

Article

Transparency Between Norm, Technique and Property in International Law and Governance: The Example of Corporate Disclosure Regimes and Environmental Impacts

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I. INTRODUCTION TO TRANSPARENCY

In the second decade of the 21st century, academics have come to recognize the diffusion of power away from the state and the rise of governance centers beyond state power, especially in the international sphere.¹ But the techniques of that power and the methodologies of that diffusion remain mysterious. In the 1970s, Michel Foucault presciently suggested the fundamental change in the character of the state and its function, from a “state of justice” grounded in territoriality and law to a “state of government” no longer defined by territory but by the “mass of the population.”² The improvement of the condition of this mass of the population serves both as the final ends of government³ and as the

1. GRALF—PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW*, 27–180 (2010).

2. MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION*, LECTURES AT THE COLLÈGE DE FRANCE 1977–1978 110 (Michel Senellart, et al. eds., Graham Burchell, trans., Palgrave Macmillan 2007) [hereinafter FOUCAULT, 1977–1978].

3. *Id.* at 105.

instrument of that object.⁴ Those ends and means have produced a governmentalization of institutions around which populations are organized—states, international organizations, corporations, non-governmental actors and religious communities⁵—understood as “the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power. . . .”⁶ But the mass of the population is itself incarnated from the procedures, analyses and reflections, calculations and tactics that define governmentalization. Foucault identifies the instrument of this incarnation as “statistics”, an instrument which “enables the specific phenomena of population to be quantified.”⁷ These “statistics” enmesh both the generation of data and its availability to participants in governance.⁸ It is in this sense that one can begin to understand the triangular relationship between *governmentalization* (of both public and private institutional actors with managerial power), the mass of the *population* (which is its object and now its foundation), and the “*statistics*” (that both define and serve to manage the mass of the population), as the essence of the problem of *transparency* in the 21st century.

This problem of transparency can be understood from its role both as technique and norm; as the need for formal constituting structures of organization and as the “tight grid of disciplinary coercions that actually guarantees the cohesion of that social body.”⁹ As technique, transparency is understood as the aggregate of methods of producing information for use in managing power relationships. As norm, it serves as the expression and policing of the normal and thus, the acceptable right conduct, right rule and right relations among individuals and the social organs that manage their relations.

4. *Id.*

5. Larry Catá Backer, *Governance Without Government: An Overview*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION (Günther Handl & Joachim Zekoll, eds., forthcoming 2012).

6. FOUCAULT, 1977–1978, *supra* note 2, at 108.

7. *Id.* at 104.

8. Larry Catá Backer, *Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes*, 15 IND. J. GLOBAL LEGAL STUD. 101 (2008) [hereinafter Backer, *Global Panopticism*].

9. MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE 1975–1976, 37 (Mauro Bertani & Alessandro Fontana, eds., David Macey, trans., Picador 2003).

Transparency is deployed in two quite distinct arenas. It is used *within* an organization or community to enhance its operation and discipline its members; it is used externally to enhance legitimacy (norm) and accountability (technique) among stakeholders who have an interest in but not a direct participation in the operation of the enterprise. "In our day, it is the fact that power is exercised through both right and disciplines, that the techniques of discipline and discourses born of discipline are invading right, and that normalizing procedures are increasingly colonizing the procedures of the law, that might explain the overall workings of what I would call a 'normalizing society.'"¹⁰

In the public sphere, transparency serves as a substitute for public participation and the accountability of institutional actors¹¹ among the mass of the population or subset communities.¹² It serves as a way to speak to an application and implementation of the ideology of mass democracy in the public and private spheres¹³ without invoking by name the normative framework it means to manage. Transparency functions as a method of deflection, and in this sense it serves as a *symptomatic* discussion.¹⁴ The focus on the mechanics, techniques, and symptomatic manifestations of transparency obscures and deflects debate about its causes, such as the ramifications of acceptance of or resistance to the ideology of mass democracy in the public and private spheres. This deflection subjects the concept-symptom of transparency to its own indeterminacy and ultimately to incoherence of legal norms, an effect now well understood within regimes of

10. *Id.* at 38–39.

11. Alan Boyle & Kasey McCall-Smith, *Transparency in International Law-Making*, in *TRANSPARENCY IN INTERNATIONAL LAW* (Andrea Bianchi & Anne Peters eds., forthcoming 2012) (manuscript at 2–3, 12–13).

12. See Anders Esmark, *The Functional Differentiation of Governance: Public Governance Beyond Hierarchy, Market and Networks*, 87 *PUB. ADMIN.* 351, 355–56 (2009).

13. See Joseph Stiglitz, *Transparency in Government*, in *THE RIGHT TO TELL: THE ROLE OF MASS MEDIA IN ECONOMIC DEVELOPMENT* 27–43 (Roumeen Islam, ed., 2002). "There is a natural asymmetry of information between those who govern and those whom they are supposed to serve, much akin to the asymmetry of information of information that exists between company managers and shareholders." *Id.* at 27.

14. Megan Donaldson & Benedict Kingsley, *Transparency in Global Administrative Law*, in *TRANSPARENCY IN INTERNATIONAL LAW*, *supra* note 11.

intellectual property.¹⁵ That incoherence grows as globalization provides a structure for choosing among legal regimes—the norm–technique structure of transparency in the public sphere now becomes commodity as well.¹⁶

In the private sphere, transparency can also be understood as a substitute.¹⁷ But, in this case, it is a substitute for the more difficult discussion of accountability and participation within the ideology of globalized markets and shareholder wealth maximization.¹⁸ Transparency is the language through which social and environmental human rights, as well as economic impacts of corporate activity, can be revealed, assessed and engaged in by stakeholders with an interest in the action.¹⁹ Transparency serves as a battleground for the obligation to give form to these impacts²⁰ and to permit stakeholders to participate in decisions touching on those actions. Thus, the ideology of shareholder welfare maximization as a pronouncement of law²¹ becomes the basis of regimes of management of private markets for securities,²² grounded in transparency that itself deepens the normative commitment to shareholder welfare maximization by focusing almost exclusively on financial reporting as the basis for the incarnation of the corporation and its activities.²³ In this manner, transparency serves both as norm and technique.

15. Thomas Cottier & Michelangelo Temmerman, *Transparency and Intellectual Property Protection in International Law*, in TRANSPARENCY IN INTERNATIONAL LAW, *supra* note 11.

16. *Id.* at 5–12.

17. *See generally* Boyle, *supra* note 11.

18. *See generally id.*

19. *See* ANDREW SAVITZ & KARL WEBER, THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO, 49–51, 59–61 (2006).

20. *See id.*

21. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”).

22. Securities Act of 1933, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a et seq. (1933));

Securities Exchange Act of 1934, Pub. L. No. 73–291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a et seq. (1934)).

23. Larry Catá Backer, *Using Corporate Law to Encourage Respect for Human Rights in Economic Transactions: Considering the November 2009 Summary Report on Corporate Law and Human Rights Under the UN SRSG Mandate*, LAW AT THE END OF THE DAY (Sept. 23, 2012, 5:10 PM), <http://lbackerblog.blogspot.com/2010/01/using-corporate-law-to-encourage.html>.

However, efforts to substitute a different normative framework of corporate activity, grounded for example in stakeholder or public welfare maximization, does not seek to directly engage the foundational ideology. Instead, it seeks to change the focus of disclosure and transparency engagement by focusing on such things as environmental,²⁴ human rights,²⁵ or societal²⁶ impacts of corporate activities as a means of measuring, reporting and accounting. But, these efforts both mask the objective, which is engagement in a normative discussion framed by law.²⁷ These efforts create dissonance to the extent that the normative objectives attained through transparency regimes are opposed to the fundamental legal ordering structures and are now moving towards polycentricity in governance, accelerating the shift of governance power from the state.²⁸ Transparency, removed from the orbit of law and the state, becomes the essential mechanism for the articulation of alternative normative standards as soft law.²⁹

Yet transparency is increasingly shaped by fundamentally statist notions, and in particular, notions of property. As

24. David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 395–401 (2005); Sanford Gaines, *Reflexive Law as a Legal Paradigm for Sustainable Development*, 10 BUFF. ENVTL. L.J. 1, 9 (2002); Mark J. Spaulding, *Transparency of Environmental Regulation and Public Participation in the Resolution of International Environmental Disputes*, 35 SANTA CLARA L. REV. 1127, 1132–40 (1995).

25. Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, U.N. Doc. A/HRC/17/32 (May 27, 2011) [hereinafter *U.N. Options*]; Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (March 21, 2011) [hereinafter *U.N. Guiding Principles*].

26. SAVITZ, *supra* 19, 41–63, 177–89; DAVID CROWTHER, *SOCIAL AND ENVIRONMENTAL ACCOUNTING*, 22–24, 26–30, 35–46 (2000).

27. *See generally* Boyle, *supra* note 11.

28. Inger J. Sand, *From The Distinction Between Public Law And Private Law – To Legal Categories On Social And Institutional Differentiation*, in *LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW* 85–99 (Hanne Peterson & Henrik Zahle eds., 1995); *see generally* SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY AND INTERNATIONAL LAW* (1996).

29. Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591 (2008) [hereinafter Backer, *Moral Obligation*].

companies are pressured by state and nonstate actors to disclose the environmental impact of their activities, officers naturally see the information subject to disclosure as a possession from which property rights flow. Corporate actors, in their interactions with transparency systems, are increasingly aware of methods by which transparency can be a means to not only manage perception of the company's environmental morality, but as a means to market augmentation and supply chain management.³⁰ This awareness gives rise to a separate set of market strategies to control informational perception and dissemination, emphasizing the corporate actor's ability to choose from different available transparency regimes, or to instead produce and promote their own.³¹ In light of this choice, corporate interaction with transparency doctrines resembles other, more conventional *techniques* of business resource exploitation. The picture that emerges is increasingly one in which transparency reporting as a whole, if not a true marketplace, is still an environment of competing 'products'.

Consequently, the private sphere provides a useful lens through which to understand the problem of transparency and its naturalization within discourses of power. The private sphere exposes transparency as a mechanism, object and mediating mechanism. Transparency functions as a *mechanism* for *accountability* to stakeholders³², for *risk management* by company boards and officers, and of *autonomous private governance* beyond the state through, for example, supply and value chains (crucial component of non-state "law" systems). As a *commodity*, transparency, like law within global governance markets, can be marketed, bought and consumed in the production of profit. These definitions explain transparency in its external context by emphasizing its component elements (technique) and its character as inventory that is bought/sold/combined to suit the needs of its users in context by both private and public manufacturers of transparency technique systems.

But transparency is also *an object*, one that is meant to produce the objects (information) to be consumed by internal

30. See generally CROWTHER, *supra* note 26.

31. See Archon Fung et al., *Realizing Labor Standards: How Transparency, Competition, and Sanctions Could Improve Working Conditions Worldwide*, 26 BOSTON REV. 4, 5 (Feb./Mar. 2001).

32. See CROWTHER, *supra* note 26, at 37–38.

and external stakeholders. It functions as the articulation of the normative framework that shapes the character and scope of the commodities (information) it produces, one that both creates and satisfies demand for its product. This definition is transparency in its internal context, emphasizing its process—construction (normative) elements and its character as machine rather than as consumable.

Transparency as commodity and object suggest its passive qualities. But transparency has an instrumental character as well, one that goes beyond its character as mechanism. Transparency also functions as a *mediating mechanism* for communication (structural coupling)³³ between states, consumers, investors, NGOs, and international organizations.³⁴ This mediating role can enhance the visibility of tensions between transparency's internal role (risk management; legitimacy; norm) and its external role (participation in policy and business decisions; accountability; technique).³⁵

The possibilities and limits of transparency are most apparent in international environmental law³⁶ and were nicely framed for the modern era in the bedeviling Principle 10 of the Rio Declaration on Environment and Development:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress

33. Loet Leydesdorff, *Luhmann, Habermas, and the Theory of Communication*, 17 SYSTEMS RES. AND BEHAV. SCI. 273, 273–87 (2000).

34. Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 (2007).

35. CROWTHER, *supra* note 26, at 52–53.

36. For early work, see, for example, Joel B. Eisen, *From Stockholm to Kyoto and Back to the United States: International Environmental Law's Effect on Domestic Law*, 32 U. RICH. L. REV. 1435, 1456 (1999); Spaulding, *supra* note 24, 1132–40.

and remedy, shall be provided.³⁷

The bedevilment arises from a sense that this form of transparency is firmly grounded in the management of information through the domestic legal orders of states and their governmental apparatus, and is directly connected to public participation in lawmaking within the framework of a domestic legal order. The managerial obligations of states in the construction and deployment of mass sentiment are emphasized through facilitation, encouragement, and well-mannered participation. These obligations are to be controlled through the judicial and administrative organs of the state. This idea is hardly an auspicious beginning for contemporary approaches to transparency in international law. It ignores the role of international organs as autonomous actors (even as mere managers of markets for information).³⁸ It is unconscious of the governance role of enterprises and their role in monitoring, reporting and interacting with mass opinion,³⁹ whether organized in politically sovereign units or otherwise in functionally differentiated governance communities.⁴⁰ It is also not conscious of the role of civil society in developing and monitoring environmental reporting standards⁴¹ or the role of transparency in markets as a mechanism of managing substantive objectives.⁴²

37. United Nations Conference on Environment and Development, Rio de Janeiro, Braz. June 3–14, 1992, Rio Declaration on Environment and Development, U.N. Doc., A/CONF.151/5/Rev.1, princ. 10 (June 13, 1992), reprinted in 31 I.L.M. 874, 878 (Jan. 1992) [hereinafter *The Rio Declaration*].

38. JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, 109–268 (2006).

39. Backer, *Moral Obligation*, *supra* note 29; see Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Disclosure*, 87 WASH. U. L. REV. 115, 123 (2009).

40. On functionally differentiated governance units, see, for example, Esmark, *supra* note 12, 351–70, 353–56.

41. Barbara Gemmill & Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, STAKEHOLDER FORUM (Dec. 2002), http://sep.stakeholderforum.org/fileadmin/files/SEP/The_role_of_NGOs_and_Civil_Society_in_Global_Environmental_Governance_-_Gemmill.pdf (last visited October 22, 2012).

42. Case, *supra* note 24, at 395–401; Gaines, *supra* note 24, at 9. Consider also the phenomenon of socially responsible investing. See Joel C. Dobris, *SRI—Shibboleth or Canard (Socially Responsible Investing, That Is)*, 42 REAL PROP. & EST. L.J. 755 (2008); Theresa Bradley, *Finally, Socially Responsible Investors Can Measure Their Impact*, CHRISTIAN SCIENCE MONITOR, Sept. 24, 2011, available at <http://www.csmonitor.com/Business/new-economy/2011/0924/Finally-socially-responsible-investors-can-measure->

Since the adoption of the Rio Declaration in 1992 much has changed. The construction of a substantive architecture for environmental protection—under both international hard and soft law frameworks—has accelerated.⁴³ At the same time, public and private actors have increased both in their understanding of transparency as a governance tool⁴⁴ and in the development of transparency principles and implementation systems in domestic and international law.⁴⁵ Sometimes the two strains of development are coordinated.⁴⁶ However, there is no singular structural framework for coherence in international law, norm and policy. Incoherence becomes more acute at points of contact between international law/norms/policy and the legal/policy regimes of the states.

Transparency as a value or concept in domestic environmental law has seen some coherent policy movement,⁴⁷ but it has historically suffered problems of definition and application.⁴⁸ For a number of reasons, including its employment during its development,⁴⁹ its existence in a climate

their-impact (last visited October 22, 2012).

43. Cf. PATRICIA W. BIRNIE, ALAN E. BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW AND THE ENVIRONMENT* 43–105, 753–810 (3rd ed. 2009); ALEXANDRE CHARLES KISS & DINAH SHELTON, *GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW* 31–71 (2007).

44. See, e.g., Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001); Fung, *supra* note 31.

45. See Norman D. Bishara, *Governance And Corruption Constraints In The Middle East: Overcoming The Business Ethics Glass Ceiling*, 48 AM. BUS. L.J. 227 (2011); Karsten Nowrot, *Transnational Corporations As Steering Subjects In International Economic Law: Two Competing Visions Of The Future?* 18 IND. J. GLOBAL LEGAL STUD. 803 (2011); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999); Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335 (1999).

