NGO", i.e. the corporate front group, is initiated by business, meaning that business not only acts as a financial force but also, from the beginning on, as a proactive one.

Corporate front groups can be characterized by the fact that they are functionally embedded in the system which they target. They are embedded in the market and the market is what they aim to reproduce. By contrast, "legitimate NGOs" are fully embedded in civil society and thus target the market from without. This difference, between an association being functionally embedded within the system which it aims at reaffirming and an association acting from the outside is best represented by the terms vested versus nonvested interests (Warren, 2001: 117). Corporate front groups represent an exemplary case of vested interests, whereas "legitimate partner NGOs" represent nonvested interests.[9] As we will see in the section on procedural characteristics of NGOs in comparison to interest groups (in the section "Distinguishing NGOs and Interest Groups According to Procedural Criteria" (Chapter 14)), whether an association is vested or nonvested also affects its tendency to rely on discursive means for promoting its claims.

An example of a corporate front group is the Global Climate Coalition (GCC) (for another example see Covey and Brown 2001). The GCC, a confrontational industry group in the United States, battled reductions in greenhouse gas emissions by pretending concern about the drastic increase in gas prices and unemployment that would result from emissions regulations (Sourcewatch, 2007; Earth Policy Institute). Yet, in fact, the GCC was a pure PR-vehicle set up by the industry. When British Petroleum (BP) and later Ford realized the threat to their reputation that resulted from their membership in this coalition, they left the GCC.[10]

Equally illustrative is a case reported by Apollonio and Bero (2007) from the tobacco industry. They suggest that the tobacco industry is particularly prone to the creation of front groups because it suffers from a general lack of trust. In 1994, the tobacco company R.J. Reynolds created a coalition named "Get Government Off Our Back" with the goal to fight federal regulation of tobacco. Quite soon the coalition started to hide its initial goal behind the support of outside organizations without an immediately visible stake in tobacco issues (such as veteran groups but also the

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[9] Snow, Soule, and Kriesi (2004: 7) find a similar distinction at work between social movements and interest groups. According to them, interest groups "are generally embedded within the political arena", whereas social movements "are typically outside of the polity". Snow concludes from the embedding of interest groups that they are recognized as legitimate actors within the system whereas social movements usually lack the same "standing or degree of access to or recognition among political authorities". Obviously, Snow et al. advocate a descriptive notion of legitimacy which equates with social acceptance.

[10] BP's official justification was that "the time to consider the policy dimensions of climate change is not when the link between greenhouse gases and climate change is conclusively proven, but when the possibility cannot be discounted and is taken seriously by the society of which we are part. We in BP have reached that point." (Earth Policy Institute, 2006). One can easily recognize the company's attempt to salvage its reputation by taking societal perceptions as a benchmark for its actions. When Ford left the GCC a couple of years later, it stated that "over the course of time, membership in the Global Climate Coalition has become something of an impediment for Ford Motor Company to achieving our environmental objectives" (Earth Policy Institute, 2006). With this statement, Ford made it clear that it realized the impending threat to its credibility in the field of environmental responsibility if it kept its membership in the GCC alive. The GCC eventually disbanded in 2002 (Sourcewatch, 2007).

US Chamber of Commerce and Citizens for a Sound Economy) of whom however at least 46% were financially supported by the tobacco industry (Apollonio and Bero, 2007: 421). The organizers even openly claimed that the coalition initially had been set up to protect small business, because larger firms "often welcome new regulations because they know the regulations will help consolidate their market share and wipe out small business competitors" (Apollonio and Bero, 2007: 422). They thus managed to present their anti-regulation agenda as an expression of the will of seemingly independent civil society organizations (Apollonio and Bero, 2007; see also Carter, 2002).

It thus becomes obvious, that corporate front groups are industry-led initiatives. While their inherent tendency not to disclose their origins is morally questionable as such, the problem with corporate front groups is further aggravated (and becomes relevant for NGOs) by the fact that they typically aim at eliminating "rival NGOs". Bendell points to the initiative of the American Apparel Manufacturers Association, the Worldwide Responsible Apparel Production (WRAP), as an example of such an industry-led initiative which lacked any public disclosure and systematically crowded out stakeholders from active participation in the organisation's work. Initiatives like WRAP are a clear attempt on the part of big corporations to take over a *modus operandi* that was developed by NGOs (Bendell, 2005: 364ff.).

The difference between the terms co-optation and corporate front groups (or astroturf NGOs) consists of the actors to whom they ascribe "the active part"; whereas "co-optation" describes NGOs as the active agents that seek proximity to the economic system, the term "corporate front groups" describes corporations who play the active part by setting up their "private NGOs". In any case, both (structural) co-optation and corporate front groups, denote an interaction with corporations in which NGOs risk losing their independence and thus can no longer be considered genuine representatives of civil society. Legitimate partner NGOs do not lose sight of their commitment to the public interest when cooperating with companies. Instead, they successfully manage to walk the tightrope between collaborating with economic actors and maintaining their independence from the private interest orientation of the market sector.

How could one make sure that NGOs are not co-opted by economic interests? One measure for revealing co-optation would be to require NGOs to disclose their connections to corporations (Gray, Bebbington, and Collison, 2006: 329, 336ff.). However, apart from the difficulty of enforcing such a measure, it might only help to distinguish between NGOs and corporate front groups/interest groups in cases where their proximity is structurally evident. In many cases, co-optation becomes manifest procedurally rather than structurally, as we will see section "Discursive Style" (Chapter 14). Moreover, an important empirical point is that most disclosure statements, reports, and evaluations are conceptualized as tools of "upward accountability", not "downward accountability" (Ebrahim, 2003: 824). As stated in the section "Addressees of NGO Legitimization" (Chapter 1), upward accountability refers to relations with donors, foundations, and governments and mostly focuses on the use of designated money for designated purposes. Downward accountability refers primarily to relationships between NGOs and their constituency

(Ebrahim, 2003: 814; Edwards and Hulme, 1996: 967). Downward accountability is particularly important in the distinction between NGOs and activists (see next section).

After having argued that structural measures do not provide normative orientation for telling NGOs apart from interest groups, I want to assess whether they are helpful in order to tell NGOs apart from activists.

Structural Ties Between NGOs and Activists

So far, I have only addressed the problem of co-optation of NGOs through economic interests. Yet, the "unhealthy proximity" that raises doubts about the legitimacy of NGOs as partners of corporations can also occur between NGOs and activists. Taking the ties between NGOs and activists as an indicator of the legitimacy of an NGO is a double-edged sword. Of course, an NGO that maintains close connections to groups which disregard basic rules of civil behaviour cannot be considered a legitimate partner. This is the case for instance when NGOs collaborate closely with activist groups that not only deny a corporation's status as a legitimate partner but even its right to existence. At the same time, the fact that many NGOs have interest ties with more "radical groups" is indicative that they are not purely elite organizations but are in touch with "the people" (Murphy and Bendell, 1999: 51).

If we assess what is the right degree of proximity between NGOs and activists from a descriptive perspective, we can distinguish between negative and positive radical flank effects. On the one hand, the backlash that the activities of radical factions can have because they undermine or discredit the activities and goals of the NGO is known by the term "negative radical flank effect" (Haines, 1984: 32). On the other hand, ties to more radical groups can also have a positive radical flank effect; this is the case when "the bargaining position of moderates is strengthened by the presence of more radical groups" (Haines, 1984: 32). But obviously, as the vocabulary of Haines' quote reveals, this perspective does not provide normative orientation but rather strategic advice.

Many theorists place high value on the links of NGOs to activists. Parker states that NGOs draw their lifeblood from being embedded in wider social movements (Parker, 2005: 170). Den Hond and de Bakker – in their descriptive exploration of the influence of activism on corporate social change activities – similarly claim that ties to radical groups are a very positive effect on the legitimacy of the "core group". According to them, radical factions that are closely associated to an NGO can pave the way for the claims of the "core group" and thus strengthen their (descriptive) legitimacy; their existence might even facilitate the NGO's access to decision-makers (Den Hond and De Bakker, 2007: 904). However, this conclusion must be taken with a grain of salt because if the radical factions go too far in their disruption of the establishment, it might also affect the NGO's ability to raise funds. All in all, it is difficult for NGOs to find the "right degree" of proximity to radical groups (Haines, 1984), that is, to determine how close the ties between NGOs and radical factions should be so as to ensure their social embedding without being factually

co-opted by the radical factions. Yet it becomes quickly evident that structural measures are not adequate for determining the right degree of proximity. Rather, we need to assess whether the more radical factions collaborating with an NGO remain committed to civil behaviour and are primarily oriented towards discursive and consensual behaviour. The assessment of these characteristics, however, needs to be based on procedural rather than on structural characteristics, as will become obvious in the section "Distinguishing NGOs and Activists According to Procedural Criteria" (Chapter 14).

The close connections between NGOs and their more activist counterparts have received heightened attention because of the obvious disconnection between certain global-level NGOs and their constituencies. Grassroots activities are much closer to the NGOs' constituencies than are professional organizations. Grassroots action often plays an important role in initiating calls for greater social and environmental responsibility on the part of corporations (Murphy and Bendell, 1999: 51). The developing disconnection from the grassroots has undergone harsh criticism from activists and theorists alike in the past years. Chandhoke reproaches international NGOs for "hardly ever com[ing] face to face with the people whose interests or problems they represent" (Chandhoke, 2005: 362). NGOs are accused of not listening to the grassroots activists and concentrating instead on "travelling all around the world (...), getting far away from what happens locally" (Albrow and Anheier, 2005: 12; see also Edwards, 2000; and Mitlin, 1998: 86ff.) Anderson even claims that international NGOs are not "conduits from the 'people' or the 'masses' or the 'world citizenry' from the 'bottom up'" but rather "a vehicle for international elites to talk to other international elites about the things – frequently of undeniably critical importance – that international elites care about" (Anderson, 2000: 118). He thus diagnoses a horizontal rather than vertical conversation.[11]

This rather radical criticism aside, it is safe to claim that even if NGOs maintain their links to grassroots organizations, this does not necessarily make them automatically "better representatives" of their constituency's concerns. It all depends on how the relationship between an NGO and a grassroots organization is shaped. There is always a danger that NGOs may enforce their own agendas upon their partners or that the local communities will not be properly involved. It is also possible for the relationship between NGOs and grassroots organizations to assume paternalistic forms, which are shaped by the grassroots organizations' dependence on the NGOs (Mitlin, 1998: 86ff.). Hence, the sole fact that an NGO can credibly prove that it has ties with its constituency might be a necessary but certainly not a sufficient indicator of its legitimacy.