46. *U.N. Options*, *supra* note 25; *U.N. Guiding Principles*, *supra* note 25.

47. Over a decade ago, it was understood as a means toward more flexible reflexive lawmaking that balanced economic action with social costs. See, e.g., Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1240–41 (1995). These efforts in the United States traditionally took the form of “right to know” legislation – requiring disclosure of either use or discharge of large numbers of listed chemicals. California’s legislation was among the most aggressive. See Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE § 25249.5 (Deering 2012).

48. For a recent attempt at comprehensive definition, see Carolyn Bell, *What is Transparency?*, 11 PUB. INTEGRITY 293, 295–98 (2009).

49. See *id.* at 295; David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through*

marked by intense translational and interdisciplinary requirements⁵⁰ and its interaction with contentious issues of science, environmental transparency faces problems of consideration and deployment. While scandal, history, and prior involvement have worked to increase the role of government-mandated transparency in finance matters⁵¹ (albeit procedural in nature),⁵² environmental transparency practices remain the subject of disputes involving state sovereignty, and acceptable formatting. Environmental transparency practices labor under the lingering sense that entities that claim transparency are doing so in a circuitous or an intentionally ineffective manner.⁵³

This article considers transparency and business in international environmental law. It is divided into five sections. After this Introduction, Section II considers conventional sources of international environmental law for its transparency effects on the environmental impacts of business activity, looking at both hard law and soft law frameworks. While there is a substantial and growing body of public international hard and soft law frameworks in environmental governance, much of it is focused on the role of states and the information and participation rights of affected communities in the political and regulatory processes that have environmental impacts. Section III then critically examines transparency in international and transnational regulatory and governance regimes outside of environmental governance frameworks. The focus is on the regulatory regimes that might have an impact on environmentally related transparency involving business activities. Section III.A considers public sources of transparency regulation, focusing specifically on recent efforts at transnational regulation of economic actors. It concentrates on two examples—the OECD framework and the recently endorsed Guiding Principles of Business and Human Rights. Section III.B examines transparency at the intersection of domestic and international law, focusing on the projection of

Transparency, 17 BUS. ETHICS Q. 453, 453–467 (2007).

50. Simon Pulver, *Making Sense of Corporate Environmentalism*, 20 ORG. & ENV'T 44, 44–45 (2007).

51. See, e.g., Troy A. Paredes, *The Board, Corporate Governance, and Some Thoughts on the Role of Congress*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS, 495, 501 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

52. *Id.* at 519.

53. Pulver, *supra* note 50, at 46.

domestic law outward from the state. It concentrates on the environmental transparency effects of extraterritoriality, the incorporation of international norms within domestic legal orders, and the internationalization of domestic rule frameworks.

It is beyond the orbit of the state that the more interesting developments in transparency have occurred. Section IV then considers transparency and governance beyond the state. For that purpose, three distinct regimes are identified and examined. Section IV.A examines hybrid governance efforts—the ISO and Global Compact systems. Section IV.B considers private non–corporate governance regimes, principally the GRI and product certification programs. Finally, Section IV.C analyzes private corporate governance transparency regimes that include elements of environmental disclosure. Section V then examines transparency inaction under these potential transparency enhancing governance frameworks. Section V.A analyzes this potential. In addition, tensions in transparency are examined more closely in the context of environmental disclosure by BP during the time of the Deepwater Horizon explosion and oil spill of 2010,⁵⁴ which suggest the possibilities and limits of transparency in domestic and international law. Section V.B examines transparency in environmental activities within the overall disclosure and sustainability reporting of a large multinational corporation—Wal-Mart Stores, Inc. Section VI then analyzes the results. Section VI.A considers environmental disclosure within the context of regulatory incoherence and its effect on the utility of transparency in two ways. It considers the effect on the utility of transparency as both a means of conveying information to corporate insiders and outside stakeholders, as well as a means of permitting engagement and participation in corporate decision–making affecting stakeholders. Section VI.B ends with an analysis of these disclosure structures in the context of the framework developed in Section I, with particular attention on the limits of transparency as both a norm–making tool and a technique within the principles of property.

54. For a discussion of the Deepwater Horizon oil spill, see, for example, *The Deepwater Horizon Tragedy: Holding Responsible Parties Accountable: Hearing on S.253 Before the S. Comm. on Commerce, Sci. and Transp.*, 111th Cong. 2 (2010).

II. INTERNATIONAL LAW AND TRANSPARENCY IN THE ENVIRONMENTAL FIELD: HARD AND SOFT LAW

The foundation for international environmental law transparency might be based in the growing number of substantive conventions and norms recently generated through internal organs of the community of states.⁵⁵ A summary review of these efforts suggests that there is relatively little attention paid to transparency issues, especially when the monitored activity occurs at the level of corporate actors.⁵⁶

The current template, with a division between substantive environmental regulation and monitoring/transparency regimes was set in two soft law instruments separated by about twenty years—the 1972 Stockholm Declaration⁵⁷ and the 1992 Rio Declaration.⁵⁸ The Stockholm Declaration was the first major attempt at constructing some basis for international environmental policy obligations.⁵⁹ Both aspirational and vague, the preliminary language of the Declaration makes no direct reference to transparency efforts.⁶⁰ The closest thing to a transparency element is found in Principle 11, which states that “appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.”⁶¹ The Rio Declaration focused more directly on transparency, but was limited severely by the governance framework within which it was structured.⁶² It dealt solely with state actors, by limiting both transparency obligations for information held by the public authorities and outside access to

55. See Mark R. Goldschmidt, *The Role of Transparency and Public Participation in International Agreements: The North American Agreement on Environmental Cooperation*, 29 B. C. ENVTL AFF. L. REV. 343, 343 (2002).

56. See Christopher Marquis & Michael W. Toffel, *When do Firms Greenwash? Corporate Visibility, Civil Society Scrutiny, and Environmental Disclosure* 38 (Harvard Business School, Working Paper No. 11, 2012).

57. Stockholm Declaration of the United Nations Conference on the Human Environment art. 2, June 16, 1972, 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

58. The Rio Declaration, *supra* note 37.

59. See Duncan French, *International Guidelines and Principles*, in CONVENTIONS, TREATIES, AND OTHER RESPONSES TO GLOBAL ISSUES 76 (2009).

60. Stockholm Declaration, *supra* note 57.

61. *Id.* at 1419.

62. The Rio Declaration, *supra* note 37, at 877.

non-state actors by imposing an appropriateness principle.⁶³ An important object of transparency was to enhance democratic participation by individuals, who were to be given the opportunity to participate in the decision-making processes of states, along with access to administrative and judicial remedies.⁶⁴

Conventional law efforts did not advance transparency to any significant extent. Signed concurrent to the Rio Declaration, the Convention on Biological Diversity⁶⁵ includes monitoring obligations, and references to the exchange of information, but only with regard to “the conservation and sustainable use of biodiversity.”⁶⁶ This accord does not focus on transparency, because it focuses on matters affected by, but not directly producing, environmental outcomes.⁶⁷ As such, outcomes-based transparency might be enhanced but transparency with respect to poor environmental practices are not directly within its scope. Likewise, the International Maritime Organization⁶⁸ produced the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,⁶⁹ commonly known in its most modern form as the London Protocol.⁷⁰ This protocol contains no reference to transparency beyond a general assertion of monitoring responsibility.⁷¹

The UN Framework Convention on Climate Change,⁷² and the subsequent implementation of the Kyoto Protocol,⁷³ were

63. *Id.*

64. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (with annexes), art. 1, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

65. U.N. Conference on Environment and Development: Convention on Biological Diversity, June 5, 1991, 31 I.L.M. 818.

66. *Id.* at art. 17.

67. *Id.* at art. 26.

68. For an in-depth review of the International Maritime Organization, see Int'l Maritime Org. [IMO], *Strategic Plan For The Organization (For The Six-Year Period 2010– 2015)*, IMO Assemb. Res. A 1011 (26) (Jan. 18, 2010).

69. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 104 U.N.T.S. 120.

70. 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 and Resolutions Adopted by the Special Meeting, Nov. 7, 1996, 36 I.L.M. 7, 7–26 (1997).

71. *Id.*

72. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107. .

73. Kyoto Protocol to the United Nations Framework Convention on

sea change moments for the development and public recognition of climate change as a subject of international concern. Despite the great expectations raised by the Protocol, its effects on global warming are unclear, due to a variety of compromising factors.⁷⁴ The reporting requirements were broad and directed toward state parties.⁷⁵ Many have argued that the broad array of means by which signatory countries could evade the intended behaviors enforced by the Protocol effectively undermined its reporting requirements.⁷⁶ The Protocol, like the Convention and the Stockholm Declaration before it, does not consider business actors as separate stakeholders in the compliance process,⁷⁷ nor does it consider transparency as an independently important issue.⁷⁸

Other conventions provide a broader framework for disclosure—at least among states. For example, Article 8, Section 8 of the Convention on International Trade in Endangered Species⁷⁹ includes a notable concession to a public interest in the covered subject material— a provision indicating that the annual and semiannual trafficking and permissions reports made by the parties to the Convention “shall be available to the public where this is not inconsistent with the

Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

74. One compromising factor is the possibility of corruption during the emissions trading process, for more information on the emissions trading process. See United Nations Framework Convention on Climate Change, Montreal, Can., Dec. 10, 2005, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session*, U.N. Doc. FCCC/KP/CMP/2005/8/Add.2 (March 30, 2006) [hereinafter *Kyoto Protocol on its First Session*].

75. Kyoto Protocol, *supra* note 73, at 35.

76. For a discussion of non-compliance and reporting concerns, including recommendations for remedy, see *Joint Working Group Compliance on the Kyoto Protocol: An Overview of Suggestions on Compliance* 17–19 (June 11, 1999) (unpublished manuscript) (on file with author), available at <http://igitur-archive.library.uu.nl/law/2010-0519-200206/1999GHAddink.pdf>.

77. Steven Kaufman, *Briefing on Kyoto Mechanism Eligibility for CARILEC Member Companies*, GREEN MARKET INTERNATIONAL, INC. (2005), http://toolkits.reeep.org/file_upload/10304040_1.pdf (illustrating that business participation recognition is contingent upon national ratification).

78. See, e.g., United Nations Framework Convention on Climate Change, Copenhagen, Swed., Dec. 7–19, 2009, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its Fifth Session, held in Copenhagen from 7 to 19 December 2009*, U.N. Doc. FCCC/KP/CMP/2009/21/Add.1 (March 2010).

79. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243.

law of the Party concerned.”⁸⁰ Another example of this approach is Article 5 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.⁸¹ It describes in some detail reporting and informational obligations between party states, and to the administrating secretariat. Absent, however, is any mention of public disclosure, or any form of uncontrolled communication of information regarding the subjects of the Convention beyond interested state actors, hazardous materials and activities.⁸² A different approach is taken in the UN Convention to Combat Desertification,⁸³ in which signatory parties appear to make few strong obligations. Article 16, however, does include a clause directing parties to “exchange and make fully, openly and promptly available information from all publicly available sources relevant to combating desertification and mitigating the effects of drought.”⁸⁴ The effectiveness of this provision remains unclear.

Other conventions may include provisions that touch on environmental issues. The UNESCO Convention Concerning the Protection of the World Cultural & Natural Heritage,⁸⁵ as befits an arrangement based upon the protection of cultural materials, includes numerous mechanisms for publicizing risks to locations of cultural heritage.⁸⁶ Despite this fact, the clauses describing reporting by state participants include no reference to any duty or obligation to publicize.⁸⁷

Regional environmental conventional law appears to have placed more emphasis on transparency issues. The UN Economic Commission for Europe,⁸⁸ in producing the Convention on Long-Range Transboundary Pollution,⁸⁹ sought

80. *Id.* at art. 8.

81. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 125.

82. *Id.* at art. 13.

83. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994, 1954 U.N.T.S. 3 [hereinafter Desertification Convention].

84. *Id.* at art. 16.

85. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151.

86. *Id.* at art. 11.

87. *Id.* at art. 29.

88. UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, <http://www.unece.org/> (last visited October 22, 2012).

89. Convention on Long-Range Transboundary Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217.

to address the political problems raised by the incomplete and at times, perverse incentive systems arising from pollution across national boundaries.⁹⁰ As an organization devoted to a narrower geographic area, and more closely aligned with its individual parties, the Convention implemented reporting mechanisms specific to each protocol agreement formed under the broader Convention body. Among a sampling of protocols agreed to under the Convention, no reference was found to public disclosure within these reporting agreements.⁹¹ In this area, as in others detailed below, the narrow area of consideration, coupled with the pragmatic bargaining nature of the governance structure imposed on the parties, appear to serve as a veil between state (and indirectly, corporate) actors and the public in carrying out environmentally compromising activities.

Perhaps the most developments have occurred at the regional level. For example, take the internalization of the provisions of the Aarhus Convention⁹² within the E.U.⁹³ “It is the first piece of European legislation that combines environmental rights and human rights and it is also the first document completely about public participation in environmental matters.”⁹⁴ The Aarhus Convention requires “public authorities, in response to a request for environmental information, [to] make such information available to the public, within the framework of national legislation.”⁹⁵ It also requires public participation in decision making⁹⁶ and access to justice.⁹⁷ These provisions were transposed into European law through a

90. For a discussion on the Convention on Long-Range Transboundary Pollution, see, for example, *CLEARING THE AIR: 25 YEARS OF THE CONVENTION ON LONG-RANGE TRANSBOUNDARY AIR POLLUTION* (Johan Sliggers & Willem Kakebeeke, eds., 2005).

91. *Id.*

92. Aarhus Convention, *supra* note 64, at 451; see Aarti Gupta, *Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance*, 8 *GLOBAL ENVTL. POL.* 1, 3 (2008).

93. Vera Rodenhoff, *The Aarhus Convention and its Implications for the 'Institutions' of the European Community*, 11 *REV. OF EUR. COMMUNITY AND INT'L ENVTL. L.* 343, 343–357 (2002).

94. Alan Pickaver & Wouter Kreiken, *The Aarhus Convention*, EUROMARINE (Aug. 3, 2011, 1:29 PM), http://www.euromarineconsortium.eu/wiki/The_Aarhus_Convention.

95. Aarhus Convention, *supra* note 64, at art. 4. States are required to develop systems for the collection of information as well. *Id.* at art. 5.

96. *Id.* at arts. 6–8.

97. *Id.* at art. 9.

series of directives and regulations.⁹⁸ This structure, however, is of secondary use to business in matters of environmental transparency. More importantly, these structures suggest the utility of information produced by business in the ability of state organs to meet their information harvesting obligations under the Convention as transposed into European law.⁹⁹

Taken together, these developments suggest that transparency plays a secondary role in the policy development of substantive environmental law. The principal focus remains traditional in scope and method—centering on the state. The state is the only subject of international law, direct regulation, standards and conduct commandments. The state is the principal vehicle for the realization of substantive objectives involving transparency. Transparency and its related techniques¹⁰⁰ are not understood to carry substantive regulatory possibilities, and non-state actors remain objects of international law.¹⁰¹ States for the most part retain substantially unlimited control over the types of information it might develop, harvest, and make available to non-state actors.¹⁰² Even where the state appears to be obligated to fully disclose, for example, in the Desertification Convention,¹⁰³ disclosure is limited to information publicly available. While regional accords provide a better model, one cannot readily speak of transparency in substantive international economic law. The exception appears to be the Aarhus Convention.¹⁰⁴ It is focused on transparency, but its character as an instrument of public governance—environmental democracy—reduces its

98. Commission Regulation 1367/2006, of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, 2006 O.J. (L264) 13, 14. *See also* Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters, EUR. PARL. DOC. (COM 624) 4 (2003).

99. Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1, 33 (2007).

100. *See* Backer, *Global Panopticism*, *supra* note 8.

101. *See Non-State Actors*, in INTERNATIONAL RELATIONS, 59–76 (Bas Art et al. eds., 2001).

102. *See id.* 59–76.

103. Desertification Convention, *supra* note 83, at art. 16.

104. *See generally* Aarhus Convention, *supra* note 64 (The Aarhus Convention grants the public rights regarding access to information, public participation and access to justice, in governmental decision-making processes on environmental matters.).

value as a method of transparency in the context of business activities.

III. SOURCES OF TRANSPARENCY RULES IN INTERNATIONAL LAW BEYOND ENVIRONMENTAL GOVERNANCE FRAMEWORKS

Though there is an increasing amount of substantive environmental regulation at the international level, there is substantially less focus on issues of transparency.¹⁰⁵ To some extent, the slack is taken up in international efforts to create governance frameworks for economic activity, rather than environmental governance frameworks. Those frameworks seek to develop general corporate governance structures at the international level. Hard law in the area of corporate governance and especially corporate disclosure remains a distant goal.¹⁰⁶ On the other hand, important soft law efforts have been emerging since the 1990s.¹⁰⁷ The most successful of these efforts seek to leverage social norm systems¹⁰⁸ within international and domestic public institutional frameworks. Section A highlights two important soft law efforts: the OECD's transparency provisions within its guidelines and principles of corporate governance, and the Guiding Principles of Business and Human Rights. Section B then examines transparency at the intersection of domestic and international law, looking to domestic efforts to export their legal regimes abroad or to internationalize their law-based norm structures that include a transparency component that touches on transparency in environmental impacts of corporate activity.

105. See generally Backer, *Moral Obligation*, *supra* note 29.

106. Isabelle Duplessis, *Soft International Labour Law: The Preferred Method of Regulation in a Decentralized Society*, in GOVERNANCE, INTERNATIONAL LAW & CORPORATE SOCIAL RESPONSIBILITY 7 (2008), <http://www.ilo.org/public/english/bureau/inst/download/116.pdf> (last visited Oct. 22, 2012); GAO Yun, "Secondary Effect" in Implementation of Corporate Social Responsibility in Supply Chain, in GOVERNANCE, INTERNATIONAL LAW & CORPORATE SOCIAL RESPONSIBILITY 155 (2008), <http://www.ilo.org/public/english/bureau/inst/download/116.pdf> (last visited Oct. 22, 2012).

107. See Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420 (1991).

108. Special Representative of the Secretary-General, *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶¶ 48–54, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).

A. International Soft Law Frameworks: The OECD and Guiding Principles of Business and Human Rights

The OECD Principles of Corporate Governance (OECD 2004)¹⁰⁹ provide a generalized framework reflecting the consensus among developed states of the basis for corporate organization in the context of a markets-based, welfare maximizing economic system. Chapter 5 of the Principles, with its associated commentary, is dedicated to disclosure and transparency practices.¹¹⁰ Emphasizing potential market benefits for companies that make effective use of disclosure mechanisms, the Commentary delineates a series of concerns regarding obstacles to good faith corporate disclosure, paying particular attention to the importance of the validity of third party auditors and the accessibility of publicly disclosed information.¹¹¹ These concerns form a foundation upon which other, more targeted agreements build.

The OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD 2005)¹¹² were crafted specifically as a complement to the Principles of Corporate Governance.¹¹³ Drafted from the perspective of the state as owner, they are meant to reflect the necessary restructuring of the state economic sector in light of globalization, technological changes and emerging regimes of free movement of goods, services and capital across borders.¹¹⁴ Mirroring the Principles of Corporate Governance in structure, Chapter 5 of the state-owned enterprises (SOEs) document also addresses transparency and disclosure at length.¹¹⁵ Its basic premise is that state-owned enterprises (SOEs) should, at a minimum, generally be held to a disclosure and accounting standard fully equal to that of privately held corporations. Central to this parity mandate is the implementation of independent auditing systems and annual (or, ideally, biannual) reporting procedures.¹¹⁶

109. Organization for Economic Co-operation and Development [OECD], *OECD Principles of Corporate Governance* (2004), <http://www.oecd.org/dataoecd/32/18/31557724.pdf> (last visited Oct. 22, 2012).

110. *Id.* at 22–23.

111. *Id.* at 49–57.

112. Organization for Economic Co-operation and Development [OECD], *OECD Guidelines on Corporate Governance of State-Owned Industries* (2005), <http://www.oecd.org/dataoecd/46/51/34803211.pdf> (last visited Oct. 22, 2012).

113. *Id.* at 9.

114. *Id.* at 10.

115. *Id.* at 41–46.

116. Paragraph E further emphasizes the need for additional disclosure in

The Guidelines on Multinational Enterprises (2010)¹¹⁷ provide a comprehensive framework for guiding the behavior of economic activity that crosses borders. The object of these Guidelines, among many, is to encourage positive contributions “to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise.”¹¹⁸ Like the Principles of Corporate Governance and Guidelines for SOEs, the Guidelines for Multinational Enterprises focus disclosure on financial matters geared toward shareholder concerns.¹¹⁹ But because disclosure is grounded on “information . . . regarding [enterprise’s] activities, structure, financial situation and performance,”¹²⁰ enterprises are also “encouraged” to include additional information that “could include” value statements or statements of business conduct, policies or other codes of conduct adopted by the enterprise, including performance in relation to those codes, information on internal audits and information on relationships with labor and stakeholders.¹²¹

Taken together, the three OECD governance frameworks suggest the contours for a system of monitoring and reporting that have potentially significant application to issues of environmental transparency. These frameworks suggest the outlines of a social norm standard for transparency in general, including environmental effects on transparency. Such social norms are then meant to be enabled and facilitated through the instrumentalities of states, without invoking the formal structures of the domestic legal orders of participating states.¹²² The effects can be quite substantial, but they remain grounded in politics, and the social norm systems that fall

the context of SOEs, due to the greater endowment of public trust and authority that such endeavors maintain. In this context, “company objectives should be made clear to all other investors, the market and the general public. Such disclosure obligations will encourage company officials to clarify the objectives to themselves, and could also increase management’s commitment in pursuing these objectives. It will provide a reference point for all shareholders, the market and the general public for considering the strategy adopted and decisions taken by the management.” *Id.* at 44.

117. Organization for Economic Co-operation and Development [OECD], *OECD Guidelines for Multinational Enterprises* (2000), <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (last visited Oct. 22, 2012).

118. *Id.* at 11.

119. *Id.* at 15–16.

120. *Id.* at 15.

121. *Id.* at 15–16.

122. *See id.* at 9.

outside the comfortable and well-established parameters of law and the state system.¹²³

Like the OECD framework, the U.N. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework (UNGP),¹²⁴ endorsed in June 2011 by the U.N. Human Rights Council,¹²⁵ also posits a soft law framework for business conduct, in which transparency plays a substantial part.¹²⁶ The UNGP posits a three-part framework—a state duty to protect human rights, a corporate responsibility to respect human rights, and an obligation to provide remedies for human rights wrongs.¹²⁷ The state duty is grounded in and limited by each state's legal commitments under international law.¹²⁸ The corporate responsibility to respect human rights is based on the social norm obligations of corporations which is defined substantively by the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights), coupled with the eight International Labor Organization core conventions that form the basis of the Declaration on Fundamental Principles and Rights at Work.¹²⁹

123. For a discussion from earlier work, see Larry Catá Backer, *Governance without Government: An Overview*, in "EXTRATERRITORIALITY": TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION (Günther Handl & Joachim Zekoll eds., forthcoming 2012).

124. Special Representative of the U.N. Secretary-General, *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, U.N. Doc. A/HRC/17/32 (May 27, 2011); Special Representative of the U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, (Mar. 21, 2011) [hereinafter *UNGP*] <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples> (last visited Oct. 22, 2012).

125. H.R.C. Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), (Apr. 2, 2012, 5:12 AM), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

126. E.g., Bill Witherell, *Corporate Governance and Responsibility Foundations of Market Integrity*, 234 OECD OBSERVER 7 (2002), (Apr. 2, 2012, 5:22 AM), <http://www.oecd.org/pdf/M00036000/M00036447.pdf>.

127. *UNGP*, *supra* note 124, at 6–27.

128. *Id.* at 8–13.

129. The social norm character of these obligations is apparent because many of the specific provisions of the International Bill of Human Rights are not binding on all states, nor are they incorporated into the domestic legal

The remedial obligation is constructed from the premise that states are obligated to provide a formal system of grievance resolution, which is to be supplemented by informal public alternatives and private systems of dispute resolution.¹³⁰

The transparency elements of the Guiding Principles reflect their substantive assumptions. The state duty describes its transparency elements in general terms.¹³¹ The transparency obligations for states are framed only as part of effective compliance with the legal obligations of states as a matter of both its international obligations and the rules of its domestic legal order.¹³² The Guiding Principles are clear about their limits—they merely structure existing state obligations,¹³³ though they also suggest a hierarchy of law in which international obligations are superior to national legislation.¹³⁴ Within this limited scope, the Guiding Principles focus on transparency through the lens of policy coherence, both within the state¹³⁵ and in relationships with others.¹³⁶ Otherwise, states are encouraged to share and obtain information from non-state actors in aid of their effective implementation of legislation or the advancement of policy.¹³⁷ States are also encouraged to develop national standards, including performance-monitoring rules.¹³⁸

order of states, and are thus beyond the obligation commitments under the state duty to protect human rights. See Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 69 (2012).

130. *UNGP*, *supra* note 124, at 22–23.

131. *See generally id.*

132. *Id.* at 8 (“The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws”).

133. *Id.* at 6 (“Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.”).

134. *Id.* at 6–7.

135. *Id.* at 11–12.

136. *Id.* at 12–13.

137. *Id.* at 10–11.

138. *Id.* at 9–10 (These might include social and environmental reporting as part of the securities laws reporting regimes in the United States); *see, e.g.*, Mitchell F. Crusto, *Endangered Green Reports: “Cumulative Materiality” in Corporate Environmental Disclosure After Sarbanes-Oxley*, 42 HARV. J. ON LEGIS. 483, 486 (2005); *see also*, Commission Guidance Regarding Disclosure

It is in the context of the social norm framing provisions of the corporate duty to respect human rights that transparency assumes its greatest breadth.¹³⁹ That breadth is developed through the elaboration of a system of human rights due diligence,¹⁴⁰ the core means through which the corporate responsibility to respect human rights is implemented and made transparent.¹⁴¹ The methodologies of human rights due diligence is to be built, in part, on the patterns and experience of environmental due diligence already practiced by companies,¹⁴² and reporting can be consolidated with social and environmental reporting as well.¹⁴³ Companies are advised either to build self-standing human rights due diligence processes or to integrate them with corporate environmental impact assessments,¹⁴⁴ which can be integrated with corporate internal tracking systems for environmental performance.¹⁴⁵ Severe human rights impacts that may trigger both the reporting obligations and mitigation/remediation include the delayed effects of environmental harm.¹⁴⁶

B. TRANSPARENCY AT THE INTERSECTION OF DOMESTIC AND INTERNATIONAL LAW—EXTRATERRITORIALITY, INCORPORATION OF INTERNATIONAL NORMS WITHIN DOMESTIC LEGAL ORDERS, AND INTERNATIONALIZATION OF DOMESTIC RULES

International structures are to some extent grounded in and implemented through the domestic legal orders of

Related to Climate Change, 17 C.F.R. § 211, 231, 241 (2010).

139. *UNGP*, *supra* note 124, at 15 (providing that corporate policy should be publicly available and communicated to all internal and external relevant parties).

140. *Id.* at 16–21.

141. *Id.* at 20 (showing that companies respecting human rights requires “a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.”).

142. U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, THE CORPORATE RESPONSIBILITY TO PROTECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE, at 31, HR/PUB/12/02, U.N. Sales No. GE.12–42255 (2012) <http://www.business-humanrights.org/Links/Repository/1009746/jump> (last visited Oct. 22, 2012) [hereinafter CORPORATE RESPONSIBILITY]. However, these processes for assessment cannot change the focus on all internationally recognized human rights. *UNGP*, *supra* note 124, at 17–18.

143. CORPORATE RESPONSIBILITY, *supra* note 142, at 53.

144. *Id.* at 37.

145. *Id.* at 48. There is an assumption that the technical standards applicable to environmental impacts will all be used as a model. *Id.* at 49.

146. *Id.* at 7, 71.

participating states. But states do at times seek to internationalize their domestic legal orders by projecting state power outward into the territories of other states.¹⁴⁷ The most effective way of doing so is by attaching domestic law to its citizens or legal constructs—corporations and other juridical persons.¹⁴⁸ However, there are other methods as well. Some of the more important methods of internationalization of national law systems that may affect transparency in environmental law are the following: extraterritoriality, the incorporation of international hard or soft law into domestic law, and the internationalization of domestic law. Of these methods, the first is by far the most important.

1. Extraterritoriality

While much of the focus on transparency in international environmental law flows downward from international organs developing law or standards to its incorporation by states, some internationalization in this respect might be understood as flowing in the other direction. Though by no means as broad in scope, nor as legitimate (at least in some quarters), extraterritoriality of law represents a method of internationalization worthy of consideration. For that purpose, one considers efforts along those lines undertaken by the United States, one of the most active proponents of this form of nationalist internationalization.

States have sought to project their domestic legal orders abroad, especially in the context of governance gaps. Extraterritoriality has been encouraged by some soft law international corporate governance frameworks (for example in the UNGP discussed above) when the domestic legal order has transposed international standards.¹⁴⁹ Environmental statutes sometimes, either as their sole purpose or as part of a broader legislative objective, aim to impose a requirement of consideration, requiring administrators or adjudicators to weigh some form of information regarding environmental

147. See generally BIRNIE, *supra* note 43, at 108–267 (providing an overview of the environmental policy in international law and states' obligations and rights, as well as issues of enforcement).

148. See generally *id.* at 108–267.

149. UNGP, *supra* note 124, at 7 (“There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses.”).

effects in permitting a given corporate action.¹⁵⁰ Other statutes protect the authority of domestic and international environmental interests from corrosive effects, such as limiting trade agreements that could subsequently be used as a hammer against plant or animal protection.¹⁵¹ Tragedies such as the Bhopal chemical leak have produced calls for greater extraterritorial measures, but these calls have been most successful within academic circles.¹⁵²

Bilateral Investment Treaties may also produce some extraterritorial effect. The boldest move in exporting accountability for environmental effects came directly from the United States' executive branch. In 1999 Bill Clinton issued Executive Order 13141, which directed the US Trade Representative and the Chair of the Council on Environmental Quality to require assessment and review of the potential environmental impact of major trade agreements.¹⁵³ This relatively unprecedented move has not been replicated since, and its enactment was the source of considerable criticism as a

150. See, e.g., Environmental Effects Abroad of Major Federal Actions, Exec. Order No. 12114, 44 Fed. Reg. 1957 (Jan. 4, 1979) (sets forth the requirements for analysis of environmental impacts abroad from major federal actions without determining the extent or limitations of NEPA's extraterritorial reach); Endangered Species Act, 16 U.S.C. § 1536 (1973) (requiring federal agencies to consult with the Fish and Wildlife Service or the National Marine Fisheries Service when a proposed agency action may adversely affect a listed endangered or threatened species); National Environmental Policy Act, 42 U.S.C. §§ 4321–4370 (1969) (seeks to ensure that government decision-making takes account of the environmental consequences expected to result from governmental actions and approvals).

151. Packwood–Magnuson Amendment to the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1821(e) (1979) (imposes trade measures on countries diminishing the effectiveness of international fisheries conservation); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992 (1976) (regulates the generation, transportation, treatment, storage, and disposal of hazardous wastes); Marine Mammal Protection Act, 16 U.S.C. § 1372 (1972) (prohibits the unauthorized taking of a marine mammal by any person subject to the jurisdiction of the U.S.); Pelly Amendment to the Fisherman's Protective Act of 1967, 22 U.S.C. §§ 1978–1980 (1971) (permits trade restrictions for actions that diminish the effectiveness of international wildlife agreements).

152. See generally Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5 (2003) (analyzing extraterritorial measures and examining the Bhopal chemical leak).

153. For a description of the writing process for the Order and the concurrent debate over its effect, see, for example, James Salzman, *Executive Order 13141 and the Environmental Review of Trade Agreements*, 95 AM. J. INT'L L. 366 (2001).

purportedly protectionist policy.¹⁵⁴ Beyond actions of legislative and executive fiat, the U.S. justice system continues to struggle with issues of jurisdictional conflict that have risen from its attempted exportation of prescriptive corporate law.¹⁵⁵

2. Incorporation of International Norms Within Domestic Legal Orders

For many jurisdictions, international law remains merely an obligation between states, with no internal effect until those obligations are incorporated within the domestic legal order of the state. There is little written about the extent to which states have undertaken their treaty obligations in this respect. Though there have been calls for internationalization of domestic practice¹⁵⁶ or adoption of harmonized best practices¹⁵⁷ with the object of adding to customary international law, these calls have not produced a uniform body of international law.