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[11] A reaction to the professional NGOs' disconnection from their constituencies can be seen in mass membership organizations of the poor and excluded in the southern half of the globe which typically focus on activist behaviour, such as the Landless Rural Workers Movement (MST) in Brazil (Fowler, 2000: 31).

Deriving Normative Orientation from Structural Criteria?

In the previous section I argued that the structural legitimacy deficit of NGOs is made evident by the fact that they are non-membership organizations who speak for a constituency that has not officially given them a mandate to do so. On the other hand, it is precisely the fact that they are non-membership organizations that makes NGOs more credible as advocates of public claims. Membership organizations typically come under the suspicion of representing the particularistic interests of their members only.

In general, structural criteria for defining the legitimacy of NGOs as partners of corporations focus on technical aspects. As a consequence, structural criteria might serve as indicators for the descriptive legitimacy of NGOs but are not adequate for judging the normative legitimacy of NGOs as partners. This becomes evident in attempts such as to define NGOs by assessing whether they qualify for tax-exempt status in accordance with the US Internal Revenue Code. Legal accountability must not be confused with normative legitimacy. Of course, structural measures such as disclosure statements might help to reveal corporate front groups, which probably constitute the most extreme case of blurred boundaries between NGOs and interest groups. They might also help to reveal if an NGO has an unequivocal dependence on one or two powerful corporate donors. But structural measures of this type only function upward – they are only adequate for determining whether an NGO is accountable to its donors, foundations and, in case of NGO-business partnerships, to companies. As Scholte rightly argues, most of the accountability mechanisms that NGOs deploy – such as "loose oversight by a board (often composed largely of friends, who are in some cases paid), periodic elections of officers (with low rates of participation and sometimes dubious procedures), occasional general meetings (with sparse attendance), minimalist reports of activities (that few people read) and summary financial records (which often conceal as much as they reveal)" – mainly address the bureaucratic requirements of governments and donors (Scholte, 2004: 230/1).

When it comes to downward accountability, that is, the accountability of NGOs to their constituency, structural criteria are not as unambiguous. I have argued that NGOs need to be linked to their activist constituency to some extent in order to receive input from the grassroots. But structural criteria do not help assess the right degree of proximity between NGOs and more radical groups. This degree can only be determined procedurally, as we will see in the next chapter.

Structural criteria thus only provide limited normative orientation. They might help to reveal the blurred boundaries between NGOs and interest groups but in general they fail to capture the fine lines between the three actor types.

Chapter 14
Procedural Characteristics of Legitimate Partner NGOs

After having assessed the normative orientation that substantive and structural criteria provide for distinguishing between legitimate partner NGOs and interest groups as well as activists, the challenge in this chapter is to specify procedural characteristics that allow NGOs to enter into discourse with a corporation without becoming co-opted by the economic logic and without resorting to primarily confrontational means to gain attention. NGOs and corporations typically start from very different frames of reference in their interaction, because corporations are often unsympathetic to public claims. NGOs who wish to approach companies need to choose procedures that are appropriate for transmitting their claims in a "new environment" (Dryzek, 2000: 54). I will first address the procedural differences between NGOs and interest groups and then those between NGOs and activists.

Distinguishing NGOs and Interest Groups According to Procedural Criteria

There are three ways in which NGOs can be procedurally distinguished from interest groups. One way is to look at the *discursive style* that NGOs adopt; the other way is to examine their orientation towards *consensual behaviour,* which is reflected in their choice of how to represent their claims, and the third way is to assess their *orientation towards deliberation and/or bargaining*.

Discursive Style

As to the discursive style, I would argue that NGOs can differentiate themselves from interest groups if they conform to the normative requirements of public reasoning, that is, if they are willing to clarify their claims argumentatively and to prove that their demands are grounded in public interests and not in particular interests. With respect to distancing themselves from pressure groups trying to exert political influence, NGOs need to prove the social relevance of their propositions (Breed, 1998: 59). Interest groups and pressure groups are typically vested

associations, that is, they aim to reproduce the system and are therefore function-
ally embedded within this same system. Vested associations are likely to avoid
public exposure and justification, preferring "to exercise influence through money,
power, or the mobilization of bias" (Warren, 2001: 165). Business lobbies, for exam-
ple, rather engage in large campaign contributions or threats of capital flight when
they exercise political influence instead of publicly justifying their claims (Warren,
2001: 165).

Legitimate NGOs in contrast have "avowable intentions" (Bohman, 1996a: 204).
Social movements must put forward reasons that convince the others that their
claims deserve public attention. Legitimate NGOs are nonvested groups that exhibit
an orientation towards public reasoning because, in contrast to vested groups, they
seek change and thus do not benefit from established flows or resources. In order
to inspire change they discursively justify their claims and stimulate public debate
(Warren, 2001: 165).[1] This requirement is likely to be met only if NGO represen-
tatives understand themselves as "part of a larger public to whom their claims are
addressed" (Bohman, 1996a: 207).

Dryzek makes a helpful distinction that illustrates how representatives of par-
ticular interests differ from representatives of public interests in their preferred
type of reasoning. He distinguishes between instrumental and constitutive reason-
ing. According to Dryzek, constitutive reasoning plays a central role in what he
calls "reflexive intelligence" (2006: 113), which denotes the capability of actors
to develop an enhanced awareness of the consequences of their actions and their
circumstances. They question the strategies of hitherto powerful actors who have
aimed to influence the world according to their interests (Dryzek, 2006: 112). This
is exactly the role that NGOs assume vis-à-vis economic actors.

According to Dryzek, the difference between the two forms of reasoning is
reflected in the motivation for action: an actor who reasons constitutively does not
just ask the instrumental question, "does action X help achieve goal Y within the
context of the world as it is?" but instead asks, "does action X help constitute a
world which I find attractive?" (Dryzek, 2000: 131). Dryzek suggests that non-state
actors are especially prone to constitutive reasoning, or to reflexive intelligence in
general (2006: 115), and that they need to be able to act effectively in the discursive
realm. Civil society actors, in contrast to economic actors or states, are not primar-
ily oriented towards economic or security imperatives. It is up to civil society then
to exploit its freedom to reason constitutively in favour of its values instead of just
reasoning instrumentally (Dryzek, 2000: 131; 2006: 122f.). Dryzek criticizes the
example of the Rainforest Alliance, which claims that rain forests need to be pre-
served because they are storehouses for potential pharmaceutical products. While
this argument might secure the support of pharmaceutical companies, it actually
fosters a discourse in which ecosystems in the Third World are only valued in terms

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[1] This refers us back to the role of social-political critique as spelled out in the section "The Content
of Public Reason" (Chapter 7) which aims to persuade citizens to view fundamental issues in a
different light.

of their economic benefit to the industrial countries (Dryzek, 2000: 131f.).[2] Similar criticism has been directed at the Forest Stewardship Council (FSC):

> The FSC argues that by making at least parts of a forest economically valuable it stops the forest from destruction due to illegal logging, agriculture, or ranching, in other words harvesting a part of the forest saves the rest of it. (Hance, 2008)

However, some environmentalists and also indigenous rights experts say that certification of some token logging companies is not helpful because what is needed is dismantling of the "whole system of industrial logging concessions" (Hance, 2008). The FSC is accused of legitimising a fundamentally flawed approach to forest management (see also Dingwerth, 2008; Schepers, 2009).

The style of reasoning plays a role not only in the interaction between civil society actors and economic actors but also in the interaction between civil society actors and state authorities. With respect to the latter type of interaction, Montpetit criticizes Dryzek for linking cooperation between civil society actors and state authorities inextricably to democratic loss. He claims that Dryzek cannot conceive of interaction between civil society actors and state authorities without the former losing their independence (Montpetit, Scala, and Fortier, 2004: 140). However, Montpetit's interpretation of Dryzek is inaccurate because Dryzek emphasizes the possibility not only of democratic loss through such cooperation but also of democratic gain. On the other hand, Dryzek confines the danger of co-optation to cases in which cooperation goes beyond partnership, when "a group leaves the oppositional sphere to *enter* the state" (Dryzek, 2000: 87, emphasis added). This would then be a case of structural co-optation rather than procedural co-optation.

Harsh criticism of instrumental reasoning is also put forward by Corry. He illustrates this type of reasoning by means of the "rainforest harvest idea". The argument that rainforests need to be preserved because they have more value if left standing than if they are eroded, only takes into account the *monetary value* of rainforests and ignores their *real* value for the people who live with and from the forest (Corry, 1993: 3). The "rainforest harvest idea" would be the line of reasoning offered by a corporate front group set up by the pharmaceutical industry or timber industry. Such a corporate front group would not take into account the risk that results from promoting the enhanced economic value of the rainforest, namely the increased settlement which would threaten its conservation.[3]

Dryzek's distinction between constitutive and instrumental reasoning is comparable to Suchman's distinction between moral and pragmatic legitimacy. As mentioned above, pragmatic legitimacy indicates the self-interested calculations of actors, whereas moral legitimacy reflects conscious moral judgments about the

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[2] There are, of course, certain structural circumstances that influence the probability of (procedural) co-optation. For example, the risk of co-optation is likely to increase if partnerships between an NGO and a company focus on a single issue. In single-issue partnerships NGOs might be more reluctant to criticize their business partners publicly.

[3] For further criticism about timber industry-NGO partnerships, see Murphy and Bendell (1999: 13); and Bendell (2005: 369).

rightness of an activity (Suchman, 1995: 578f.). Instrumental reasoning can thus be viewed as the discursive expression of an orientation towards pragmatic legitimacy, while constitutive reasoning is equivalent to the discursive expression of an orientation towards moral legitimacy.

In a similar vein as Dryzek but in accordance with Suchman's terminology, den Hond and de Bakker state that reformative groups, i.e. groups that are willing to embrace companies as part of the solution, primarily use arguments based on pragmatic legitimacy, thus adhering to instrumental reasoning. By contrast, radical groups, i.e. groups that only see companies as part of the problem, invoke arguments based on moral legitimacy, thus adhering to constitutive reasoning. For den Hond and de Bakker, "the granting of pragmatic legitimacy thus implies a co-operative stance towards firms" (Den Hond and De Bakker, 2007: 16) whereas the granting of moral legitimacy implies a confrontational stance.