Perhaps the most interesting experiment in incorporation is regional. The European Union provides the most evolved example.¹⁵⁸ The European Union has focused on product

154. Smita B. Brunnermeier & Arik Levinson, *Examining the Evidence on Environmental Regulations and Industry Location*, 13 J. ENV'T. & DEV. 6, 7 (2004).

155. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) (affirms a circuit court ruling dismissing claims against British defendants in an action under the Commodity Exchange Act because the Act did not provide for nationwide service of process and the requirements of the Louisiana long-arm statute were not met); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (identifying factors for determining when jurisdiction would be refused on the basis of *forum non conveniens*).

156. See, e.g., Brian R. Popiel, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. ENVTL. AFF. L. REV. 447 (1995) (advocating for internationalization of environmental impact assessments as a mechanism for transborder resolution of harm); INTERNATIONAL ASSOCIATION FOR IMPACT ASSESSMENT, *PRINCIPLES OF ENVIRONMENTAL IMPACT ASSESSMENT BEST PRACTICES* (1999) ("the process should have clear, easily understood requirements for EIA content; ensure public access to information; identify the factors that are to be taken into account in decision making; and acknowledge limitations and difficulties.").

157. See, e.g., OPEN SOCIETY FOUNDATION, *ENVIRONMENTAL TRANSPARENCY PARTICIPATION AND JUSTICE* (2011) (recommending best practices in transparency, accountability and civic engagement).

158. See, e.g., ENVIRONMENTAL POLICY IN EUROPE, *THE EUROPEANIZATION OF NATIONAL ENVIRONMENTAL POLICY* (Andrew Jordan & Duncan Liefferink eds., 2004).

standards¹⁵⁹ and environmental quality standards.¹⁶⁰ As in other areas of regulation, the form of regulatory intervention has shifted from an early emphasis on command-and-control regulation focusing on product/process standards and environmental quality objectives to principles and objectives based 'New environmental policy instruments' ('NEPIs').¹⁶¹ The institutional form appears to shift governance from foreign to environmental ministries, and from a singular focus on Member State governments to a networked approach that includes international organizations and civil society actors.¹⁶²

But, like governance efforts at the international level, the E.U. has also advanced voluntary or soft law approaches. For example, the Eco-Management Audit Scheme,¹⁶³ operative since 1995 and last revised in 2010, is structured as a voluntary program.¹⁶⁴ Its key elements include an annual update of the organization's environmental policy targets, implementation assessments, third party verification of performance, and the circulation of an environmental statement.¹⁶⁵ There is some effort to harmonize EMAS with ISO 14001 standards, but the systems are not interchangeable,¹⁶⁶ potentially creating some inter-systemic

159. See, e.g., Council Resolution 136/01, 1985 O.J. (C 136) 1–9 (EC) (beginning the new regulatory approach).

160. E.g., ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION, SETTING ENVIRONMENTAL STANDARDS, 1998 Cm. 4053 (U.K.), available at <http://webarchive.nationalarchives.gov.uk/20080727172000/http://www.defra.gov.uk/environment/rcep/21/01.htm>.

161. See generally Council Resolution 79/409, 1979 O.J. (L 103) 1 (EC) (Birds Directive); Council Resolution 966/92, 1992 O.J. (L 103) 1 (EC) (Habitats Directive); *Natura 2000 Network*, EUROPEAN COMMISSION, http://ec.europa.eu/environment/nature/natura2000/index_en.htm (last updated Sept. 14, 2012) (Natura Directive).

162. See, e.g., ESSAYS IN ENVIRONMENTAL POLICY CONVERGENCE IN EUROPE: THE IMPACT OF INTERNATIONAL INSTITUTIONS AND TRADE (Katharina Holzinger, et al. eds., 2008); Council Directive 2000/60, 2000 O.J. (L 327) 1 (EC) (Water Framework Directive).

163. See Commission Regulation 1221/2009, 2009 O.J. (L 342) 1 (EC).

164. *Key Elements of EMAS*, EUROPEAN COMMISSION (last updated Sept. 12, 2012), http://ec.europa.eu/environment/emas/about/summary_en.htm.

165. *EMAS Frequently Asked Questions: Question 1.2*, EUROPEAN COMMISSION, http://ec.europa.eu/environment/emas/tools/faq_en.htm#Section1Question2 (last updated Sept. 12, 2012).

166. *EMAS Frequently Asked Questions: Question 13.2*, EUROPEAN COMMISSION, http://ec.europa.eu/environment/emas/tools/faq_en.htm#Section13Question2 (last updated Sept. 12, 2012) ("The adoption of EN ISO 14001:2004 as the

dissonance.¹⁶⁷ Another example is the EU Ecolabel, which is also structured as a voluntary product certification scheme accrediting products and services.¹⁶⁸

In the United States, some state statutes indirectly incorporate international environmental standards. Several states have sought to modify their corporate law to permit the creation of “benefit” corporations that may deviate from the fundamental objective of maximizing shareholder wealth,¹⁶⁹ operate as low profit limited liability companies,¹⁷⁰ or prioritize operating in an environmentally and socially responsible manner.¹⁷¹ In Maryland, benefit corporations are to be operated for both general and specific public benefit,¹⁷² and must deliver to shareholders an “annual benefit report” that includes an “assessment of the societal and environmental performance of the benefit corporation prepared in accordance with a third-party standard.”¹⁷³ The third party standard setters can include any entity that meets statutory requirements.¹⁷⁴ These

management system element of EMAS will allow organisations to progress from EN ISO 14001:2004 to EMAS without undue duplication of effort. A successful certification of EN ISO 14001:2004 means that the most important steps towards EMAS certification have been taken. However, certain additional steps will have to be taken in order to register under EMAS as the premium benchmark for environmental management.”).

167. *EMAS Frequently Asked Questions: Question 13.3*, EUROPEAN COMMISSION,

http://ec.europa.eu/environment/emas/tools/faq_en.htm#Section13Question0

(last updated Sept. 12, 2012) (pointing out 13 differences between EMAS and ISO 14001 standards, some of which make adoption of both programs difficult); see also Joey Tsu-Yi Chen, *Green Sox for Investors: Requiring Companies to Disclose Risks Related to Climate Change*, 5 J. BUS. & TECH. L. 325, 341–43 (2010).

168. Commission Regulation 66/2010, 2009 O.J. (L 27) 1 (EC); *Ecolabel*, EUROPEAN COMMISSION, <http://ec.europa.eu/environment/ecolabel/> (last updated June 6, 2012).

169. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 594 (2011) (referring to laws in Maryland, New Jersey, Vermont, and Virginia).

170. Elizabeth Schmidt, *Vermont’s Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 167–70 (2010).

171. Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1019–20 (2009).

172. MD CORPS & ASS’NS § 5–6C–01(b)–(c) (LexisNexis 2011).

173. *Id.*, § 5–6C–08(a)(2).

174. In Maryland these include independence from the benefit corporation, publicly available information about the identity of the people who are responsible for the development and control of the standards, and publicly available metrics. MD CORPS & ASS’NS § 5–6C–01(e); see also N.J. STAT. ANN.

providers include private or public entities.¹⁷⁵ More importantly, the statutes indirectly provide a method for incorporation of international norms within domestic law since “[c]ertifiers of high environmental performance, such as those authorized to assess compliance with the ISO 14001 Environmental Management System standard, could likewise qualify as third-party standard-setters with a few changes.”¹⁷⁶ Some standard setters are also actively engaged in the development of this sort of enterprise,¹⁷⁷—a case of the standard setter as substantive regulator.¹⁷⁸

3. *Internationalization of Domestic Rules*

A number of domestic rules of transparency affect global actors because of their effective reach. This section considers two examples: regulation of security transaction disclosure and regulation of markets for trading in corporate securities. These regulations arose to respond either to changes in national law creating liability for certain environmental effects of corporate activity or to changes in social norms such as ethical investment standards. These regulations have international impacts since international companies listed on the US markets must conform to domestic rules, thereby altering how the businesses operate around the world.

In the United States, the disclosure rules under federal law have tracked the growth of liability for certain environmental activity.¹⁷⁹ Disclosure is usually predicated on the possibility that such action will have a material effect on the financial

§ 14A:18–1 (West 2012).

175. Brakeman Reiser, *supra* note 169, at 601–03 (identifying potential private providers).

176. *Id.* at 602–03.

177. Among them is B Labs. *Powered by B Lab*, GIIRS, <http://giirs.org/powered-by-b-lab> (last visited Apr. 2, 2012) (“B Lab is a nonprofit organization whose mission is to create a new sector of the economy that harnesses the power of business to solve social and environmental problems.”); *see also*, Christopher Marquis, Andrew Klaber, & Bobbi Thomason, *B Lab: Building a New Sector of the Economy*, in HARVARD BUSINESS SCHOOL CASE STUDIES (2010).

178. *See, e.g.*, David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 395–401 (2005) (describing regulatory effects of mandatory disclosure regimes); *see generally* Backer, *Global Panopticism*, *supra* note 8 (discussing mechanics of surveillance as governance).

179. Mark Latham, *Environmental Liabilities and the Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change-Related Risks*, 39 ENVTL L. 647, 702 (2009).

condition of the company.¹⁸⁰

Securities markets have served as a nexus of domestic and international norms through the development of indexes conforming to particular requirements. The Dow Jones Sustainability Indexes and the FTSE4Good series are among the most well-known “green” indexes.¹⁸¹ A social return on investment analysis has also been developed, fashioned to measure the value and impact of a company’s environmental and social activities.¹⁸² Principle 6 of the social return on investment analysis framework emphasizes transparency as essential.¹⁸³

IV. TRANSPARENCY FRAMEWORKS BEYOND PUBLIC LAW

This section describes hybrid governance efforts, focusing on the work of the International Organization for Standardization (ISO) to develop standards for environmental management and corporate social responsibility and the United Nations Global Compact (“UNGC”) framework which encourages corporate social responsibility disclosures. Second, this section considers private efforts, focusing on Global Reporting Initiative (“GRI”) corporate social responsibility mechanisms, with an eye toward coherence, potential gaps, conflicts, and differences in transparency elements in product certification between GRI and ISO definitions and methods. Third, private corporate governance transparency regimes are considered.

180. *Id.* at 671–73.

181. “Green” indexes are global indexes focusing on sustainability and environmental practices. *See The Dow Jones Sustainability Index*, THE GREEN MARKET ORACLE, <http://www.thegreenmarketoracle.com/2011/05/dow-jones-sustainability-indexes.html> (last visited Oct. 8, 2012).

182. *See A Guide to Social Return on Investment 2012*, THE SROI NETWORK, http://www.thesroinetwork.org/publications/doc_details/241-a-guide-to-social-return-on-investment-2012 (last visited Apr. 1, 2012); Nicholls et al., ARTS COUNCIL ENGLAND, *A Social Return on Investment: A Guide to SROI Analysis* 4 (2006), http://www.artscouncil.org.uk/media/uploads/strategic_commissioning/A_social_return_on_investment.pdf.

183. THE SROI NETWORK, *supra* note 182 (“This principle requires that each decision relating to stakeholders, outcomes, indicators and benchmarks; the sources and methods of information collection; the different scenarios considered and the communication of the results to stakeholders, should be explained and documented.”).

A. HYBRID GOVERNANCE EFFORTS: ISO AND UNGC

ISO has produced two sets of standards with applicability to the issue of environmental transparency. The first, the ISO 14000 and 14001 standards are focused on substantive and internal management issues. ISO 14000 includes two standards which deal with environmental issues, covering environmental management systems (EMS),¹⁸⁴ general EMS guidelines,¹⁸⁵ the requirements for an EMS,¹⁸⁶ and specific environmental aspects, including: labeling, performance evaluation, life cycle analysis, communication and auditing. With respect to transparency, ISO 14000 focuses principally on developing common references for communicating about environmental management to corporate stakeholders—customers, regulators, the public and other stakeholders.¹⁸⁷

ISO 14001 says nothing about what environmental practices a company should adopt, though it creates a strong presumption that the company will require, at a minimum, compliance with applicable regulations.

Although the ISO standard lacks substantive 'teeth,' the expectation behind environmental management systems is that a company with a written environmental management policy, a senior officer in charge of that policy, and oversight of the policy by its board of directors is much more likely to become aware of environmental problems and to act responsibly to address them than a company that lacks such internal procedures.¹⁸⁸

The second set of standards, the International Guidance Standard on Organizational Social Responsibility or ISO 26000, represents perhaps the only complete and coherent attempt at a description of effective corporate social responsibility

184. International Organization for Standardization, *Environmental Management Systems: Requirements With Guidance For Use*, ISO 14001:2004 (2004) [hereinafter ISO 14001:2004]; International Organization for Standardization, *Environmental Management Systems: General Guidelines on Principles, Systems and Support Techniques*, ISO 14004:2004 (2004) [hereinafter ISO 14004:2004].

185. ISO 14004:2004, *supra* note 184.

186. *Id.*

187. *Id.*

188. Sanford Gaines, *Reflexive Law as a Legal Paradigm for Sustainable Development*, 10 BUFF. ENVTL. L.J. 1, 11 (2002).

practices.¹⁸⁹ It has become an influential standard of reference, reflecting a greater willingness to assert governance authority through soft law measures by international organizations.¹⁹⁰ Though structured to provide general guidance across a broad range of subjects, ISO 26000 also provides a greater focus on issues of transparency outside of enterprises.¹⁹¹

While the 26000 standard has specific sections devoted to topics such as environmental or labor corporate social responsibility, it is at most useful in discussing general practices necessary for corporate social responsibility. The standard defines transparency as “openness about decisions and activities that affect society, the economy and the environment (2.6), and willingness to communicate in a clear, accurate, timely, honest and complete manner.”¹⁹² The corresponding sections of the standard cover transparency and the role of communication in social responsibility, providing detailed and tremendously effective criteria against which to measure companies’ internal regimes.¹⁹³

Despite strong criticism from some quarters that the ISO 26000 standard was part of a long-term effort towards mandatory hard law corporate social responsibility requirements,¹⁹⁴ the series of standards has remained advisory in nature, and has not been applied as part of any overt push toward mandatory disclosure regimes.¹⁹⁵ Instead, the

189. International Organization for Standardization, *Social Responsibility*, ISO 26000:2010 (2010) [hereinafter ISO 26000:2010].

190. Halina Ward, *The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy*, 12 THEORETICAL INQUIRIES IN L. 665 (2011).

191. See, e.g., ISO 26000:2010, *supra* note 189, at 2.18 (defining social responsibility as “[r]esponsibility of an organization (2.12) for the impacts (2.9) of its decisions and activities on society and the environment (2.6), through transparent and ethical behavior (2.7) that...contributes to sustainable development (2.23), including health and the welfare of society. . . takes into account the expectations of stakeholders (2.20) . . . is in compliance with applicable law and consistent with international norms of behavior (2.11) . . . and . . . is integrated throughout the organization (2.12) and practiced in its relationships.”).

192. *Id.* at 2.24.

193. See generally *id.*

194. James Roberts, *How Corporate Social Responsibility (ISO 26000) Mandates Undermine Free Markets*, HERITAGE FOUNDATION, <http://www.heritage.org/Research/Reports/2010/05/Corporate-Social-Responsibility-Standards-ISO-26000-Bad-for-Business> (last visited Oct. 31, 2011).

195. ISO 26000:2010, *supra* note 189, at 1.

application of the ISO 26000 has been through its recent incorporation as advisory guidance in the predominant corporate social responsibility initiatives of the present day.¹⁹⁶ Although only recently promulgated and 'mere' guidance, the ISO 26000 standard provides a useful rubric against which to measure the designs and outcomes of NGOs seeking to involve themselves in corporate social responsibility activities, as well as the behavior of corporate actors. Perhaps above all else, what stands out in examining the ISO is its economy of necessity. Each list of recommendations for practice is clear in its own terms, and each element in each such list communicates by implication the absolute necessity that it be followed.¹⁹⁷ A practice that fails to imitate only a single given element of the 26000 standard may by so doing completely undermine the effectiveness of the practice, special circumstances requiring customization notwithstanding. This creates a gap between the expectations of stakeholders for information and the objectives of enterprises seeking to use disclosure to reduce exposure and capture market share.

The UNGC is one of the most recognizable and easy-to-follow initiatives relating to gathering and asserting corporate social responsibility disclosures.¹⁹⁸ Organized around ten principles covering subjects of human rights, labor, environmental and anticorruption values, the UNGC seeks to create a framework for corporate accountability, though it continues to suffer issues of legitimacy.¹⁹⁹ Organizations wishing to adhere to the UNGC are required to provide an annual Communication of Progress (CoP) self-reporting their support for the Global Compact and practical actions taken to implement the Ten Principles.²⁰⁰ This self-reporting is

196. *Id.*

197. *See generally id.*

198. *See generally* AFSHIN AKHTARKHAVARI, GLOBAL GOVERNANCE OF THE ENVIRONMENT: ENVIRONMENTAL PRINCIPLES AND CHANGE IN INTERNATIONAL LAW AND POLITICS 92–151 (2010) (discussing the Global Compact and its environmental principles).

199. *See* Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT'L L. 1, 20–30 (2007) ("The GC's legitimacy problems stem from two fronts: (a) its inability thus far to gain the explicit support of governments in the developed countries, and (b) the exclusion of at least one relevant constituency—host communities—from direct participation in its process.").

200. UN Global Compact, UN Global Compact Policy on Reporting Progress, http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy

mandatory and meant to protect the integrity of the Global Compact system as applied.²⁰¹ Failure to comply can result in listing the company as “non-communicating” or “inactive.”²⁰² The UNGC “has reported that it has made 600 companies ‘inactive’ for not having submitted their CoPs.”²⁰³

According to the Global Compact Office policy, CoPs “should be fully integrated in the participant’s main medium of stakeholder communications, including (but not limited to) a corporate responsibility or sustainability report and/or an integrated financial and sustainability report.”²⁰⁴ This is intended to simplify and broaden the communication of UNGC compliance. A simple form is provided for organizations.²⁰⁵ However, the expectation for more sophisticated organizations is that the CoP will be a part of the company’s larger, annual communications to the press, public and investors. This can produce strange outcomes when an organization seeks to serve the aspirational language of the UNGC requirements alongside its normal, commercial representations. The UNGC has been criticized as an initiative designed to appeal to industry through broad and vague requirements and minimal cost.²⁰⁶ Expulsion is the only real sanction faced by an organization that seeks to enjoy the reputational benefits of the UNGC.²⁰⁷ Beyond that, critics have suggested that NGOs have been effectively delegated responsibility for monitoring and reporting conformity to the UNGC standards.²⁰⁸ Despite this

_Feb11.pdf (last updated Feb. 25, 2011).

201. Surya Deva, *Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?* 39 GEO. WASH. INT’L L. REV. 255, 298–99 (2007).

202. UN Global Compact, *supra* note 200, at 1 (requiring a statement of commitment, description of practical actions, and description of outcome measures).

203. AKHTARKHAVARI, *supra* note 198, at 162.

204. UN Global Compact, *supra* note 200, at 3.

205. UN Global Compact, Basic Online COP Template (Jan. 27, 2012), http://www.unglobalcompact.org/COP/communicating_progress/basic_cop_template.html.

206. These criticisms have spawned organized critical engagement with the UNGC and its institutions. See e.g., GLOBAL COMPACT CRITICS, <http://globalcompactcritics.blogspot.com/>.

207. See, e.g., *Great News: Global Compact expels company that refuses to engage in dialogue with activists*, GLOBAL COMPACT CRITICS (June 6, 2011), <http://globalcompactcritics.blogspot.com/2011/06/great-news-global-compact-expels.html>.

208. JONATHAN COHEN, *Socially Responsible Business: Global Trends*, in A FUTURE FOR EVERYONE: INNOVATIVE SOCIAL RESPONSIBILITY AND

risk, it is clear that for many corporate actors, the benefits of the UNGC regime outweigh the costs. This has given rise to criticism of “bluwashing”,²⁰⁹ and in reaction, caused the UNGC to protect the integrity of its system.²¹⁰

B. PRIVATE NON-CORPORATE GOVERNANCE REGIMES: THE GLOBAL REPORTING INITIATIVE AND PRODUCT CERTIFICATION

Environmental transparency, grounded in corporate governance regimes, is not limited to public international organizations. Influential civil society organizations have also sought to develop corporate transparency structures within the context of efforts to elaborate and redirect corporate social responsibility norms.²¹¹ Most of these efforts, like those of public international organizations, are grounded in the development of soft law principles that harness and institutionalize social norms.²¹² This section considers an example of NGO sourced standards—the Global Reporting Initiative Sustainability Reporting Framework (GRI)²¹³—and important variant, product and process certification systems.

The GRI “is a non-profit organization that promotes economic, environmental and social sustainability. GRI provides all companies and organizations with a comprehensive sustainability reporting framework that is widely used around the world.”²¹⁴ It is a multi-stakeholder network governed by a

COMMUNITY PARTNERSHIPS 3, 7 (David Maurrasse & Cynthia Jones eds., 2003) (“While the U.N. must establish a policy to deal with companies that do not abide by the Global Compact, NGOs must also take a lead role in holding companies to their commitments.”).

209. The term refers to corporations that participate in UN initiatives, like the Global Compact as a means of improving their public relations image but with little intent to embed the principles in the business. See, e.g., Sean D. Murphy, *Essay in Honor of Oscar Schachter: Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 413 (2005); Alexis M. Taylor, *UN Reports: the UN and the Global Compact*, 17 N.Y.L. SCH. J. HUM. RTS. 975, 981 (2001).

210. Jean-Philippe Therien & Vincent Pouliot, *The Global Compact: Shifting the Politics of International Development?*, 12 GLOBAL GOVERNANCE 55, 68 (2006).

211. GLOBAL REPORTING INITIATIVE, SUSTAINABILITY REPORTING FRAMEWORK G3.1 GUIDELINES, (Sandra Pederson ed., 2010), available at <https://www.globalreporting.org/resourcelibrary/G3-Guidelines-Incl-Technical-Protocol.pdf>.

212. *Id.*

213. *Id.*

214. *About GRI, GLOBAL REPORTING INITIATIVE,,*

structure that is similar to those of public international organizations.²¹⁵ Transparency is central to the development of the GRI standards.²¹⁶

While the UN Global Compact represents the public communication of broad, aspirational and ultimately not very demanding disclosures (to the extent they may be called such), the GRI presents a willingness to command a high level of detail in disclosure. Unlike the general principles approach of the Global Compact, the GRI Sustainability Reporting Guidelines consist of a complex system of disclosure elements, described as ‘performance indicators’, which can be quantitative or qualitative and reflect issues and elements of corporate behavior at practically every level.²¹⁷ Knowledgeable researchers can easily determine the degree and nature of the organization’s response to each performance indicator by looking at its specified code.²¹⁸ There are “sector supplements” reflecting corporate activity in specific industries for additional customization.²¹⁹

Organizations are able to self-evaluate and publicize their level of disclosure by grading their responses according to a formula that produces an ‘application level’ to signify its performance.²²⁰ Organizations can also ask the GRI to evaluate and confirm their application level through a GRI Application Level Check. Beyond even this level of certification, organizations can seek out External Assurance, an analysis by a third party confirming their stated application level and the

<https://www.globalreporting.org/information/about-gri/Pages/default.aspx> (last visited Apr. 1, 2012).

215. See *Governance Bodies*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/network/network-structure/governance-bodies/Pages/default.aspx> (last visited Apr. 1, 2012). GRI is governed through the Board of Directors (with final decision making authority), a Stakeholder Council (the main multi-stakeholder forum in GRI’s governance structure) and a Technical Advisory Committee (that provides expert sustainability reporting advice and oversees the development of the Guidelines).

216. GLOBAL REPORTING INITIATIVE, *supra* note 211, at 2 (“The urgency and magnitude of the risks and threats to our collective sustainability, alongside increasing choice and opportunities, will make transparency about economic, environmental, and social impacts a fundamental component in effective stakeholder relations, investment decisions, and other market relations.”).

217. See *id.*

218. *Id.* at 36.

219. *Id.* at IP Protocols Set: HR 14.

220. *Id.* at GRI Application Levels 2.

presentation of their disclosure.²²¹ By doing so they can place a plus symbol next to their application level when promoting their level of disclosure compliance.²²² The GRI's approach to the design and implementation of reporting and disclosure is similar.²²³ Although it lacks the media appeal and aspirational qualities of the UNGC, the GRI has nonetheless produced a highly successful and much used disclosure mechanism. For example, the application level system produces a strong incentive for accountability among CSR practitioners without implying any of the negative publicity or binding commitment that the UNGC has through its expulsion system.²²⁴ Unfortunately, the GRI framework sacrifices communicability. The description of the system above is a gross oversimplification; to have a basic comprehension, the system requires reading multiple manuals and its lack of simplicity creates the possibility that enforcement of effective disclosure may sometimes slip through the cracks. The regime is also frequently updated.

There are a number of other non-governmental organizations in the emerging process certification and measurement metrics industry. The object of these organizations is to develop not only the mechanics of reporting, but also the measurement standards and strategies in specific fields.²²⁵ Some have arisen in the context of the development of CSR focus on social and environmental issues.²²⁶ Others target specific sub-categories of corporate economic activity.²²⁷ "The proliferation of codes of conduct and other related activities in the areas of environmental and social management and

221. *Id.*

222. *Id.* at Sustainability Reporting Guidelines 5.

223. *See id.*

224. *See Great News, supra* note 207.

225. *AA1000 AccountAbility Principles Standard 2008*, ACCOUNTABILITY, ORG (Apr. 2, 2012, 6:50 AM), <http://www.accountability.org/about-us/publications/aa1000.html>.

226. GIIRS, <http://www.giirs.org> (last visited Apr. 2, 2012, 7:22 AM). GIIRS "is a comprehensive and transparent system for assessing the social and environmental impact of companies and funds with a ratings and analytics approach analogous to Morningstar investment rankings and Capital IQ financial analytics. It seeks to spark the impact investment movement by providing a tool that is intended to change investor behavior and unlock the potential of this new asset class."

227. *See How to Become a B?*, CERTIFIED B CORPORATION, (last visited Sept. 29, 2012, 12:45 PM), <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp>.

auditing, has created a rapidly growing sector of consultants and verifiers who have an interest in the growth of these activities.”²²⁸

Product certification tries to induce corporate actors to do things that are good for the environment but are not legally binding as a matter of international or domestic law.²²⁹ While these efforts tend to target labor conditions, they often affect environmental issues, including environmental transparency. The rapid development of industry-produced certifications, however, has served to undercut the short-term effectiveness of most certifications. Consumers are usually insufficiently literate to distinguish certifications that indicate environmentally friendly production from environmental stewardship that is recital at best. These processes have been criticized for “greenwashing,” the potentially deceptive use of the appearance of compliance with environmental norms.²³⁰ Individual producers have also demonstrated success by sidestepping formal certification processes in favor of direct-to-consumer claims regarding their environmental practices.

C. PRIVATE CORPORATE GOVERNANCE TRANSPARENCY REGIMES

In the context of corporate environmental practices, transparency practices take the form of voluntary corporate disclosure of the environmental effects of activities.²³¹ Industry leaders now recognize corporate social responsibility reporting as a compelling social norm obligation of business.²³² The 2011 KPMG International Corporate Responsibility Reporting Survey 2011 reported that “[o]f the 250 largest global companies, fully 95 percent now report on their CR activities...

228. RHYS JENKINS, CODES OF CONDUCT: SELF REGULATION IN A GLOBAL ECONOMY (April 2011), *available at* <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1010&context=codes>.

229. See, e.g., Errol E. Meidinger, *The New Environmental Law: Forest Certification*, 10 BUFFALO ENVTL. L.J. 213 (2001).

230. See generally, Jacob Vos, Note, *Actions Speak Louder than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 673 (2009).

231. See, e.g., Ans Kolk & Rob van Tulder, *Setting New Global Rules? TNCs and Codes of Conduct*, 14 TRANSNAT’L CORP. 1, 4–7 (2005), *available at* <http://unctad.org/en/docs/itejit20059a2.en.pdf>.

232. CORPORATE RESPONSIBILITY REPORTING BECOME DE FACTO L. FOR BUS., <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Pages/de-facto-business-law.aspx> (last visited Apr. 2, 2012, 6:52 AM).

[and] it should be noted that a two-thirds of non-reporting G250 companies are based in the US.”²³³ Of this group, 80% of G250 and 69% of N100 now use the GRI reporting standards.²³⁴ John Ruggie, on the other hand, has found that while some of the largest global enterprises have not adopted any of the available voluntary human rights codes of conduct, “the discourse of human rights is gaining recognition in the corporate arena.”²³⁵ One problem continues to be communication to stakeholders as to the content and form of disclosure.²³⁶ However, sustainability metrics, including environmental metrics, are unregulated and harmonization of standards has not been realized.²³⁷ That problem produces another—the lack of a direct relationship between environmental reporting and environmental performance.²³⁸

Private CSR standards, whether developed by civil society actors and adopted by an entity, or developed by an entity for its own use, are designed to fill a well-recognized “governance gap.”²³⁹ These private efforts have also produced transparency gaps.²⁴⁰ Current scholarship has not yet produced a common theoretical approach.²⁴¹ Although numerous individual studies

233. KPMG, INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2011 6 (2011), available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Documents/2011-survey.pdf>.

234. *Id.* at 20.

235. JOHN RUGGIE, HUMAN RIGHTS POLICIES AND MANAGEMENT PRACTICES OF FORTUNE GLOBAL 500 FIRMS: RESULTS OF A SURVEY (2006), available at <http://www.reports-and-materials.org/Ruggie-survey-Fortune-Global-500.pdf>.

236. *Id.* at 22–27.

237. *Id.* at 26 (showing some of the ways that companies report).

238. Adam Sulkowski & Steven White, *Financial Performance, Pollution Measures, and the Propensity To Use Corporate Responsibility Reporting: Implications for Business and Legal Scholarship*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 491, 513 (2010) (“study suggests that financial and environmental performance does not affect the propensity of a company to engage in CR reporting.”).

239. *See id.* at 503.

240. Carol A. Adams, *The Ethical, Social and Environmental Reporting-Performance Portrayal Gap*, 17 ACCT., AUDITING & ACCOUNTABILITY J. 731 (2004) (lacking completeness and resulting in the “reporting-performance gap”).

241. Joe W. (Chip) Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J. L. & PUB. POL'Y 334 (2009); *Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 3, COM (2002) 0347 final. European actors have been leading efforts to institutionalize harmonization efforts. *See, e.g., About Us*, CSR

of disclosure practices in specific locales or under specific reporting regimes have been produced, a common language of study or effect has not yet emerged. Few researchers attempt to make broad comparisons between governance systems or across different reporting mechanisms.²⁴² The result is this lack of academic, political, or doctrinal consensus is an environment in which a wide array of different CSR doctrines, schemes and initiatives are employed, with cultures of informal convergence developing around functionally differentiated production sectors.²⁴³

V. TRANSPARENCY IN ACTION—ENVIRONMENTAL IMPACTS AND REPORTING BY BP AND WALMART

The development of international frameworks for transparency in the context of corporate governance has had significant effect on corporate practice. Two examples are offered here:²⁴⁴ environmental transparency by BP in the context of the Deepwater Horizon disaster, reporting independence and the transparency of corporate activity supply chain impacts in Wal-Mart Stores, Inc.

A. BRITISH PETROLEUM AND THE MANAGEMENT OF ENVIRONMENTAL REPORTING

The environmental reporting of British Petroleum (BP) during the course of the Deepwater Horizon spill was selective.²⁴⁵ The initial accident, the subsequent failure to immediately prevent the leak, the BP executives' attitude toward the spill, controversy over the restitution payments to

EUROPE, (Apr. 2, 2012, 7:02 AM), http://www.csreurope.org/pages/en/about_us.html. ("Strengthen Europe's global leadership on CSR by engaging with EU institutions and a wider range of international players . . . Shape European CSR policy development . . . Engage with CSR Europe's National and leading global CSR organisations").

242. See, e.g., Denis Cormier & Irene M. Gordon, *An Examination of Social and Environmental Reporting Strategies*, 14 ACCT., AUDITING & ACCOUNTABILITY J. 587 (2001).

243. Walter Aerts, Denis Cormier & Michel Magnan, *Intra-Industry Imitation in Corporate Environmental Reporting: An International Perspective*, 25 J. ACCT. & PUB. POL'Y. 299, 300 (2006).