However, Dryzek as well as den Hond and de Bakker draw overly strong conclusions. They all suggest that by examining the style of reasoning we can *unambiguously* determine whether an NGO has adopted a cooperative or even co-opted stance towards a company – and thus "qualifies" as an interest group – or whether its attitude is radical – which reminds us of activists – or at least independent. Reliance on instrumental reasoning or the granting of pragmatic legitimacy does indeed recall something we could call "co-opted rhetoric": NGOs that rely on instrumental reasoning discursively cross the boundary over to the private interest orientation of the economic sector. They are thus discursively co-opted. However, co-opted rhetoric should not be confused with the kind of co-optation which becomes manifest in structural ties.[4] Moreover, it must be kept in mind that, to a certain extent, NGOs are well-advised and even required to adopt the language of their corporate partners in order to enhance the latter's understanding.[5] This helps them to build a bridge between their own and their corporate partner's frames of reference. They need to be flexible in their rhetoric without entirely succumbing to the economic rhetoric of benefits and gains. The Rain Forest Alliance exhibits such flexibility. In addition to pointing out the economic value of rain forests as storehouses of potential pharmaceutical products, which Dryzek criticizes as instrumental reasoning, the Rain Forest Alliance (RFA) states equally clearly that

> we must transform the current destructive market system into one that values sustainable production, sourcing, consumption and equitable trade. (Rain Forest Alliance, 2007)

This explicit criticism of the current market system signals that the RFA cannot be considered to be entirely discursively co-opted.

It is important to note that co-opted rhetoric can also occur the other way around, namely in the case of corporate front groups. Corporate front groups pretend to raise

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[4] See section "Structural Criteria for the Legitimacy of NGOs" (Chapter 13) on structural co-optation.

[5] Berry illustrates this with a case on the action of community advocacy groups against the strategic plans of a multinational chemical company. He found that the community groups were forced to "translate their sentiments (and ethical expectations into the language that speaks to the economic concerns and legal structure constraining corporations and governments" (Berry, 2003: 25).

public claims but are in fact organizations set up by businesses in order to pursue their private interests. According to Habermas, however, such a strategy is bound to be unmasked. Starting from the assumption that not all interests can be publicly advocated, he states that

> concealing publicly indefensible interests behind pretended moral or ethical reasons necessitates self-bindings that either on the next occasion expose a proponent as inconsistent or, in the interest of maintaining his credibility, lead to the inclusion of others' interests. (Habermas, 1996b: 340)

All in all, as has been argued in the section on structural characteristics (in the section "Structural Ties Between NGOs and Interest Groups: Co-optation and Corporate Front Groups" (Chapter 13)), procedural characteristics, too, pose a challenge to NGOs of walking the tightrope between collaboration and co-optation. It is not possible to develop exhaustive theoretical guidelines for determining exactly when an NGO steps over the boundary into the economic sector and thus becomes co-opted. Yet examining the style of reasoning is at least an approximate measure; it is necessary but not sufficient for revealing co-optation.

Consensual Behaviour

Besides examining the kind of public reasoning with which an NGO justifies its cooperation with a company, one could also examine the extent to which an NGO is oriented towards "consensual behaviour". As will be argued below, this is not only helpful for distinguishing NGOs from interest groups but also from activists. Of course, the consensual behaviour of an actor is determined by the style of reasoning chosen, so that the reflections from the previous section apply also in this section.

It should be noted that the term "consensual behaviour" sometimes also refers to the orientation of actors to consensus as a goal. Yet, as stated when arguing in favour of a moderate procedural justification of deliberation (in the section "Structural ties Between NGOs and Interest Groups: Co-optation and Corporate Front Groups" (Chapter 13)), for my purpose, particularly in this section on procedural characteristics of legitimate NGOs, consensus-orientation refers to the actors' commitment to consensual methods of promoting their goals. By locating consensus in the methods that NGOs deploy rather than the goals, we do not preclude disagreement as a result. The goal of legitimate NGO action, in accordance with deliberative democracy, is not necessarily consensus but rather "workable agreement" (Young, 2001: 674) or "reasonable disagreement" (Gutmann and Thompson, 2004: 28). Reasonable disagreement relates to "conflicts not between views that are clearly right and clearly wrong, but between views none of which can be reasonably rejected" (Gutmann and Thompson, 2004: 28). Setting consensus as a goal would imply an overly

harmonious account of the result of the interaction between NGOs and companies and would reopen the risk of co-optation.[6]

The deliberative approach takes the orientation of accountable NGOs towards consensual behaviour as an indicator of their distance from interest groups (and activists) whose behaviour is oriented towards conflict. As Young accurately points out,

> An interest group approach to politics encourages people to organize groups to promote particular ends through politics and policy by pressuring or cajoling policy makers to serve those interests. By means of lobbying, buying political advertisements, [. . .], interest groups further their goals and defeat their opponents. (Young, 2001: 674)

Again, consensual behaviour becomes manifest in the style of communication that NGOs choose. According to Dryzek, there are two restrictions on deliberative communication: first, deliberative communication must not involve coercion or the threat of coercion, and second, deliberative communication must be able to connect the particular to the general. If any of these two requirements is violated, the communication must be excluded from deliberation. It is important to note, though, that these two restrictions can be applied to different forms of communication, including storytelling, testimony, rhetoric, greeting or even argument (Dryzek, 2000: 68).[7] NGOs are thus not restricted to formal speech that deprives them of their creativity of expression. More about the danger of depriving NGOs of their "authenticity" will be said in the section on the procedural differences between NGOs and activists (in the section "Distinguishing NGOs and Activists According to Procedural Criteria" (Chapter 14)).

Dryzek's characterization of communication leads us to assess the difference between deliberation and other patterns of communication, such as bargaining and negotiation, which fundamentally rely on the absence or presence of threats.

Difference Between Bargaining and Deliberation

Any conception of deliberative democracy must pay attention to the theoretical distinction between deliberation and bargaining because these two modes of decision-making characterize different conceptions of the political process (Besson and Martí, 2006: xvii). Since bargaining and negotiation are modes of decision-making that are particularly relevant to the economic theory of democracy, they are worth examining in the course of comparing the procedural characteristics of NGOs to those of interest groups. As advocates of particular interests, interest groups typically exhibit some proximity to the economic system and are thus more

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[6] See section "In Favour of a Moderately Procedural Justification of Deliberation" (Chapter 9) on the problem of an overly harmonious account of deliberation. On the problem of dealing with conflict in deliberative democracy in general, see Mansbridge (2006).

[7] Dryzek argues that no form of communication is fully free from the danger of being coercive or of referring only to the particular. He provides examples of coercive and particularistic forms of storytelling, testimony, greeting, rhetoric, and argument (Dryzek, 2000: 68ff.).

prone than NGOs to adapt to the economic functional logic in which bargaining and negotiation play a central role. Before turning to deliberation as a distinctive mode of decision-making for NGOs, however, let me emphasize that this does not mean that bargaining is per se illegitimate or undemocratic (Chambers, 2003: 309). If I argue that their orientation towards deliberation is a distinctive procedural characteristic by which NGOs can mark their distance from interest groups, this is intended as an ideal-typical claim. Balancing the fine lines between situations where a resort to bargaining is legitimate and those in which it is not legitimate is a challenge. Deliberative democrats have thus begun to integrate bargaining into deliberative frameworks of legitimacy (Mansbridge, 2006: 120ff.), and Habermas, too, has defined the conditions for fair bargains.[8]

As mentioned in the section "The Deliberative View of the Political Process: A Non-voting-centric Conception of Democracy" (Chapter 8), deliberation describes the process of opinion formation and decision-making in whose course initially blurred preferences become more explicit and finally result in a reasoned will (Manin, 1987: 357). Deliberation relies on the argumentative backing of claims (Besson and Martí, 2006: xvi; Peters, 1997: 12). The argumentative form of deliberation consists of the exchange of information and reasons among parties who introduce and critically test proposals (Habermas, 1996b: 305). In contrast to deliberation, negotiation or bargaining are based on irrational persuasion or the use of coercion and threats.[9] In bargaining, "all that counts [. . .] are incentives or disincentives with which the parties can tempt or threaten each other" (Peters, 1997: 13; see also Bohman, 1996a: 208). Bargaining can be defined as a "self-interested zero-sum interaction in which whatever I gain, you lose and vice versa" (Mansbridge, 2006: 120). It is essentially seen as the antithesis to deliberation, because an agreement that results from negotiation or bargaining may have been reached by "deception, lies, threats or promises of reward, but it never implies a reasoned change of mind, and parties are openly motivated by self-interest" (Besson and Martí, 2006: xvi). Thus, obviously, bargaining violates the requirement introduced by Dryzek that communication must not involve threats.

According to Habermas, bargaining, understood as negotiation between success-oriented parties who are willing to cooperate, remains an alternative when an issue touches on the diverse interests of affected people in different ways, that is, when there is no generalizable interest or clear priority of one justifiable value over another (Habermas, 1996b: 165). If, on the other hand, morally (i.e. referring to justice) or ethically (i.e. referring to the common good) relevant issues are at stake, we need discourses, which submit the contested interests to a universalization test

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[8] The conditions hold that the arrangement resulting from bargaining must (a) be more advantageous to all than no arrangement whatsoever, (b) exclude free riders who refuse cooperation, and (c) exclude exploited parties who contribute more to the cooperative effort than they gain from it (Habermas, 1996b: 166).

[9] In contrast to bargaining, Mansbridge defines negotiation as requiring "an exploration beyond the original surface preferences of each party, with the purpose of uncovering some features of the relationship that are not zero-sum" (Mansbridge, 2006: 120). Thus, negotiation implies that the participants communicate more than they haggle, as they might be said to do in bargaining.

in the case of moral questions, or which even push *beyond* contested interests in the case of ethical questions (Habermas, 1996b: 165, emphasis added). Similarly argues Gaus who defines bargaining as a process of decision-making adequate for situations in which interests or mere preferences are at stake, while deliberation comes into play in discussions which aim at getting things right or gaining the truth (Gaus, 2003: 148).