244. Cf. Lee A. Tavis, *Novartis and the U.N. Global Compact Initiative*, 36 VAND. J. TRANSNAT'L L. 735 (2003) (detailing other examples).

245. See, e.g., Lawrence C. Smith, L. Murphy Smith & Paul A. Ashcroft, *Analysis Of Environmental And Economic Damages From British Petroleum's Deepwater Horizon Oil Spill*, 74 ALB. L. REV. 563 (2010–2011) (discussing the Deepwater Horizon Oil Spill).

those whose livelihoods were lost or reduced by the disaster, and the allegations of “greenwashing” by BP all received tremendous amounts of play in media around the world.²⁴⁶ BP responded by promising an increased degree of transparency regarding its response to the spill and its ongoing cleanup efforts.²⁴⁷

Before the spill, BP enjoyed an international reputation as a model of transparency. It had “won over many of the industry’s toughest skeptics, including environmental groups and social investing mutual funds.”²⁴⁸ It routinely was rated as among the most transparent companies in governance and transparency assessments.²⁴⁹ BP’s annual reports contained substantial reporting on social and environmental issues.²⁵⁰ Its CoPs for the years 2009²⁵¹ and 2010²⁵² conformed to the UNGC requirements. The reports were not technical and detailed. Instead, the sustainability reports reflect an attempt simultaneously to allay concerns regarding the company’s environmental practices, entice potential investors, and demonstrate the company’s commitment to fulfilling the requirements of the GRI and UNGC reporting schemes.²⁵³ Among the features of the 2009 CoP were a faux question-and-answer session with then Group Chief Executive, Tony Hayward,²⁵⁴ magazine style articles describing recent low carbon energy investments by BP,²⁵⁵ an article describing

246. Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster*, 85 TUL. L. REV. 983, 983–1038 (2010).

247. See BP SUSTAINABILITY REVIEW 2010 (2010), available at http://www.unglobalcompact.org/system/attachments/9850/original/bp_sustainability_review_2010.pdf?1302280427.

248. RICHARD W. OLIVER, WHAT IS TRANSPARENCY? 61 (2004).

249. *Id.* at 62.

250. See e.g., BP SUSTAINABILITY REVIEW 2009 (2009), available at http://www.unglobalcompact.org/system/attachments/5353/original/bp_sustainability_review_2009.pdf?1276075215.

251. *Id.*

252. BP SUSTAINABILITY REVIEW 2010, *supra* note 247.

253. See BP SUSTAINABILITY REVIEW 2009, *supra* note 250, at 7. The 2009 CoP graphs describe the frequency of recordable injuries, normalized greenhouse emissions, employee satisfaction, and super major oil production on the same page, with the terms defined in 6 point font footnotes or parentheticals, and accompanied by a paragraph describing the positive interpretation the reader should derive from the charts.

254. *Id.* at 2–3.

255. *Id.* at 8–11.

issues of contention relating to Canadian sand oil expiration,²⁵⁶ and a page devoted to safety and operational performance “at a glance” (including a second graph displaying the frequency of recordable injuries using different margins).²⁵⁷ Each of these pages also contains a link to a separate BP website that maintains recent information on that CoP topic.²⁵⁸ The information on the sustainability site has a single body of information that acts as a continuously refreshing version of the assurances provided by the CoP.²⁵⁹

An important part of the report described the company compliance with some of the different reporting initiatives to which the company subscribed.²⁶⁰ This section shows both the availability of corporate choices among disclosure systems and the overlapping and cumulative character of disclosure regimes.²⁶¹ BP has described its compliance with different reporting initiatives, including the International Petroleum Industry Environmental Conservation Association (IPIECA)/American Petroleum Institute Oil and Gas Industry Guidance on Voluntary Sustainability Reporting,²⁶² and the GRI.²⁶³ The UNGC is mentioned in both CoPs, but is not included or described in the reporting efforts on this page.²⁶⁴ In addition, the 2010 Report includes an inset statement by the VP of Sustainability that discussed the sincerity of BP’s dialogue with NGOs and stakeholders in the time following the explosion on Deepwater Horizon.²⁶⁵ Both the 2009 and 2010 BP Sustainability Reports also include the results of an independent assurance qua, the optional mechanism described by the GRI.²⁶⁶

The BP reports emphasize their direct connection with BP’s larger communications efforts. These are not dry informational reports, but extensions of the British Petroleum

256. *Id.* at 12.

257. *Id.* at 23.

258. *Id.*

259. BP SUSTAINABILITY, www.bp.com/sustainability (last visited Sept. 29, 2012).

260. BP SUSTAINABILITY REVIEW 2009, *supra* note 250.

261. *Id.*

262. *Id.*

263. *Id.*

264. BP SUSTAINABILITY REVIEW 2010, *supra* note 247, at 21; BP SUSTAINABILITY REVIEW 2009, *supra* note 250, at 3.

265. BP SUSTAINABILITY REVIEW 2010, *supra* note 247, at 41.

266. *Id.* at 42; BP SUSTAINABILITY REVIEW 2009, *supra* note 250, at 34.

brand; a continuous, highly developed and relentlessly focused effort to persuade rather than to inform. The Gulf of Mexico crisis pushes the rhetorically universalist approach to disclosure to its limits in the 2010 report. The same simplified statistics presented in the 2009 report are available closer to the beginning of the 2010 report.²⁶⁷ The footnote mentioning that damages caused by the Deepwater Horizon are not included in the statistics is bumped up to 8 point font size, and separated in its own BP-green box so that no one can accuse the authors of manipulating the reported statistics.²⁶⁸ Rather than downplaying the disaster as less sophisticated marketers might prefer to do, BP fully owned the environmental disaster. BP placed the oil spill and photographs of BP's cleanup efforts at the very beginning of the report and changed the language and tone of much of the document to reflect how BP aspired to become stronger and more prepared. To do so, BP will need to change some of its environmental policies.

The tension between the marketing and monitoring focus of the reports was reflected in the explanation of the independent assurance evaluator's report:

We saw that BP's materiality process has been used to prioritize the issues related to Deepwater Horizon to be included in this report. Although this process includes consideration of the importance of issues to stakeholders, some groups may consider that their individual concerns have not been addressed. Others will feel that the coverage in the report does not do justice to the complexity of certain issues.²⁶⁹

Despite these distinctions, what is perhaps most striking about the BP CoPs are their similarities. While the 2010 report is longer, and devotes a great deal of imagery and descriptive language to BP's response to the Deepwater Horizon disaster, the designers made no apparent effort to increase the detail of disclosed information or statistics regarding the sustainability performance of the company.²⁷⁰ The BP Communication on Progress for 2010 actually lacked required elements for

267. See BP SUSTAINABILITY REVIEW 2010, *supra* note 247, at 10.

268. *Id.* at 4.

269. *Id.* at 11.

270. Compare BP SUSTAINABILITY REVIEW 2009, *supra* note 250, with BP SUSTAINABILITY REVIEW 2010, *supra* note 247.

continued active participant status under the UNGC.²⁷¹ As a result, BP is now placed on probationary “learner” status for 12 months.²⁷² If BP does not rectify the missing elements of this communication on progress before April 8, 2012, they will be further downgraded to ‘non-communicating’ status and could be publicly expelled if they do not reverse their error.²⁷³

More importantly, while the BP reports appeared simple and easy to understand, they did not necessarily convey the material information in a manner that was easy to use.²⁷⁴ The form and content of the materials with which the corporate actor surrounds and presents information can easily prevent understanding, or even distort its interpretation. The fundamental untrustworthiness and obscurantism of the BP CoPs should be understood not as simple corporate maleficence, but as a less immoral but perhaps far more pernicious and lasting problem. The problem is that there is a fundamental difference in perception between corporate actors and transparency advocates regarding the purpose of environmental disclosure and CSR more generally. To those who advocate for greater transparency, regardless of the area or mechanism of disclosure, *communication of material information for monitoring and enforcement* is key. For companies, however, transparency frameworks lack the precision of financial reporting rules and sometimes are reduced to a communication commercial in purpose and rhetorical in form.

271. *Participants and Stakeholders: BP Plc*, U.N. GLOBAL COMPACT, <http://unglobalcompact.org/participant/1433-BP-Plc> (last visited Sept. 29, 2012); U.N. Global Compact, Policy on Reporting Progress, (Feb. 25, 2011), available at http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy_Feb11.pdf (detailing the requirements for each status under U.N. Global Compact).

272. *Participants and Stakeholders: BP Plc*, *supra* note 271; U.N. Global Compact, Policy on Reporting Progress, *supra* note 271.

273. *Participants and Stakeholders: BP Plc*, *supra* note 271.

274. ISO 26000:2010, *supra* note 189, at 7.5.2. It is not clear, for example, that the BP documents comply with ISO 26000’s guidance regarding the communication of information, particularly that the information relating to social responsibility be “... provided with regard for the knowledge and the cultural, social, educational and economic background of those who will be involved in the communication. Both the language used, and *the manner in which the material is presented, including how it is organized*, should be accessible for the stakeholders intended to receive the information...” (emphasis added).

B. WALMART AND THE CONSTRUCTION OF NETWORKED
STANDARDS FOR SUSTAINABILITY AND ENVIRONMENTAL
REPORTING AND PARTICIPATION

At first glance, the format and nature of Walmart's CSR reporting is similar to British Petroleum. Both companies have faced severe domestic and international criticism for their effect on the environment.²⁷⁵ Both companies maintain annual reports and an online presence to display the well-maintained, ethically commercial face of corporate conduct.²⁷⁶ Both have images of smiling workers, an intimate comment from an executive, and carefully presented data to back up the company's assertion of beneficent business.²⁷⁷ Despite appearances, however, BP and Wal-Mart Stores, Inc. have taken wildly divergent approaches to environmental transparency in two different ways.²⁷⁸ First, Walmart has not joined the UNGC, does not report using GRI standards, and has evaded any form of standardized, soft law governance on its environmental reporting; its policies, metrics and standards are internally developed and self-administered.²⁷⁹ This independence has benefits and drawbacks, but Wal-Mart has capably managed its own environmental reporting to great effect. Second, where BP has faced criticism for Gulf incident, Walmart faces a greater set of challenges as the administrator of an incredibly complex global supply chain.²⁸⁰ A faulty manufacturing batch or an exposé on worker abuse by a supplier abroad still poses a serious risk to Walmart's image. In a climate of increased scrutiny of foreign manufacturers, environmental impacts are another risk for the company. In this area, too, Walmart has capably managed the components of its supply chain and leveraged disclosure requirements to maintain and enhance supply chain control.²⁸¹

275. See e.g., *Wal-Mart to Pay \$27.6 Million for Environmental Violations in California*, ENVIRONMENTALLEADER.COM, <http://www.environmentalleader.com/2010/05/02/wal-mart-to-pay-27-6-million-for-environmental-violations-in-california>; Smith, Smith & Ashcroft, *supra* note 245.

276. See *Building the Next Generation Walmart...Responsibly: 2011 Global Responsibility Report*, WALMART, <http://www.walmartstores.com/sites/ResponsibilityReport/2011/> (last visited Sept. 29, 2012).

277. See *id.*

278. See e.g., ANITA CHAN, *WALMART IN CHINA* (2011) (describing one of Walmart's most active vectors for supply chain control).

279. WALMART, *supra* note 276, at 21.

280. See *id.* at 26.

281. See Cherry & Sneirson, *supra* note 246, at 1014.

Wal-Mart Stores, Inc. maintains one of the most well-organized online and documentary records of its corporate performance, especially its “sustainability” section.²⁸² Many companies struggle to implement disclosure systems that meaningfully fit global standards due to conflicting commercial and communication interests.²⁸³ Despite facing the same problems BP faced in an arguably more complex industry to track, Walmart chose to bear the increased burden of developing and maintaining its own disclosure techniques, despite the increased scrutiny such practices invite.²⁸⁴ Walmart has been more successful than other entities in its approach to corporate reporting, less because its reporting evades the problems of corporate communication, but because the company’s scrutiny and disclosure are heavily filtered through the management of its own supply chain.²⁸⁵ Walmart is able not only to control the flow and coordination of supplier information, but to make suppliers follow Walmart’s internally developed supplier sustainability standards by leveraging its market power.²⁸⁶ The clear, strict supplier standards allow Walmart to present practice failures along its supply chain as failures at the supplier and not the distributor level. The fact that these standards are internally developed allows the company to leverage their market power to dictate practices to any competitors whose supply systems overlap.²⁸⁷ Where supply practices conflict, the greater source of demand is likely to win out.²⁸⁸

When the corporate actor is successful in leveraging one form of self-maintained transparency technique, other applications of independent transparency practice will follow. Walmart is now in the process of developing its own “Walmart Sustainable Product Index.”²⁸⁹ Like the supplier standards that

282. *Environmental Sustainability*, WALMART (Apr. 4, 2012, 3:14 AM), <http://walmartstores.com/Sustainability>.

283. Cherry & Sneirson, *supra* note 246, at 1010–14 (discussing the different levels of corporate social responsibility and the different interests).

284. *Id.*

285. WALMART, *supra* note 276, at 21.

286. *Suppliers*, J[WALMART], <http://walmartstores.com/Suppliers> (discussing the standards for Walmart suppliers).

287. See Yu Xiaomin & Pun Ngai, *Walmartization, Corporate Social Responsibility, and the Labor Standards of Toy Factories in South China*, in *WALMART IN CHINA* 54–59 (Anita Chan ed., 2011).

288. See *id.*

289. *Walmart Announces Sustainable Product Index*, WALMART (Apr. 4, 2012, 5:20 AM), <http://news.walmart.com/news-archive/2009/07/16/walmart->

existed before, Walmart's supply chain reporting mechanism will compete with a previously existing international practice set, which in this case are the GRI reporting guidelines.²⁹⁰ Although facially an open process developed in consultation with suppliers, the end result is likely to be a direct conflict between previously dominant, nonprofit reporting schema and the self-interested developments of a distributor with major preexisting market penetration and leverage.

Walmart has fully internalized the commercial applications of environmental transparency. While not above scrutiny or criticism, the company has successfully and smoothly transitioned to a state of transparency sufficient to serve its own interests in the years to come. BP has floundered in attempting to meet multiple externally defined reporting doctrines, but companies such as Walmart have demonstrated that pursuing compliance and consensus may be less lucrative than the bold move of creating your own compliance standards. Now, Walmart has effectively inserted itself into the transparency marketplace as a major player with its own line of corporate social responsibility products.

VI. LOOKING FORWARD: PROPERTY, COMMODITY, MISCOMMUNICATION AND COHERENCE AMONG SYSTEMS OF TRANSPARENCY

Transparency in international law provides a structure for reporting, but the existence of multiple frameworks and the tension between the corporate and stakeholder objectives in transparency evidences the systemic miscommunication built into the commodity and markets based approach to multi-systemic production of environmental reporting that has evolved over the last half of a generation. Almost a decade ago, Brad Karkkainen suggested incoherence in environmental information policy.²⁹¹ Little has changed at the national level, and the incoherence has grown at the international level as international environmental reporting systems have proliferated.²⁹² The resulting governance regimens have

announces—sustainable—product—index.

290. *Cf. Id.* (announcing the index, and as it occupies the supply chain reporting mechanism field it will invariable compete with other such mechanisms).

291. Karkkainen, *supra* note 44, at 283–286.

292. Carsten Schmitz–Hoffmann & Philipp Schukat, *Essay on Scaling up Sustainability–Standard Systems*, in SHAPING GLOBALIZATION: SCALING UP VOLUNTARY STANDARDS 15, 15–16 (2008) (GTZ, Programme Office for Social

produced a number of governance systems that might be applied simultaneously and to different effect and for different constituencies.²⁹³ The resulting polycentricity in governance—and especially in environmental reporting—is well illustrated by the proliferation of voluntary corporate codes, environmental management systems, “green label” schemes, environmental reporting standards, green financial schemes, and green indexes described above.²⁹⁴ The result produces both incoherence and the possibility of the establishment of a powerful forward-looking network of systems that, when coordinated and harmonized, will regulate the emerging systems of functionally differentiated governance communities.²⁹⁵ This section then looks forward to consider the efforts at policy and substantive coherence between emerging transparency systems with powerful effects on environmental law transparency.