Habermas' and Gaus' justifications of bargaining and deliberation can be linked to Suchman's distinction between pragmatic and moral legitimacy: if an actor is motivated by self-interested calculations, we can expect him or her to prefer bargaining in cases in which he or she does not have to justify the claims as a mode of decision-making. If, however, an actor primarily aspires to reveal "the truth", for example by pointing out injustices, we can reasonably expect him or her to be willing to enter into deliberation because he or she has nothing to hide.

A different line of reasoning is presented by Leggewie. He argues that negotiation (or bargaining) takes place, where distribution questions (who gets what?) are at stake, whereas argument takes place when cognitive problems (why and how?) are also on the agenda (Leggewie, 2003: 8). Thus, whereas for Habermas distribution questions, which he considers to be morally relevant questions, are appropriate for deliberation, for Leggewie they can only be resolved through bargaining. If we adhere to our definition of NGOs as advocates of public claims we can then state, in accordance with Habermas, that independently of whether the public claims raised by NGOs relate to moral or ethical questions, they are best resolved by deliberation and not by bargaining. This argument receives further support from the discourse-ethical claim that questions of values, as typically raised by NGOs, cannot just be treated as a special type of questions of interest, as typically raised by interest groups, and that value conflicts are not typically subject to bargaining procedures (McCarthy, 1994: 56). Last but not least, fair bargaining aims at compromises, but many public disputes "are not merely conflicts of interest, but conflicts of principle" (Bohman, 1995: 253) and as such concern disagreements about fundamental values that are not susceptible to compromise because they (see also McCarthy, 1996: 362). Thus again, bargaining is not an adequate method for resolving public claims.

Table 14.1 summarizes the procedural differences between legitimate NGOs' and interest groups. As a preliminary conclusion we can state that the three procedural

Table 14.1   Procedural differences between legitimate partner NGOs and interest groups

	Discursive style	Consensus – vs. conflict-orientation	Preferred pattern of communication
NGOs	Constitutive reasoning	Methods: consensual; goal: reasonable disagreement	Deliberation
Interest groups	Instrumental reasoning	Methods: confrontational; goal: fulfillment of particular interest	Bargaining

criteria assessed in the preceding sections, namely the primary orientation of NGOs towards constitutive reasoning, towards consensual behaviour, and towards deliberation, provide some normative orientation for judging the legitimacy of NGOs as partners of corporations as distinguished from interest groups.

Distinguishing NGOs and Activists According to Procedural Criteria

The difference between the methods of NGOs and of activists might be judged by two main criteria. First, we could assess whether an NGO acts within the boundaries of civil behaviour. This is a *conditio sine qua non* for legitimate partner NGOs, but it is equally a *conditio sine qua non* for legitimate activist behaviour and for legitimate interest group behaviour, though this is not the subject of this book. Second, we must assess whether civil behaviour is expressed discursively or non-discursively. As with the difference made between NGOs and interest groups, it will again be argued that within the discursive orientation NGOs must additionally exhibit consensual behaviour.

I will proceed in four steps (see Table 14.2): First, I will outline the boundary between civil behaviour and un-civil behaviour (1.). Within civil behaviour I will then distinguish between discursive and non-discursive behaviour (2.). Third, I will specifically address the conflict-oriented variant of discursive behaviour called dissensual communication because this kind of behaviour is typical for value-based conflicts such as those in which NGOs are often involved (3.). In a last step, I will focus on the special role played by civil disobedience, that is, non-discursive conflict-oriented behaviour, in distinguishing NGOs from activists (4.). I will end the assessment of procedural differences between "legitimate NGOs" and activists by addressing the question whether deliberation is too narrow (5.). I will argue that,

Table 14.2 Determining the range of legitimate behaviour for NGOs

	Range of legitimate behaviour		
	Civil behaviour		Un-civil behaviour 1.
	Discursive 2.	Non-discursive	Non-discursive
Consensual	Deliberative 5.	Tacit agreement	–
Confrontational	Dissensual communication 3.	Civil disobedience: rituals, guerrilla theatre, leafleting, etc. 4.	Tactics of material damage; violence

if we want to avoid depriving civil society of its colourful, creative core, we have to widen the forms of communication admissible to deliberation.

Civil Behaviour, Un-civil Behaviour and Civil Disobedience

Let me first note why it is worth mentioning the distinction between civil and un-civil behaviour at this point in the book. I would argue that the question of un-civil behaviour is more relevant with regard to activists than to interest groups: un-civil activists such as violent protest organizations still share some similarities with NGOs by raising public claims; un-civil interest groups, on the other hand, are organizations that promote particular goals by un-civil methods, hence "pure criminals". There is thus no noticeable similarity between them and NGOs. Un-civil behaviour is always non-discursive and irreconcilable with the requirement that NGOs be primarily oriented towards discourse in order to assume a meaningful political role in the postnational constellation. Un-civil behaviour is characterized by an explicit orientation towards conflict combined with the willingness to resort to violence against things or even persons. I derive this admittedly rough definition of un-civil behaviour from taking it to be the opposite of "civil disobedience" which is by definition non-violent, for if it was violent, it would not be civil (Rawls, 1999: 182; see also Thomassen, 2007: 202).[10]

In contrast to civil disobedience, un-civil oppositional activity is never a viable route for legitimate partner NGOs. If an NGO resorts to un-civil oppositional activity, it loses its legitimacy as a partner for a company, and a company can then reasonably refuse cooperation and even dialogue. In contrast to civil oppositional activity, un-civil oppositional activity precludes discursive orientation. One example of a potentially un-civil mission are campaigns against the very existence of the company in question (Den Hond and De Bakker, 2007: 907). Illustrative examples of NGOs that aim to destroy their campaign targets can be found among anti-tobacco NGOs (Palazzo and Richter, 2005: 392). Companies that are the target of a campaign that aims at their destruction cannot be expected to seek cooperation with the originators of the campaign.[11] Another example of un-civil behaviour is the infliction of material damage in order to attack targets. An activist association that regularly crosses the border between civility and un-civility by deliberately deploying the tactics of material damage is People for the Ethical Treatment of Animals (PETA). Their repeated disruptions of fashion shows suggest that they refuse dialogue with companies and might even aim to destroy at least those parts of a company that produce fur. Other groups that deliberately violate the law in order to promote their goals and that, as a consequence, have been labelled terrorist groups by leading US

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[10] More on civil disobedience will be said in the section "Justifying Civil Disobedience" (Chapter 14).

[11] Of course, it must be noted that, especially in the context of the tobacco industry, the question arises whether tobacco is a legitimate business at all. This issue, however, goes beyond the scope of this work.

government agencies, are EarthFirst! and the Earth Liberation Front (Hoffman and Bertels, 2009: 7).

If NGOs leave the path of non-violent behaviour, they become what Mitchell, Agle, and Wood (1997: 877f.) call "dangerous stakeholders". For them, dangerous stakeholders are those groups that resort to coercive means such as wildcat strikes, employee sabotage, and even terrorism in order to advance their claims. Mitchell et al. also include environmentalists who spike trees in areas to be logged as well as religious groups. The action of these dangerous stakeholders crosses not only the boundaries of legitimacy but also threatens both the stakeholder-manager relationship and the individuals and entities that are involved. Mitchell et al. claim that it is important to identify such dangerous stakeholders in order to refuse them. According to them, refusing acknowledgment is an effective means in the fight to maintain civility and civilization. This approach is shared in this book, since one of the central arguments in favour of developing a typology of legitimate partner NGOs is that corporations need to be able to justify their choice of partners as well as to justify their rejection of other actors. However, in contrast to Mitchell et al., I would not use the term stakeholders for such groups but rather, as mentioned, prefer to call them "un-civil activists".

The challenge for NGOs is to exclusively commit themselves to civil behaviour and to primarily focus on the discursive, consensual aspect of civil behaviour while justifying any resort to non-deliberative, but still civil means of action. There are roughly three types of behaviour along the un-civil/civil axis: un-civil behaviour (which is never legitimate), civil but non-deliberative behaviour (which is legitimate under certain circumstances), and civil deliberative behaviour (which represents the ideal-typical behaviour for NGOs). The middle type is ignored by Kohn, who states in a surprisingly laconic manner,

> Clearly, to the degree that profound moral disagreements over policy issues like abortion can be settled or at least mitigated through public deliberation, this is preferable to bombing clinics and assassinating providers. (Kohn, 2000: 426)

But it is precisely the justification of civil non-deliberative behaviour that interests us in what follows. Before assessing cases that justify a deviation from deliberative behaviour, that is, cases that justify confrontational discursive civil behaviour as well as confrontational non-discursive civil behaviour, I wish to briefly consider the justification for crossing the border between deliberative and non-deliberative behaviour, as proposed by Fung. Since Fung does not divide deliberative behaviour into its discursive and consensual components, I am addressing his proposal at this point before refining the categories in the next sections.

According to Fung, a deviation from deliberation, that is, "nonpersuasive, even coercive, methods for the sake of deliberation" is justified in the case of "widespread inequality and failures of reciprocity" (Fung, 2005: 399). We must then ask ourselves how reasonable it is to require NGOs to limit themselves to discursive consensual behaviour under such circumstances. Fung differentiates between two possible positions, which imply different assessments of the real-world conditions in which NGOs encounter companies (Fung, 2005: 399f.). The first position states

that actors who are committed to deliberation should limit themselves to deliberative methods under all circumstances. This position obviously assumes an overly naïve view of a status quo in which the conditions for dialogue between companies and NGOs are always fulfilled. That this is not the case will become obvious in the next section, where I argue that non-discursive behaviour is legitimate if companies totally refuse dialogue with NGOs or if they base the interaction fully on power. Moreover, if we characterize a status quo as de-legitimizing civil disobedience, we deprive activists (and to a certain extent also NGOs) of their *raison d'être* and block all innovation. As Habermas states,

> The justification of civil disobedience relies on a *dynamic* understanding of the constitution as an unfinished project. (Habermas, 1996b: 384, emphasis added)

If this dynamic is not acknowledged, there is a danger of freezing existing power relations and blocking any critical, emancipatory potential.

The second position adheres to the principle that "all bets are off before the revolution" (Fung, 2005: 399). Advocates of this position acknowledge that under highly unfavourable circumstances deliberative actors are not only allowed but even required to resort to non-deliberative methods. This position represents a highly agonistic view of the status quo, in which the power structures favour companies to such extent that civil society actors are forced to resort to civil disobedience or non-deliberative behaviour. I agree with the view that highly unfavourable circumstances justify such a deviation from deliberation, but I differ from Fung in one important respect. Fung's research focus is on actors who define deliberation as an *end*: they aim at extending deliberative institutions and the underlying political values that justify those institutions. He calls these actors deliberative activists (Fung, 2005: 402). In this book, by contrast, the focus is on legitimate NGOs who are from the first interested in putting forward public claims and who use deliberation as a *means* to put forward those claims. Fung asks, can deliberation be promoted by non-deliberative behaviour? My question, however, is whether it is legitimate to put forward public claims (in general) by non-deliberative means. The problem with Fung's account is that his focus contains a purely instrumental view, since deliberative activists in his conception are concerned with whether the means justify the ends.

In contrast to Fung, the focus in the following sections is not instrumental but intrinsic. In line with the distinction between epistemic and procedural conceptions of legitimacy as presented in the section "Procedural and Epistemic Accounts of Deliberative Legitimacy" (Chapter 9), I argue that the criterion for judging the legitimacy of democratic processes is not epistemic but procedural; that is, it is not primarily relevant whether the behaviour in question leads to just outcomes. Instead, the legitimacy of behaviour – be it deliberation or any other behaviour within the sphere of civility – must be judged by the fairness of its procedures.

It remains, however, to assess the justifications for deviation from deliberative behaviour, that is, deviation from discursive and consensual behaviour. I will argue that "legitimate NGOs" have a primary orientation towards deliberation but are

aware of the circumstances that might justify a deviation. A consideration of the distinction between discursive and non-discursive behaviour will suggest what justifies the deployment of non-discursive behaviour.

Justifying Non-discursive Behaviour

In contrast to un-civil behaviour, civil behaviour can be expressed discursively or non-discursively. Civil non-discursive behaviour does not preclude the legitimacy of an NGO as a partner of a corporation.

As stated above, in accordance with Fung's account of the legitimacy of confrontational behaviour for actors who are primarily oriented towards deliberative action, I claim that legitimate NGOs should be allowed to forsake the use of reason for the more common weapons of the political arena if they encounter unfavourable circumstances, such as the hostility of powerful actors (i.e. extreme failure of the will to reciprocity) or extreme inequality (Fung, 2005: 402). As a rough guideline one could state that a legitimate partner NGO only exercises non-discursive behaviour as "ultima ratio". Fung calls this the *principle of exhaustion*; for him this means that deliberative activists "should refrain from using non-deliberative political methods until reasonable efforts to persuade and institute fair, open, and inclusive deliberations fail" (Fung, 2005: 403).

With respect to their behaviour towards companies, this means that if companies are absolutely unwilling to enter into a dialogue with NGOs or if they base their interaction fully on power, then NGOs are allowed to leave the path of deliberation and deploy non-discursive methods without losing their procedural legitimacy. Not every NGO that resorts to non-discursive behaviour can be counted as a chaotic or even dangerous troublemaker. One always needs to take into account the circumstances under which it adopts this behaviour. Oxfam provides a good example of justifying its both of "activist-type activities" and "NGO-type activities": Oxfam never enters into partnerships with corporations that are targets of Oxfam campaigns (Billenness, 2003). Oxfam thus concedes that it does not exclusively rely on bilateral cooperation with companies but also uses unilateral attention-seeking methods like campaigning. It pursues discursive and non-discursive strategies but refuses to simultaneously direct them at the same company. The same is true for Friends of the Earth who published Local Group Guidelines for Positive Relationships with Companies which were produced following "extensive stakeholder consultations" (Friends of the Earth, 2011). Friends of the Earth state that they only ever enter into a positive relationship with a company, if it clearly serves to achieve their goals, and if there are "no adverse campaigning implications (...) involved" (Friends of the Earth, 2011). This means that they "may not enter into any type of relationship with a company against which FOE is currently campaigning, anywhere in the world" (Friends of the Earth, 2011). Thus, Oxfam and Friends of the Earth are effectively using role heterogeneity, a behaviour which allows them "to fulfil several roles when working with various partners" (Simpson, Lefroy, and Tsarenko, 2011; see also Hoffman, 2009: 49).

An alternative to relying on Fung's principle of exhaustion is proposed by Humphrey and Stears who take the *moral urgency* of a claim as a justification for non-deliberative action (Humphrey and Stears, 2006: 415ff.). Yet, as has been argued in Chapter 12, in pluralistic societies, it is difficult to reach a consensus on substantive measures that would allow for judging the legitimacy of an NGO. I would argue that such consensus is equally difficult to find for judging the legitimacy of an NGO's behaviour. Humphrey and Stears, too, admit that we cannot agree on what is morally urgent, so they recognize that there can be no substantive agreement on the moral urgency of a claim. Nevertheless, they back out of this problem by stating that "such deeply felt moral disagreements are likely to be inherent conditions of our social and political order" (Humphrey and Stears, 2006: 416). By contrast, I take the lack of any possible substantive agreement to be a condition for selecting the right procedure, as I have argued in the section on "reasonable pluralism" (in the section "The Importance of 'public reason' in Light of the "Fact of Reasonable Pluralism"" (Chapter 7)). If we cannot agree substantively on the moral urgency of a claim, we should instead try to reach procedural agreement. Otherwise, all claims could be put forward by non-deliberative means because the activists in question are very likely to conceive of their own claims as morally urgent. Justifying non-deliberative action based on the "felt moral urgency" of a claim opens the door to an uncontrolled number of cases in which non-deliberative practices are legitimate. Even though Humphrey and Stears are aware of the difficulty of achieving substantive consensus on moral claims, they do not draw the logical conclusion that the consensus that we should aim for must be a procedural consensus. Instead, they subordinate everything to what they consider the superior goal of political equality. As long as a strategy serves to enhance political equality, it is legitimate in their eyes.[12]

Justifying Confrontational Discursive Behaviour

Aside from distinguishing discursive from non-discursive civil behaviour, we must also assess the orientation of an actor towards consensual behaviour or conflict when comparing NGOs and activists. Both discursive and non-discursive behaviour can be exercised in a consensual or a confrontational way.

Even if an NGO exhibits a discursive orientation, it must be noted that this is a necessary but not always sufficient condition for qualifying as a legitimate partner of corporations. The NGO must additionally prove its primary orientation towards consensual behaviour in order to mark its distance from activists. The combination of discursive and consensual behaviour represents the deliberative ideal. The discursive element of deliberation is obvious if we define deliberation as a

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[12] Of course they still distance themselves from violence, insurrection, and indiscriminate intimidation (Humphrey and Stears, 2006: 419).

process of opinion-formation, while the consensual element refers to the pattern of communication by which a discourse is led.[13]

In general, a reasoned will is assumed to depend on consensual behaviour. A will that results from confrontation alone is not reasoned. Yet, there is an exception to this rule; this is called "dissensual communication", which denotes the use of discursive but confrontational behaviour (Palazzo and Scherer, 2006: 82). The problem with dissensual communication is that it is especially likely to occur in the case of value-based rather than interest-based dialogues – and, as has been argued when comparing NGOs and interest groups based on procedural criteria (in the section "Distinguishing NGOs and Interest Groups According to Procedural Criteria" (Chapter 14)), NGOs typically raise questions of values, not of interests. Hence, NGOs are very likely to get involved in dissensual communication. A value-based confrontation could happen, for example, between an NGO that categorically fights child labour and a company which is suspected of using child labour (see Rowley and Moldoveanu, 2003 on the difference between interest- and value-based conflicts). In this case, communication cannot be expected to be consensual but, since the interaction is still discursive, the result could at least be reasonable disagreement. This raises the question, however, of how to define the characteristics of reasonable disagreement, which, turned around, means asking, what are the limits of discursive confrontational behaviour.

Gutmann and Thompson claim that in order for disagreement to be reasonable, the parties involved should practice the "economy of moral disagreement" (Gutmann and Thompson, 2004: 7). The principle of the economy of moral disagreement states that, even if they disagree, citizens should try to find justifications that minimize the differences with their opponents. By doing so, deliberation promotes the value of mutual respect and secures cooperation. Moreover, the economy of moral disagreement implies that someone's view on one issue "should not affect how she is treated in other respects" (Gutmann and Thompson, 2004: 88). For the research question at hand, this means that a legitimate partner NGO, even if it strongly objects to a company's policy on one issue, must not aim at the destruction of the entire company. Here we can find a difference between activists and NGOs: activists, even though they often use potentially "persuasive" approaches to politics, typically do not act in accordance with the requirements of deliberation. Activists violate the principle of the economy of moral disagreement by often dramatically maximizing the differences between their own position and the position of their rivals.

Especially when they adopt non-discursive, conflict-oriented behaviour, as we will see later, activists tend to focus more on pranks and spectacle than on the real cause (Crane and Matten, 2007: 432). They neither seek compromise nor agreement and often refuse to outline criteria which could be shared with their opponents (Humphrey and Stears, 2006: 408). Hence, activists do not strive for consensus but rather foster conflict by their choice of methods for promoting their goals.

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[13] See Manin for this definition of deliberation (Manin, 1987: 357).

Justifying Civil Disobedience

Having outlined discursive and non-discursive as well as conflict-oriented discursive behaviour, I want to take a closer look at the category in which non-discursive and confrontational behaviour overlap. I will argue that this behaviour, which we could call critical oppositional activity, is typically associated with activists (Young, 2001: 671). Such behaviour characteristically becomes manifest in confrontational tactics such as direct-action protests against companies. These actions are especially controversial and, as noted in Table 14.2, they constitute the outer edge of legitimate behaviour for NGOs. Of course, there is also behaviour that is non-discursive but consensual. This combination of consensus-orientation and non-discursive means could best be characterized by the phrase "tacit agreement". However, tacit agreement is a highly atypical behaviour for activists and NGOs alike and as such hardly plays a role in clarifying the blurred boundary between NGOs and activists. Hence, the focus here is on the confrontational variant of non-discursive civil behaviour.