A. THE PROBLEM OF TRANSPARENCY AS REGULATORY AND COMMUNICATION STANDARDS INCOHERENCE

Globalization has untethered regulation from the state, and has also provided a regulatory environment grounded in principles of regulatory commodification consumed within

and Ecological Standards), (Apr. 1, 2012, 10:26 AM), *available at* <http://www.gtz.de/de/dokumente/gtz2008-en-conference-documentation.pdf>.

But cf. Iris H-Y Chiu, *Standardization In Corporate Social Responsibility Reporting And A Universalist Concept Of CSR?—A Path Paved With Good Intentions*, 22 FLA. J. INT’L L. 361, 366 (2010) (“A common criticism of CSR reports may be that they tend to be selective, subjective, and not comparable. In light of global developments in standard setting for CSR reporting, one should not succumb to the simplicity of this criticism”).

293. See Schmitz-Hoffmann & Schukat, *supra* note 292, at 15–16. See generally Oren Perez, *Purity Lost: The Paradoxical Face of the New Transnational Legal Body*, 33 BROOK. J. INT’L L. 1 (2007) (describing how complexity and heterogeneity of systems can produce regulatory benefits); Gunther Teubner & Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (2003–2004) (arguing compatibility rather than unity should be sought in international law).

294. See Ronen Shamir, *Socially Responsible Private Regulation: World-Culture Or World-Capitalism?*, 45 LAW & SOC’Y REV. 313, 325 (2011) (“The CSR industry thus produces and distributes multiple instruments of private regulation designed to facilitate, directly or indirectly, corporate compliance with a variety of standards, guidelines, indexes principles, best performance benchmarks, labeling criteria, and soft law accreditation and certification schemes that promote social responsibility and public welfare.”).

295. See Perez, *supra* note 293, at 4.

transnational markets.²⁹⁶ Carsten Schmitz–Hoffmann & Philipp Schukat recently explained the following:

Whenever a new, promising product enters the market, the concept is quickly picked up by others. The result is what we currently observe: a proliferation of standard systems and codes of conduct. Be it in one sector (about 15 for timber), be it in the number of newcomers in different sectors (e.g. food, cotton, ethanol, timber, mining tourism, biofuels, carbon markets, financing & investment, etc.), or be it in a trend towards overarching formats such as generic standards or metastandards (the Roundtable on Sustainable Biofuels, the EU metastandard on biomass production, etc.), imitators appear, trying to outdo the pioneer, possibly by offering less stringent or less robust systems leading to the threat of greenwashing. Newcomers bring in new ideas, at times reinventing the wheel but at times also developing innovative new solutions.²⁹⁷

In the context of environmental transparency, the result has been both the proliferation of standards from a variety of producers, and a certain level of incoherence in their application by functionally differentiated consuming communities (of governments, enterprises, civil society actors, investors and consumers).²⁹⁸ These standards do not speak to each other. They compete for consumers.²⁹⁹ They do not apply the same language with respect to standards, metrics, communication, and scope.³⁰⁰ ISO 26000 notes, “. . . participation in an initiative or the use of initiative’s tools, by itself, is not a reliable indicator of the social responsibility of an organization.”³⁰¹ And verification, even within well–developed systems, is not helpful where system objectives differ

296. See generally Pontus Cerin, *Communication in Corporate Environmental Reports*, 9 CORP. SOC. RESP. AND ENVTL. MGMT. 46 (2002) (discussing, in part, corporate incentives to use environmental reporting as an opportunity to benefit the company’s public perception).

297. Schmitz–Hoffman & Schukat, *supra* note 292, at 15–16.

298. Shamir, *supra* note 294, at 324–25.

299. See Cerin, *supra* note 296, at 48.

300. See *id.* at 53–55.

301. See ISO 26000:2010, *supra* note 189, at 7.8.2.

between producers and consumers of information.³⁰²

In the aggregate, these transparency systems are incoherent, making miscommunication likely and assessment across systems difficult.³⁰³ In the context of private governance structures, specifically the development of the Guiding Principles of Business and Human Rights, John Ruggie identified what he termed legal and policy incoherence as a significant impediment to the development of effective governance.³⁰⁴ More particularly, Mr. Ruggie points to the ease with which governments have become trapped by the complexity of its operations in a global environment, what he terms “horizontal incoherence.” Mr. Ruggie further exemplified his point in saying:

Not long ago, the government of South Africa was confronted with a startling instance of how serious this lack of policy coherence can be when investors from Italy and Luxembourg took it to binding international arbitration under a bilateral investment treaty. The investors claim that certain mining provisions of the Black Economic Empowerment Act amount to expropriation, entitling them to compensation. Why did the government sign up in the first place to an investment agreement that could threaten the country’s post-apartheid foundational principle of social justice? An official policy review explains that, among other reasons, “the Executive had not been fully apprised of all the possible consequences of

302. *C.f.* Cerin, *supra* note 296, at 57 (discussing the different goals of reporting guidelines and the question of what stakeholder hope to ascertain from the reports).

303. *See id.* (describing how the heterogeneity of information in the reports makes them incomparable).

304. John G. Ruggie, Consultation on Operationalizing the Framework for Business and Human Rights Presented by the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Palais des Nations, Geneva 2 (October 5–6, 2009), available at <http://www.business-humanrights.org/Documents/Ruggie-speech-to-Geneva-consultation-Oct-2009.pdf>. (“Governments currently lack adequate policies and regulatory arrangements for fully managing the complex business and human rights agenda. Although some states are moving in the right direction, overall their practices exhibit substantial legal and policy incoherence.”).

BITs,” including for human rights.³⁰⁵

All the same, it is interesting that governments appear to suffer from this horizontal regulatory incoherence to an extent significantly greater than other large organizations—for example, the large multinational enterprises appear to be able to take advantage of sloppy government and the structural limitations of law based systems.³⁰⁶ But that is not the case universally. Large, rich, well run multinationals, like states with well-developed and expensive-to-maintain governmental bureaucracies, are better able to avoid incoherence, than either poorer multinational enterprises or poorer or less developed states.³⁰⁷ That provides an irony of sorts—large multinational enterprises are more similar in their organization and operation to more developed states than either are to their poorer and less well developed counterparts.³⁰⁸

In the context of transparency in general for private governance and environmental transparency in particular, incoherence is particularly detrimental to the development of effective systems of information delivery and utilization.³⁰⁹ It also increases compliance costs—even when compliance is mandatory only within social norm systems and not legally compelling. Companies which move across territories or between governance communities may be required to produce multiple metrics,³¹⁰ abandon disclosure, or substitute their own metric.³¹¹ These miscommunications speak to the recurring problems of compelling or persuading proper corporate interest in transparency practices.³¹² But it also speaks to its potential as a markets-based regulatory framework, grounded in information, propelled by the ability of significant stakeholders to make consumption, investment, lending and other decisions on the basis, in part, of disclosure.³¹³

305. *Id.* at 2–3.

306. *See* Schmitz–Hoffmann & Schukat, *supra* note 297, at 15; *see also* Ruggie, *supra* note 304, at 2–3.

307. *See* Shamir, *supra* note 294, at 316–17.

308. *See* Ruggie, *supra* note 304, at 3.

309. *See generally* Karkkainen, *supra* note 44, at 283–86 (describing the detrimental reality and effects of incoherence in environmental information policy).

310. *See* Schmitz–Hoffmann & Schukat, *supra* note 297, at 16.

311. Shamir *supra* note 294, at 324–325.

312. *See, e.g.*, Hess, *supra* note 49, at 455.

313. Backer, *Moral Obligation*, *supra* note 29, at 592–93; *see* Roberta S. Karmel, *Reform of Public Company Disclosure in Europe*, 26 U. PA. J. INT'L

The issue of standardization of environmental reporting has been an important subject of national debate in the United States³¹⁴ and elsewhere.³¹⁵ But it is clear that the need for harmonization, or at least coordination, has become important at the transnational level as well.³¹⁶ However, proliferation also suggests a broadening taste for environmental transparency.³¹⁷ In this context, it is not surprising that some large producers and consumers of these products have been moving, at least tentatively, toward cooperation.³¹⁸

One of the most interesting developments in Corporate Social Responsibility (CSR) is the elaboration of chains of authority among the very distinct frameworks that are being developed by both public and private international organizations. Private actors tend to produce networks of systems that are informally connected and which seek through communication and overlap to move toward convergence.³¹⁹ Theirs tends to be a functional approach to CSR, arranged within orders that are informal and tied to norm-governance frameworks.³²⁰ Public actors tend toward the construction of more formally institutionalized relationship, arranged within an order that tends to be vertically oriented and ultimately tied to the law-state system.³²¹ The object here is convergence.³²²

The UNGC has sought to play a central role as a nexus

ECON. L. 379, 386 (2005) (discussing the CLAP's to increase shareholder and third-party access to company information).

314. See, e.g., David F. Sand & Ariane van Buren, *Environmental Disclosure and Performance: The Benefits of Standardization*, 12 CARDOZO L. REV. 1347, 1348-49 (1991); Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L. J. 1619, 1745 (2004).

315. See Lucien J. Dhooze, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 446 (2004).

316. See Allen L. White, *Why We Need Global Standards for Corporate Disclosure*, 69 LAW & CONTEMP. PROBS. 167, 186 (2006); See also, UN News Service, *Social Justice and Environmental Risks Need to be Tackled Together*, UN NEWS CENTRE (Apr. 2, 2012, 1:32 PM), <http://www.un.org/apps/news/story.asp?NewsID=41609&Cr=sustainable+development&Cr1=> (describing the need for unification between areas of transparency, such as economic and environmental).

317. See Sand, *supra* note 314, at 1347.

318. See *id.* at 1349.

319. See Chiu, *supra* note 292, at 362; see also Aerts, Cormier & Magnan, *supra* note 243, at 325.

320. *Id.*

321. See White, *supra* note 316, at 186.

322. See Chiu, *supra* note 292, at 362.

point for convergence of standards and harmonization at the international level among both private and public efforts.³²³ There are three examples of its roles as a nexus. The first is between the Global Compact and the International Organization for Standardization (ISO).³²⁴ The second is between the Global Compact and the Global Reporting Initiative and its G3 Guidelines.³²⁵ The third is between the Global Compact and the Organisation for Economic Co-operation and Development.³²⁶

With respect to the first, leaders at the ISO and UN Global Compact Office entered into a Memorandum of Understanding committing ISO to develop what would become its ISO 26000 standard in a manner consistent with the UNGC.³²⁷ The Memorandum of Understanding also indicated that the two organizations would continue to support and consult with one another as they refine their respective regimes.³²⁸ The UNGC and ISO have published a high level overview of key linkages between the detailed standards of ISO 26000 and the principles of the UNGC which was meant to suggest that “all UN Global Compact Principles are included in ISO 26000.”³²⁹

323. Gavin Power, *Who Cares Wins—The Convergence of Global Corporate Citizenship and Financial Markets*, Keynote Address at the Investment Management Institute Conference (Jan. 6, 2006) *available at* http://www.unglobalcompact.org/docs/news_events/9.6/power_miami_060106.pdf.

324. See United Nations Global Compact, *An Introduction to Linkages Between UN Global Compact and ISO 26000 Core Subjects*, (Nov. 2010), *available at* http://www.unglobalcompact.org/docs/news_events/8.1/UNGC_ISO_Final.pdf.

325. See Press Release, United Nations Global Compact, UN Global Compact and Global Reporting Initiative Form Strategic Alliance (Oct. 6, 2006), *available at* http://www.unglobalcompact.org/newsandevents/news_archives/2006_10_06.html.

326. European Coalition for Corporate Justice, *Launch of the Human Rights Due Diligence Project*, EUROPEAN COALITION FOR CORPORATE JUSTICE, <http://www.corporatejustice.org/Launch-of-the-Human-Rights-Due.html?lang=en> (last visited Sept. 22, 2012).

327. See Press Release, United Nations Global Compact, *Global Compact and ISO Sign Memorandum of Understanding* (Nov. 20, 2006), *available at* http://www.unglobalcompact.org/NewsAndEvents/news_archives/2006_11_20.html.

328. Memorandum of Understanding, UN Global Compact –ISO, Nov 9, 2006, *available at* http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2009_07_17/UNGC-ISO_MoU.pdf.

329. United Nations Global Compact, *An Introduction to Linkages*, *supra* note 324, at 1.

With respect to the second, the object of the alliance between UNGC and the GRI was a “strategic alliance aimed at providing the global private sector with an opportunity to embrace a responsible business strategy that is at once comprehensive, organizing, integrated and enjoys near or total universal acceptance.”³³⁰ The UNGC would provide the substantive element and GRI would provide the methodology, including guidance on transparency and the mechanics of reporting.³³¹ In addition, a Memorandum of Understanding regarding future collaboration was signed between GRI and the ISO in September of 2011, further evidencing the convergence of the organizations.³³²

Additional important connections have developed in the form of coordination exercised through the OECD.³³³ The OECD has incorporated the substance of the United Nations Guiding Principles on Business and Human Rights (UNGPR) into its governance and reporting framework for corporate governance.³³⁴ The OECD has also entered into memoranda of agreement with the ISO and GRI.³³⁵ These aspirational

330. United Nations Global Compact, *UN Global Compact and Global Reporting Initiative Form Strategic Alliance* (2006), *supra* note 325.

331. United Nations Global Compact, *An Alliance to Mainstream Responsible Corporate Citizenship: A Call to Action From the UN Global Compact and the Global Reporting Initiative*, (Oct. 6, 2006), available at http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2006_10_06/Alliance_FINAL.pdf (“The formula described below proposes an international alliance around the two most significant global citizenship initiatives: the UN Global Compact, covering, broadly speaking, implementation; and the Global Reporting Initiative, encompassing transparency and reporting.”).

332. Global Reporting Institute, *ISO and Global Reporting Initiative Increase Cooperation on Sustainable Development*, GLOBAL REPORTING INSTITUTE (Sept. 7, 2011), <https://www.globalreporting.org/information/news-and-press-center/Pages/PR-ISO-and-Global-Reporting-Initiative-increase-cooperation-on-sustainable-development.aspx>.

333. United Nations Global Compact, *UN Global Compact and OECD Intensify Collaboration*, (Oct. 27, 2009), available at http://www.unglobalcompact.org/NewsAndEvents/news_archives/2009_10_27.html.

334. See European Coalition for Corporate Justice, *Launch of the Human Rights Due Diligence Project*, EUROPEAN COALITION FOR CORPORATE JUSTICE, <http://www.corporatejustice.org/Launch-of-the-Human-Rights-Due.html?lang=en> (last visited Sept. 22, 2012).

335. See *OECD-GRI Partnership to Help Multinational Companies Operate Responsibly*, OECD, (Dec. 13, 2010), http://www.oecd.org/document/23/0,3746,en_2649_34889_46674519_1_1_1_1_0_0.html; Memorandum of Understanding, OECD-ISO, May 5, 2008, available at <http://www.oecd.org/daf/internationalinvestment/>

documents dictate a future of greater coordination between the OECD and the other major governance organs. In practice, however, and particularly in the more carefully couched language of the OECD–ISO memorandum, the principle goal appears to be the evasion of a future in which OECD governance could conflict with, or worse still, compete with, other dominant disclosure paradigms.³³⁶ The OECD–ISO agreement, which emphasizes coordinated development of the ISO–CSR standards, contains provisions ensuring that OECD will embrace at arms–length the development of ISO standards, with a caveat ensuring that this coordination is not an endorsement³³⁷. The modus of these entities, especially at the UN level, is less convergence than engagement.³³⁸ Like state parties to a military treaty, all parties are eager to prevent conflict, but want to leave all of their options open for the future.

The GRI works closely with international organizations and with other civil society actors in increasingly close network cooperation in governance projects.³³⁹ These collaborations may produce greater movement toward future reporting format and disclosure level uniformity. At a minimum, this signals a renewed effort on the part of CSR producers to develop stronger ties between the organizations, and may at least begin to address the systemic flaws that can produce the sort of perverse disclosure product described above. To the extent that the 26000 standards are actually applied to GRI and UNGC disclosure guidelines and requirements, improvements may well occur in respect to the actual disclosure of information. If

guidelinesformultinationalenterprises/45330481.pdf.