What I introduce as non-discursive confrontational civil behaviour here is better known by the term "civil disobedience". Civil disobedience denotes acts of non-violent, symbolic rule violation that are committed as expressions of protest against circumstances that the actors consider illegitimate (in the light of valid constitutional principles) even though they are legal (Habermas, 1996b: 382/3). Civil disobedience thus essentially occurs in the gap between legality and legitimacy (Thomassen, 2007: 201). Since civil disobedience rests on a political (and thus public) conviction, it is "opposed to a search for self or group interest" (Rawls, 1999: 181) and is thus an issue that is particularly relevant for distinguishing NGOs from activists rather than from interest groups. Moreover, as Habermas notes, acts of civil disobedience are always simultaneously directed not only to the institutions of power but also to the "critical judgment of a public of citizens that is to be mobilized with exceptional means" (Habermas, 1996b: 383).

As with any deviation from deliberative norms, the justification of civil disobedience also relies on the principle of exhaustion. Civil disobedience is justified "as a last resort when standard democratic processes have failed" (Rawls, 1999: 183).

Fung presents a proportional justification for civil disobedience. According to him, the more adverse the political circumstances, the more deviation is permitted from deliberative norms (Fung, 2005: 397).[14] The adversity of political circumstances is essentially measured by the degree of inequality between the actors involved and by systematic domination. But if we take this definition of adversity seriously as grounds for justifying an NGO's resort to civil disobedience in its

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[14] For Fung the question of when an NGO can legitimately resort to civil opposition instead of deliberative action *parallels* the justification for civil disobedience but is not equivalent to it: he distinguishes between deliberative activists and civilly disobedient actors by defining the former as motivated to spread deliberative institutions and the latter as committed to certain political goals which they believe to be just and in the common interest (Fung, 2005: 402). However, in this book deliberative activism and civil disobedience are treated as synonyms because they both constitute forms of non-discursive but civil behaviour.

interaction with a corporation, then we must also ask to what extent every interaction between civil society actors and corporations is shaped by these same indicators. In other words, it is an illusion to think that an NGO is equal to a corporation in terms of power. Thus, the factors of inequality and domination can only guide our assessment of the legitimacy of civil disobedience if they are further refined.

As we will see in the next section, the question is whether civil disobedience is the only conceivable reaction to such adverse conditions or whether the admission of different forms of communication to deliberation could represent a middle way.

In any case, the important role that civil disobedience assumes with respect to activism derives from the fact that it is sometimes seen as a counterbalance to the increasing institutionalization of partnerships between NGOs and corporations or international organizations. In the eyes of the left, the institutionalization of partnerships inevitably leads to the co-optation of NGOs. Civil disobedience, as practiced by activists, is seen as a remedy. The well-known Indian writer Arundhati Roy states that

> We need to redefine the meaning of politics. The "NGO-ization" of civil society initiatives is taking us in exactly the opposite direction. It's depoliticizing us. Making us dependent on aid and handouts. We need to reimagine the meaning of civil disobedience. (Roy, 2004: 117)

Hence, for such thinkers, activism constitutes the core of politics and all NGOs are essentially corporate front groups. The politics that happens in institutionalized settings, for them, always implies domination by and dependence on powerful economic or governmental actors.

The best-known strategy of non-discursive civil behaviour or civil disobedience is corporate boycott. Other types of direct-action protest include the deliberate sabotage of a company's operations through activities such as blocking the building of new roads, interrupting shareholder meetings, etc. (Murphy and Bendell, 1999: 42). Critical oppositional activity typical of activists, which happens in the public sphere, often comes in the form of "picketing, leafleting, guerrilla theatre, large and loud street demonstrations, sit-ins" (Young, 2001: 673). All these are confrontational actions.[15] They are as conflict-oriented as interest groups' methods of promoting their goals by means of bargaining and pressure, and as such they constitute a deviation from the primarily consensual behaviour of NGOs. "Pure activists" primarily engage in critical oppositional activity instead of attempting "to come to agreement

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[15] The importance of distinguishing consensus-orientation with respect to goals and consensus-orientation with respect to means becomes evident in Humphrey and Stears' characterization of activists as consensus-oriented actors. They characterize both activists and deliberative democrats as being consensus-oriented, but state that activists reject the behavioural limitations proposed by deliberative democracy as "an unreasonable restriction on their political strategies" (Humphrey and Stears, 2006: 418). Hence, Humphrey and Stears use the term "consensus-orientation" with respect to the goal of an action, that is, from an output-oriented perspective, whereas I strictly confine it to the procedural dimension. In contrast to me, Humphrey and Stears deem it possible to classify a result that has been reached by confrontational means as consensus. We, however, agree that activists essentially share the same goals as NGOs but not the methods.

with those who support or benefit from existing power structures" (Young, 2001: 674). But there are also cases in which a "legitimate NGO" is justified in resorting to non-discursive confrontational civil behaviour. The justification for such a move is the same as for any other form of non-deliberative civil behaviour: it must only be adopted as "ultima ratio", which is to say it must follow Fung's principle of exhaustion (Fung, 2005: 403). An interesting insight into corporate boycotts is given by Friedman (1999). In a survey on boycotts which included environmental protection (EP) groups as well as animal rights (AR) groups, he found evidence that half of the animal right groups and one third of the environmental protection groups launched their boycotts without prior communication with the targets of their actions (Friedman, 1999: 190; see also Baron, 2003).

Non-discursive confrontational behaviour often also goes along with a violation of the principle of the "economy of moral disagreement" (Gutmann and Thompson, 2004: 7) as introduced in the section "Civil Behaviour, Un-civil Behaviour and Civil Disobedience" (Chapter 14). In his survey, Friedman found his intuition according to which he expected the leaders of the boycotters to "dramatize their causes in the hopes of attracting the attention of the media" confirmed (Friedman, 1999: 189). The boycotts he assessed essentially revolved around "protest demonstrations, press conferences featuring disenchanted former employees of target companies, celebrity dramatizations of boycott issues, the unfurling of giant banners in public places, disruptions of stockholder meetings, and mass picketing at the homes and offices of corporate leaders" (Friedman, 1999: 189/190).

The problem with civil oppositional activity such as demonstrations or sit-ins lies in the fact that they are often perceived to be the "core" of civil society action. If, in accordance with deliberative requirements, we demand that they be used only as a last resort, then do we risk depriving civil society of its colourful, creative core? I will address this problem in the next section by asking whether the deliberative conception of democracy is too narrow.

Widening the Forms of Communication Admissible to Deliberation

A widespread criticism of deliberative democracy, which has become especially relevant when comparing NGOs to activists, holds that deliberative democracy suffers from a narrow conception of democratic discussion. This criticism is most explicitly put forward by difference democrats and feminist thinkers.

Difference democrats claim that deliberative democracy lacks sensitivity to cultural, social and gender differences among the participants involved in deliberation.[16] As Young points out, deliberative democracy exhibits a "tendency to restrict democratic discussion to argument (that) carries implicit cultural biases that can

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[16] Difference democrats warn that the mere granting of the same formal rights and the same institutional access to members of oppressed groups extinguishes any political manifestation of difference (Dryzek, 2000: 88).

lead to exclusions in practice" (Young, 1996: 123).[17] The ideal of the deliberative model demands that interlocutors reject bad reasons and poorly argued speeches and ignore emotional outbursts. In the deliberative model, participants should deliberate until they come to a conclusion based on "the force of the better argument" (Young, 1996: 121; Habermas, 1996b: 305/6).

This notion of communication is irreconcilable with many civil society activities manifest in the unregulated public sphere, i.e. outside official conference rooms, and which take the form of street marches, leafleting, street theatre, etc. All of these activities aim at communicating specific ideas to a wide public, but they obviously do not conform to the deliberative logic of discourse. The activist style of communication is typically not confined to discursive arguments but includes slogans, humour, and irony (Young, 2001: 676).

Another criticism of deliberative communication states that deliberation is hostile to innovators. In this view, deliberative means are inappropriate for raising new claims or for drawing attention to new perspectives on an issue (Humphrey and Stears, 2006: 411/2; see also Humphrey, 2006: 324). As Warren points out, this criticism is especially relevant to associations that lack recognition. Such associations cannot change debate through dialogue but must resort to other kinds of symbolic resources such as demonstrations, sit-ins, theatre, literature etc. (Warren, 2001: 81).[18]

Related to the criticism that deliberation is hostile to innovation is the criticism that the deliberative bias towards unity – either as a starting point or as the goal of discussion – leads to exclusions of new viewpoints. If deliberation takes unity as a *prior condition* of deliberation, this erases the need for participants to transcend their original viewpoints and take account of perspectives other than their own. And if deliberative democracy takes unity in the form of common interests as a *goal* of deliberation, it can foster exclusionary tendencies by privileging the appeals to a common good which are put forward by those who dominate the definition of that common good (Young, 1996: 125f.). Strong requirements for unity either as a starting point or as a goal of deliberation between NGOs and corporations are obviously illusionary. Rather, they would foster the interaction of corporations with interest groups that are disguised as NGOs (corporate front groups). Again, as mentioned in the section on the consensual behaviour of NGOs in contrast to interest groups (in the section "Consensual Behaviour" (Chapter 14)), making unity a precursor to or goal of deliberation presupposes an overly harmonious notion of deliberation. It is irreconcilable with the emancipatory function that the deliberative model assigns to civil society in general and NGOs in particular.

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[17] A similar criticism is also raised about the liberal concept of democratic discussion. In the liberal concept, all contestatory, rhetorical, affective, or impassioned elements of public discourse, with all of their excesses and virtues, are excluded (Benhabib, 1994: 37).

[18] Similarly argues Habermas who admits that it can take a "long struggle of recognition" for issues to be taken up as political issues (Habermas, 1996b: 314). The use of disruptive tactics of an NGO is also sometimes associated with the organization's position in the life-cycle (SustainAbility, 2003: 16).

If we take heed of these criticisms, we discover an implicit tension between delib-
eration and many activities that are typically associated with the NGO world. It
seems that deliberation is hostile to alternative forms of communication which are
especially relevant in the colourful world of activism beyond boardrooms (Dryzek,
2000: 67). If this is the case, then the imposition of a deliberative model on the inter-
action between NGOs and corporations would deprive NGOs of their authenticity
and force them into using formal speech in settings where the imbalance of power
already works in favour of the corporations. Does deliberation thus necessarily con-
fer legitimacy on powerful institutions and silence real dissent? Does deliberation
with corporations automatically imply the complicity of NGOs with the workings
of those institutions (Young, 2001: 675)?

It is a fact that, as mentioned above, NGOs and corporations start their interaction
from very different frames of reference. The power asymmetries between NGOs
and corporations in particular make it difficult for them to achieve similar uptake
in public discourse (Bohman, 1996a: 205). It seems that, in order to overcome such
asymmetries and achieve any sort of uptake, speakers must deviate from deliberative
norms.

A typical way of deviating from deliberative norms involves resorting to non-
discursive confrontational means. Thus, one possible reaction to the undisputable
difficulties that NGOs encounter when interacting with corporations might be to
refuse deliberative meetings at conference tables entirely because the mode of com-
munication required by deliberative norms privileges those who are best able to
conform to these norms. These tend to be actors with particular rhetorical skills.
As a consequence, deliberative norms impose a very narrow means of participating
and exclude those who cannot conform, for instance, to the deliberative requirement
that arguments have to be presented based on reasons and not on emotional appeals
(Ackerly, 2006: 123). Certain styles of speech are clearly privileged over others –
and even if neither economic dependence nor political domination is manifest in a
deliberative context, an internalized sense of who does or does not have the right to
speak can constitute social power relations (Young, 1996: 122). As Kohn puts it:

> Under the guise of equality and impartiality, deliberative democracy privileges the commu-
> nicative strategies of elites. (Kohn, 2000: 426)

It is interesting to note that Habermas suggests resorting to bargaining processes
in situations in which social power relations are too unequal (Habermas, 1996b:
166).[19] However, difference democrats would probably reject this suggestion
because bargaining processes typically privilege those who have power.

Humphrey and Stears follow Habermas' suggestion and justify bargaining as a
tactical choice for activists (and NGOs). They take the tactics of cost-levying as an
example to illustrate their argument. Cost-levying aims to change the behaviour of
opponents by increasing the costs of their original behaviour (Humphrey and Stears,
2006: 405). Typically, it is cast directly at the opponent – for example, by blocking

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[19] Similarly, Mansbridge states that if bargaining or the pursuit of self-interest is banned from
deliberation, then it becomes harder to probe and clarify their own underlying interests for those
whose preferences are induced by hegemonic external conditions (Mansbridge, 2006: 128).

access to offices. But it can also be focused on people who want to do business with the company in question; protestors, for example, could prevent consumers from buying a company's products in a shop. Humphrey and Stears state that it is reasonable for animal rights activists seeking to put their issues on the political agenda to prefer cost-levying tactics over deliberation, although cost-levying tends to reward those who have power, money, and status, while disempowering those who do not. They hold that the costs of changing the minds of the opponent through deliberation are significantly higher than the costs of disrupting the opponent's or their customers' routines (Humphrey and Stears, 2006: 406f.).

While Humphrey and Stears' observation might be empirically true, the problem is that they use it to draw normative conclusions. Humphrey and Stears justify non-deliberative behaviour partly based on their cost-analysis. And they further derive legitimacy for non-deliberative behaviour from their observation that deliberation in its narrow form is hostile to innovation. In order to emphasize this point, they invoke Habermas' argument that the range of acceptable political strategies in the informal public sphere is different from the acceptable strategies in the formal public sphere. In the former, dramatization and interruption are acceptable, but not in the latter (Humphrey and Stears, 2006: 421, FN 16). However, Humphrey and Stears seem to be unaware of the fact that Habermas only allows for such tactics in the informal public sphere *if* this informal public sphere is coupled with deliberation in the formal public sphere. Acceptable tactics in the informal public sphere, even if they deviate from the deliberative ideal, are thus still linked to deliberation in some sense, namely to the deliberation in formal institutions, because Habermas, in contrast to Humphrey and Stears, insists on the deliberative character of the ideal political process.

In any case, we must ask ourselves whether non-discursive conflict-oriented behaviour as promoted by activists on the street really is the only conceivable way to escape the narrowness of deliberative discussions. I would argue that there is also another option, namely that of widening the range of admissible forms of communication in deliberative discourse. The criticisms spelled out above only hold true if we start from a narrow conception of deliberative behaviour.

To a large extent, deliberative democrats promote a conception of deliberation which rules out rhetoric and all emotional appeals. Political theory has long objected to rhetoric on the grounds that it operates "with emotive manipulation of the way points are made, propaganda and demagoguery at an extreme, thus meriting only banishment from the realm of rational communication" (Dryzek, 2000: 52). Rhetoric has been a very delicate issue for the most influential democratic theorists ranging from Plato through Kant to James Madison in the Federalist Papers. Plato argued that rhetoric is monological and as such irreconcilable with the dialectic (Chambers, 2006: 1), and "Kant defined rhetoric as 'the art of deceiving by means of beautiful illusion'" (Chambers, 2006: 2; see also Chambers, 2009). In The Federalist Papers, Madison draws out the contrast between cool heads (deliberation) and irregular passions (rhetoric) (Chambers, 2006: 2).

However, the strict division between rhetoric and deliberation has been increasingly challenged by deliberative theorists, such as Remer (2000) and Dryzek (2000: 52ff.; and 2010), who promote a wider understanding of legitimate discursive

behaviour. According to them, also rhetoric has an important part to play in effective deliberation. Young, too, who is a difference democrat, argues in a similar way (Young, 1996). She notes that,

> [r]hetoric assumes a distinction between *what* a discourse says, its substantive content, and *how* it says it. The general category rhetoric, as I understand it, refers to the various ways something can be said, which colour and condition its substantive content. (Young, 2002: 64/65)

Rather than being hostile to deliberation, Young claims that

> [r]hetoric constitutes the flesh and blood of any political communication, whether in a neighbourhood meeting or on the floor of Parliament. (Young, 2002: 65)

According to Dryzek if rhetoric is to be compatible with deliberation, it must be understood as a form of communication that is able to reach a particular audience by using a language that moves the audience in question (Dryzek, 2000: 52; see also Warren, 2001: 79). This view is closer to an Aristotelian understanding of rhetoric as a means of stimulating reasoned judgment in an audience (Chambers, 2006: 15). Dryzek goes further and claims that deliberation must not oppress emotional appeal because emotional responses might enhance the likeliness to establish the force of a specific point (Dryzek, 2000: 53). In short, Dryzek promotes a reconciliation between rhetoric as well as emotions with deliberative democracy. Bohman also argues in favour of extending the range of forms of communication admissible to deliberative discourse. His aim is to overcome the problem of narrow conceptions of deliberation, which are hostile to innovation, without having to resort to non-discursive behaviour. He states that if the openness of communication as presupposed by deliberative democracy breaks down, it might be necessary to allow certain violations of deliberative norms in order to restore the conditions for direct communication. Admitting alternative forms of communication facilitates the capacity for mutual understanding, which is one of the dialogical mechanisms of public deliberation (Bohman, 1996a: 205). In their role as social critics, NGOs should therefore be allowed recourse to other means of understanding such as "irony, jokes, metaphors, and other jarring ways of expressing something, as well as narratives expressing the experiences behind someone's political or normative claims" (Bohman, 1996a: 205). These modes of expression can then be a necessary phase in a dialogue in which strategic elements are employed to restore the conditions necessary for non-strategic success (Bohman, 1996a: 205; see also Kohn, 2000: 425f.).

Deriving Normative Orientation from Procedural Criteria?

Focusing on procedural characteristics offers the most accurate distinctions to be made amongst the three actor types. NGOs and interest groups can be distinguished by analyzing their predominant style of reasoning (constitutive versus instrumental reasoning) and their orientation towards consensual and/or confrontational

behaviour. Moreover, in contrast to interest groups, claims of the kind that "legitimate partner NGOs" advocate refer to a generalizable interest or clearly prioritise one justifiable value over another. The preferred pattern of communication for resolving such claims is deliberation. Hence, an actor's inclination to deliberate is indicative that he or she is advocating public claims rather than particularistic interests, and thus acting as a "legitimate partner NGO" rather than an interest group.

Moreover, focusing on procedural characteristics enables us to tell NGOs apart from activists. In contrast to activists, "legitimate NGOs" are primarily oriented towards discursive behaviour. All justifications of non-deliberative behaviour essentially rely on the principle of exhaustion, that is, on the requirement that deviation from deliberation is only allowed if all deliberative means have been exhausted. But all deviations operate under the proviso of civil behaviour. If an NGO is not acting within the bounds of civil behaviour, it loses its legitimacy as a potential partner of a corporation. Within this proviso I have exemplarily isolated three circumstances in which deviation from deliberation can be justified: Deviating from discursive means, whether consensual or confrontational, is justified if a corporation refuses to enter into dialogue with an NGO. Confrontational but nonetheless discursive behaviour is justified if deep value conflicts inhibit consensual discourse. In adverse political circumstances, that is, when two actors encounter one another under conditions of extreme inequality or if their interaction is shaped by systematic domination, then this justifies the resort to civil disobedience, i.e. to non-discursive confrontational civil behaviour. But regardless of whether the circumstances justify deviation from deliberative behaviour, it is important that we admit various forms of speech to deliberation in order to allow the innovative and emancipatory function of NGOs to persist and so as not to presume complicity on the part of NGOs with the workings of corporations. Even though these procedural focuses provide only approximate measures, they do nonetheless offer indications.

Chapter 15
Insights from Part IV

In contrast to procedural criteria, substantive and structural criteria do not provide the normative orientation that helps us judge the legitimacy of NGOs as partners of corporations. Relying on substantive criteria in order to define whether an NGO is serving public interests is risky because it may exclude certain groups a priori. Moreover, even if we can distinguish public from particularistic claims, substantive criteria cannot differentiate between activists and NGOs. Nor does relying on structural criteria clarify the blurred boundaries among the three actors, as internal democratic structures do not reveal anything about the actor's commitment to public interests. Disclosing interest ties might help to expose cases of co-optation or corporate front groups, but with respect to the distinction between NGOs and activists, it risks driving a wedge between them and grassroots activists. And legal accountability must not be confused with normative legitimacy. Structural criteria thus only provide limited normative orientation. In general, they fail to appreciate the fine distinctions amongst the three actor types.

Table 15.1 summarizes the structural, procedural and substantive characteristics that shape the legitimacy of interest groups, NGOs and activists, and shows that the core characteristics according to which NGOs can distance themselves from interest groups and activists are procedural.

Table 15.1 Summary of the differences between NGOs, interest groups and activists

Characteristics \ Actor	Interest groups	NGOs	Activists
Structural	Membership-organizations	(Mostly) non-membership organizations	Variable
Procedural	Conflict-oriented, primarily instrumental reasoning	Consensual behaviour, primarily constitutive reasoning	Conflict-oriented, in extreme cases un-civil behaviour
Substantive	Particularistic interests	Ideational, public claims	Ideational, public claims

Chapter 16
Concluding Remarks: Normative Guidelines for Conceptualizing NGOs as Legitimate Partners of Corporations and Future Implications

The assessment of NGOs as partners of corporations from a political perspective, along three different dimensions (substantive, structural, procedural), has made it evident that the legitimacy deficit of NGOs cannot be easily overcome. In the Introduction to this book I set out to find a political model that provides a meaningful conceptualization of NGOs as legitimate partners of corporations, and to find criteria that can guide our judgment when assessing the legitimacy of NGOs as partners of corporations. These goals have been achieved. From sketching out a normative framework for NGOs that promote public claims through drawing a conceptual framework of an ideal-typical distinction between NGOs, interest groups and activists, to assessing the normative orientation from substantive, structural and procedural criteria for clarifying the blurred boundaries between the different actors, I can say that the deliberative model of democracy is the most meaningful for assessing the legitimacy of NGOs as partners of corporations. Moreover, the procedural focus proposed by the deliberative model also yields the most meaningful criteria for judging the legitimacy of NGOs in practice.

As a last step, I would like to wrap up the discussion by outlining the central normative guidelines that can be derived from this book for judging the legitimacy of NGOs. In line with the two levels of abstraction on which my argumentation operates, I include points which refer to the political-theoretical level on the one hand (as addressed in Part II and III of this book), and points that refer to the more "pragmatic" level on the other (as addressed in the fourth part). The latter will be expressed in the form of rights and duties of legitimate partner NGOs. However, it must be noted that these points are not meant to be exhaustive, exclusive or unambiguous, and they neither must be mistaken for a checklist for either theorists or practitioners to tick off. They rather take the form of a plea for a political conceptualization of NGOs as legitimate partners of corporations.

Political-Theoretical Guidelines

- We need a political theory that encompasses the interaction between all political actors in the postnational constellation, hence also the interaction between NGOs and corporations. This means that we must acknowledge the political role

of NGOs in their engagement not only with formal political institutions but also with corporations. In contrast to existing political models, deliberative democracy, or more precisely the critical strand of deliberative democracy, provides normative orientation for this type of political interaction.

- NGOs must be acknowledged as advocates of public claims and as such be included in the public sphere. NGOs are subject to a discursive legitimization of their claims. Taking them at their word means requiring them to publicly constitute their claims.
- We must acknowledge the cultural diversity of NGOs as representatives of those who are deprived of voice. This means that we must not exclude NGOs from public discourse based on the substance of their claims.
- If we exclude NGOs from the public sphere, we do not free them from the coercive powers of the state but rather free them from the duty of credibly legitimizing their claims. We thereby not only deny groups that think "outside the box" the right to raise their voice in public discourse, but we also release them from their obligation to do so.
- If we assign the interaction between NGOs and corporations to the private sphere, we allow NGOs to rely on a different kind of reasoning in their interaction with corporations than in their interaction with formal political institutions.
- If we want to assign NGOs a meaningful emancipatory role, we must acknowledge their distinctive *raison d'être* without forcing them into a formal political institutionalization or subjecting them to market imperatives. This requires a political model that assigns civil society a constitutive and positive role that is equivalent to the state and the market. Deliberative democracy fulfils this requirement.
- The legitimacy of NGOs as partners of corporations must be judged not according to output but according to procedure. This implies that we acknowledge that the constitutive core of civil society is to operate free from the pressure of decision-making. A *moderately procedural approach*, by assigning an intrinsic value to the procedure by which NGOs legitimize themselves before corporations, in contrast to an output-oriented perspective, avoids the risk that the interaction between NGOs and corporations winds up as a pure demonstration of power and propaganda.

Rights and Duties of Legitimate Partner NGOs

- *Duty*: Legitimate partner NGOs act within the bounds of civil behaviour at all times. Any resort to violence is illegitimate.
- *Right*: Legitimate partner NGOs have the right to choose their internal structures freely.
- *Duty*: Legitimate partner NGOs develop policies in which they publicly justify their behaviour towards corporations.

- *Duty*: Legitimate partner NGOs mark a distance from interest groups and bring forward the proof that they are not corporate front groups. They do so by credibly proving that they have not been initiated by business, by adopting a critical attitude towards corporate funding and carefully considering which agreements to enter into with corporations.
- *Duty*: Legitimate partner NGOs mark a distance from radical activists. They are in general willing to see a company as part of the solution and as a consequence they are willing to enter into discourse with a company. If they simultaneously adopt different roles, they at the very least separate corporate partners from campaign targets.
- *Duty*: Legitimate partner NGOs always exhaust all discursive, consensual means before resorting to non-discursive, confrontational means.
- From this follows the *right* of legitimate partner NGOs to resort to confrontational, non-discursive means if corporations refuse dialogue or if the issue in question concerns a deep value conflict.
- *Right*: In line with their innovative and emancipatory role legitimate NGOs are allowed to present their claims in different communicative forms of deliberation; that is, they are allowed recourse to emotional appeal, rhetoric, and even to irony or jokes when expressing their claims.

As has become obvious from this brief list of guidelines, the entire conceptualization of NGOs as legitimate partners of corporations is meaningless if the targeted corporations reject their own responsibilities. It is inevitable that the rights and duties of NGOs also touch upon corporations. Every right that we assign to legitimate partner NGOs implies a duty for corporations, and every duty that we assign to legitimate partner NGOs implies a right for corporations.

I therefore want to close the circle and refer back to the assumption outlined in Part I that corporations are to be considered as political actors and that the assessment of the legitimacy of NGOs as partners of corporations only serves as normative orientation for the interaction between NGOs and corporations, who are both aware of their political responsibilities. Corporations that understand themselves as political actors do not primarily enter into partnerships with NGOs for economic reasons but out of a commitment to their corporate social responsibility. Such corporations publicly justify their acceptance and/or rejection of NGOs as partners.

Future Implications

With this book I have taken a step towards overcoming the double bias in the current CSR debate caused by the fact that it predominantly assesses the role of corporations but not of NGOs in NGO-business partnerships, and that it mostly focuses on the instrumental value of such partnerships for corporations. In contrast to this trend, I have explicitly focused on the rights and responsibilities of NGOs in NGO-business partnerships, and I have argued in favour of the intrinsic value of legitimate partner NGOs.

In the Introduction to this book I stated that my goal would not be to provide a checklist that could be used in practice by corporations for judging the legitimacy of NGOs as partners of corporations. As a matter of fact, there remains ample room for future research.

On a *conceptual level*, future research suggests itself towards a refinement of the categories introduced for judging the legitimacy of partner NGOs in this book. For example, how do we have to envision collaboration between legitimate partner NGOs, activists and interest groups in accordance with the normative standards elaborated in this book? What are the precise guidelines along which to assess the role heterogeneity of NGOs, that is, their simultaneous adoption of different roles? And how should we deal with dissensus between NGOs and corporations beyond the endeavour to accept it within the bounds of reason?

One aspect that has not been addressed in detail in this book but which surely would enrich the assessment of NGOs is the role of institutional political frameworks. How do interactions between NGOs and corporations vary depending on the broader institutional context in which they occur? Is an "unregulated interaction", conceptualized as a political interaction, which served as a point of reference in this book equally feasible and desirable under all circumstances? For example, how should we envision such interaction in China which is one of the booming subjects of research in CSR and one of the biggest challenges for CSR in practice? Is there anything like unregulated interaction in a state like China where civil society does not have the vibrancy necessary for NGOs to adopt a political role and where NGOs are typically tightly monitored by the state – by an undemocratic state *notabene* (Zadek, 2010: 157)?

A critical refinement and extension of the criteria suggested for judging the legitimacy of NGOs as partners of corporations could gradually also lead to establishing procedures for how to assess their adequacy *in practice*. As a matter of fact, a number of possible venues for an empirical examination of the adequacy of the criteria established in this book suggest themselves. For example, to what extent do existing multi-stakeholder initiatives such as the FSC, the MSC, the ETI etc. provide a context within which NGOs can fully embrace their role as legitimate partners as developed here? What is the notion of NGOs which underlies these frameworks? Do they for example take into account their need for discursive legitimization while respecting their right to express themselves in a colourful way in recognition of their authenticity? Can we measure the co-optation of NGOs in practice? And if so how?

Finally, let me highlight some implications of this book for practitioners in corporations. The continuous rise of partnerships will lead to a rise in both the number of success stories as well as failures. Those corporations which have successfully engaged in partnerships with the goal to provide the solution to a public issue, and which have done so in due consideration of the legitimacy of their partner NGOs, might want to reaffirm their commitment to their political responsibility by sharing their learnings with the public. Those who have had their fingers burnt might have to rethink the tools and procedures for choosing their partners.

This book should have made clear that NGO-business partnerships are no panacea for settling all issues of corporate social responsibility and that we should

keep a critical eye on the industry that is emerging around business-NGO partnerships. It has also shown that considering cooperation with an NGO does not mean uncritically giving in to any organization that presents itself as an advocate of public claims. The future will decide on the one hand whether NGOs are up to the challenge of committing themselves to their role as civil advocates of public claims and whether they can walk the tightrope between collaborating with corporations and becoming corrupted by the particularistic interest logic of the economic system. On the other hand, NGOs will only be able to master this challenge if they meet corporations which are willing to think beyond the business case and to commit themselves to partnerships which truly serve to enhance the public good rather than merely their own reputation. Once both actors assume their political responsibility, partnerships between them will make a real contribution to the provision of the common good and they will acquire a meaning that is much broader and much more promising than the one they are typically assigned when being viewed as a purely strategic venture. Given the vast amount of inherently political issues for which neither the market nor the state provide a solution, there are ample reasons for calling for such a development.

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