336. See Memorandum of Understanding, OECD–ISO, *supra* note 335, at Art. 2, § 2.5–2.6.

337. See *id.*

338. See Larry Catá Backer, *Harmonizing Transnational Corporate Governance—Communication Among CSR Soft Law Framework Systems*, LAW AT THE END OF THE DAY (Jan. 15, 2011, 8:43 PM), <http://lbackerblog.blogspot.com/2011/01/harmonizing-transnational-corporate.html> (“These efforts suggest the importance, not so much of convergence, but of institutional engagements over precedence and influence in the construction and management of systems of economic governance.”).

339. See *Regional Networks*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/network/regional-networks/Pages/default.aspx> (last visited Sept. 22, 2012) (giving examples of companies GRI is networked with). See, e.g., CARBON DISCLOSURE PROJECT, <https://www.cdproject.net/en-US/Pages/HomePage.aspx> (last visited Sept. 22, 2012) (providing an example of an organization which the GRI works closely with on climate and emission issues).

this is the case, other gaps in disclosure guidance may be closed as well.

Despite this potential move toward a uniform standard by the largest players, transparency reporting on corporate environmental behaviors remains highly uncertain. Without greater coherence among both the major and minor CSR initiatives, and even more importantly, without a fundamental shift in the factors that motivate and mitigate corporate production of disclosure reporting, the current mismatch between the aspirations of CSR and its products will remain.³⁴⁰ In the presence of this problem, major corporate actors will continue to find it in their interests to develop their own policies of disclosure, maintaining the current state of procedural cacophony.³⁴¹ It is difficult to say with any certainty that better transparency practices, unto themselves, could have prevented the Deepwater Horizon incident. Given the lack of changes in the months after the event, it seems that an even greater, more preventable catastrophe may be necessary to provide the impetus to create a more pro-communication climate for transnational corporate environmental law.

B. THE PROBLEM OF TRANSPARENCY AND THE ROLE OF PROPERTY

The transparency regimes of Walmart and BP illustrate the ways in which the discussion of accountability and participation are manifested through a discourse and implementation of systems of transparency.³⁴² In particular, transparency serves as the stage on which, at the international

340. See, David Scheffer & Caroline Kaeb, *The Five Levels Of CSR Compliance: The Resiliency Of Corporate Liability Under The Alien Tort Statute And The Case For A Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 336 (2011) (discussing the mismatch between what is desired from CSR and how companies are currently only giving rhetorical deference to CSR).

341. See *id.* at 337–38.

342. The information found in this section draws heavily from the author's blog posts. See Larry Catá Backer, *Ruminations XXXIX: Transparency As Property*, LAW AT THE END OF THE DAY, (Mar. 15, 2012, 10:52 AM), <http://lcbackerblog.blogspot.com/2012/03/ruminations-xxxix-transparency-as.html>; Larry Catá Backer, *Corporate Social Responsibility and Voluntary Codes*, LAW AT THE END OF THE DAY (June 16, 2006, 5:50 AM), <http://lcbackerblog.blogspot.com/2006/06/corporate-social-responsibility-and.html>; Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499, 505 (2007) (explaining the regulatory effect of a mature legal system).

level, the power of the ideology of shareholder welfare maximization is both deepened by corporate actors and contested by stakeholder advocates. It underlies the fundamental tension, well evidenced in the very different transparency regimes of Walmart and BP, among transparency as a means to inform, as a means of making internal management more efficient, and as a means of extending the participation of corporate stakeholders. It is in this sense that Walmart and BP's approaches illustrate the use of transparency as a mechanism for accountability to stakeholders, for risk management by company boards and officers, and of autonomous private governance beyond the state through, for example, supply and value chains (crucial component of non-state "law" systems). But in the face of crisis it can also serve as a mediating mechanism between stakeholders, governments, and internal constituencies.

As technique, transparency focuses increasingly on identification of data points worth harvesting and those that may be ignored. It also focuses on the precise metrics and assessments that are usefully extracted from harvested data.³⁴³ Private international ordering systems, such as the GRI and ISO transparency systems tend to emphasize data harvesting and metrics over an overt focus on the normative effects of transparency.³⁴⁴ However, the choice of metrics produces normative effects and that choice is left, to a great extent, to the discretion of data harvesters. The result sometimes is incoherence, making the application of comparison metrics difficult. Walmart and BP cannot, for example, be compared on the basis of the reported information. Their respective scopes of business are too disjointed.

Transparency as technique also suggests the quality of transparency as a commodity that can be marketed. ISO, GRI, UNGC, and private transparency frameworks, for example, all compete in markets for transparency users, but are also networked. Once adopted, it becomes an object, can in turn be packaged, assembled, and delivered to end users in forms that are useful to the producer. This characteristic, more than anything, is the hallmark of the connection between the transparency system producers (UNGC, etc.) and end user corporations. The passive characteristics of transparency as commodity (structures for producing transparency) and object

343. See Kravchenko, *supra* note 99, at 1–50.

344. See *id.*

(the information packaged and delivered) itself, by the choices made in these details of data production, assessment, and delivery, mask its active role in advancing the normative choices that inform determinations of which data to harvest, how to assess them and the scope of delivery.

Transparency in international law provides a structure for reporting, but the existence of multiple frameworks and the tension between the corporate and exterior stakeholder objectives in transparency have produced systemic miscommunication built into the commodified and markets-based approach to reporting that has evolved over the last half generation. Far from chilling corporate transparency, transparency in international law has had the effect of fundamentally widening the scope of transparency utility for corporate actors, facilitated in part by the proliferation of transparency framework systems that can be modified to suit the needs of the user. While state and non-state governance actors seek to promote transparency practices as a means to convey information about the consequences of corporate practices and provide a means to socially evaluate corporate actors, CSR framework developers, including companies themselves, can seize the opportunity to render transparency into a far more versatile technique of corporate reification.

The OECD and UN Guiding Principles both represent attempts to render the priorities of global corporate transparency coherent. Although they suggest one possible future, it is not clear that either set of soft policies will evade the problems of competing state and corporate interests that have historically plagued international commerce. Because these doctrines have emerged simultaneously with third party and corporate CSR practices, the purveyors of these norm systems face the unenviable task of competition with more granular, specific and changeable documents that already maintain the trappings of accepted practice. The ISO and Global Compact, while providing standards that can be relied upon by investor markets, themselves compete with the murkier world of private third-party CSR practitioners, possessed of a diversity of interests, goals, and methodologies. The resultant clashes of ideology occur between ideological, geographical, and industrial sectors. No single set of practices shows promise of sufficient dominance that adherents, be they corporate, state or citizen, can rely upon them without doubt.

As evidenced by the examples of BP and Walmart,

companies navigate, respond to, and ultimately shape the terrain of transparency environment. Absent a dominant set of norms, internationally active corporations are presented with a set of conflicting interests to satisfy between investors, public actors, states and, increasingly, the same private disclosure ecosystem. Many corporations follow a model similar to BP, adhering to the common 'bestpractice' reporting standards which, under defined, allow participants' wide latitude in presenting their own interpretation alongside social criteria.³⁴⁵ At the same time, these standards frequently lack granularity, and do not insure the company against public criticism in a chaotic CSR landscape. Other corporations, exemplified by Walmart, develop their own standards and practices, in which case the range of potential risk and benefit widens immensely. Companies that maintain their independence have the ability to shape and manage disclosure expectations, which can also provide broader market power opportunities.³⁴⁶ At the same time, wholly internal disclosure practices invite greater public scrutiny or criticism particularly from the transparency organizations with which they actively compete. Both companies examined in this chapter continue to invest heavily in the oratory space that transparency provides, despite their divergent approaches to the risks transparency involves.

The corporate actor's transparency decision ultimately does not dominate or serve, but rather competes with, that of state, interstate and private actors. In an international environment without a preeminent source of authority, transparency becomes a technique to deepen the company's moral standing as an actor alongside traditional political entities. Through careful and knowing usage of transparency, the corporate actor transubstantiates its original legal status, rising to a level equal to the state in communicating its own ethical will upon the world.

Yet it is only when transparency is understood from within notions of property, its instrumental and process characteristics become clearer. When one speaks of property in this context, it is most useful to understand it as control of the production, use and exploitation of information. Walmart has mastered this concept, indicated by its slow, measured approach to information involving supply chain practices as it

345. See OPEN SOCIETY FOUNDATION, *supra* note 157.

346. See WALMART, *supra* note 289.

develops its own sustainability index.³⁴⁷ This ownership/exploitation characteristic can thus add a substantial dimension to the understanding of transparency. That dimension helps better explain some of the tensions and difficulties of transparency as norm and process, as well as the intractability of those tensions and the strength of obstacles to their resolution in a number of ways.

In the absence of an audit-like facility there is virtually no way to test the authority and completeness of data generated, much less conclusions based on data. The GRI and OECD optional independent auditing options seek to address this problem, but in fact they tend to introduce a new set of separately beholden and interested actors. Additionally, as seen in the case of the quotation from the independent audit of BP's UNGC report, audits themselves do not necessarily draw attention to risks, and then usually in retrospect after a serious incident.³⁴⁸

The generation of data does not suggest the scope of its distribution. Ownership here is revealed in its most proprietary aspects; trade secrets and other business secrets represent sometimes critically important data. The ownership relationship of the business to the data can determine the extent to which the data must be revealed. All transparency frameworks respect these boundaries. In effect, information is divided along traditional public and private divides. Transparency advocates seek to broaden the scope of information that is public in character (tied to participation or stakeholder impacts analysis) while data generators seek to broaden the scope of the private character of information (as trade secrets or business practices that might be misused by competitors). Apple indicated this precise approach to information involving its supply chain practices when it sought to develop its own reporting metrics.³⁴⁹

Data generators, like third party standard and assessment organizations, control the use of their proprietary contributions to transparency by exploiting their respective parts in the generation of data or analysis.³⁵⁰ That control also reflects the

347. See WALMART, *supra* note 276.

348. See BP, *supra* note 247, at 10.

349. APPLE, APPLE SUPPLIER RESPONSIBILITY: 2012 PROGRESS REPORT (2012), *available at* http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2012_Progress_Report.pdf.

350. See *id.*

purposive foundation of transparency. In this case, control bends purpose to the benefit of the data gatherers or the third party assessment or framework entities. The tension between stakeholders and data producers reflects, in part, the fundamental privileging of information control by those who own it, as well as their agents (in this case the third party providers or other institutional assessment groups). The result is the usually large, and now natural, divide between internal and external transparency with the consequential strong effects on the ability of outsiders to assess corporate activity or participate in decision-making. Where this decision-making affects the interests of these outsiders the ownership power can substantially affect the ability of these outsiders to defend/advance their interests. Ownership notions provide a powerful basis for resisting transmission of information. These notions also explain the appeal of standards such as that of the UNGC, which permits participants great leeway in managing the content, state and extent of the information they (in multiple senses) convey.

Outside transparency actors may provide a basis for supplying information through their assessment or governance roles, but these actors have no real control over the generation of information and little power to audit it.³⁵¹ As a consequence, ownership is split between the data generators and the data assessment entities. The former owns data, while the latter owns assessment matrices. Product certification organizations and their transparency regimes illustrate this aspect with certification assessment and assessment techniques controlled by their party certifiers and the generation of data controlled by the entity seeking certification. These outside transparency actors also act, in some respects, as a basis for the emergence of the international or intra-industry agencies and standards—whether they be the FLA or the UNGC, as these programs can further their own goals by re-appropriating the reported material toward their own ends, deepening a sense of transparency organization ownership of reported information.

Where entities provide data and make assessments on the basis of self-generated standards, their ability to manage the data driven realities of their operation increases. Ownership permits the owner to constitute itself, through the weaving of

351. Outside transparency actors include governments, assessment agencies, product/process certification organizations, civil society actors producing standards and other similar actors.

data, into a story about itself that makes it difficult for outsiders either to challenge data or to develop a different analytical assessment, precisely because the access to methods of verification or additional data generation is not in their control. Walmart is a primary example of the benefits of this approach. Despite its brazen market power approach, the company is still more communicative now than it has been in the past, as demonstrated not only by ongoing public criticism of Walmart's avoidance of third party practices, but also in the selective, voluntary nature of the GRI indexes, as well as the non-certifying nature of the ISO standards.

Data ownership may itself limit the ability of outsiders to exploit data for their own profit. It is possible that data, even data supplied through processes of transparency belong to the producer who may acquire rights to control additional exploitation. Apple's proprietary approach to its CSR information also limited the ability of outsiders to exploit data for their own profit.³⁵² Walmart's supply chain will continue to be the target of external criticism and scrutiny, regardless of the company's actions, simply due to what it represents as the defining global corporate actor. Even this criticism signifies the emergence of new markets for transparency material, particularly in sectors not operating under the somewhat better defined codes of the UNGC and GRI.

Data may be preserved or destroyed by its owners. At the same time, the data generator also bears the cost of generation, preservation and distribution. Public reporting limits post-production control of data, but when data serves only internal purposes that limitation may not be present. State and market intervention in the form of rules and best practices may manage but not change the character of this relationship between data and its owner. International soft law frameworks touch on this relationship lightly at best. Walmart and BP have both faced criticism for their commercial management of CSR communication.³⁵³ However, it would seem strange to criticize these and other corporate actors from a legal standpoint for refusing to choose between third-party access or information ownership and an impossibly expensive doctrine of internally

352. See generally, APPLE, *supra* note 349 (reporting Apple's own statistics on corporate social responsibility).

353. See, e.g., BP, *supra* note 247, at 10 (criticizing BP's Deepwater Horizon report by Ernst & Young); WALMART, *supra* note 276, at 90–102 (detailing the progress made towards Walmart's CSR goals).

developed and maintained absolute disclosure.

Ownership notions strengthen the asymmetric relationship between data generators and outside data recipients. Where the objective of transparency is to enhance participation (in corporate decision-making or in public participation) the quality of that participation can be managed by the quality of the data produced. Therefore, ownership consequences, require the information of the state (laws requiring and managing disclosure) or incentive/market structures (no inclusion in ranking or certification), “naming and shaming” etc. The content of BP’s UNGC reports, and even more the efforts by BP to massage the meaning of their reported information by manipulating its format, suggests that even organizations that surrender information to industry standard reporting systems still seek to defend themselves against market and state transparency manipulation through use of the levers that initial information ownership affords them.

Transparency can be understood as a nexus of complex relationships between competing foundational ideologies and the site for competition among them. Transparency serves as the place where the ordering ideologies of shareholder welfare maximization in the legal regimes for the operation of economic enterprises and the ideology of property in the determination of rights to control and exploit information can be contested by those who seek to substitute other frameworks of economic organization and control principles. But transparency itself is a matrix of data gathering and assessment which can substantially focus the construction of the understanding of the entity monitored. It becomes more apparent, then, the way that ideologies, deeply embedded in the way issues are considered, but difficult to expose because of its character as background, can significantly shape the way in which issues of transparency are understood and the structures within which solutions can be realized. The ideology of property not only helps shape the presumptions from which transparency is defined and its limits understood, but also shapes the framework within which transparency can be reformed or its structures changed. As long as transparency operates under foundational principles of ownership, and ownership in the entity that generates the data as the building blocks of transparency, neither the normative nor participatory aspects of transparency’s potential will substantially change. It suggests both the reasons for the policy

and governance incoherence that are the hallmarks of transparency in fields such as environmental impacts.

The lesson is that voluntary codes work best when they produce standards that can be monitored, when they are embraced by companies willing to investigate stakeholder claims of violation, and when stakeholders can affect the consumer markets for companies irrespective of the existence of the codes. Thus, ironically enough, the codes are merely a means through which stakeholder power is most effectively asserted—by affecting consumer markets. For proponents of free market globalization, the voluntary codes work very well indeed, even if they are uncomfortable for the affected companies. For the stakeholders, including NGOs, the codes work well, too. They are able to skip the governmental middleman, so-to-speak, and directly affect corporate behavior in a precise and targeted way. For NGOs weaned on the need for government intervention, the codes should serve as an assurance that the state is not a necessary predicate for effective action, even by those with no state power.

Free market globalization has opened a great new market for consumer information. It is up to NGOs and other elements of civil society, as well as corporations and other economic actors, to get into the game. However, the transparency regimes through which free market globalization is accomplished will apply as strongly against the monitors as they do against the monitored. Those deeply engaged in efforts to broaden transparency and to use their monitoring roles to affect corporate conduct should take heed—their own systems of data harvesting and assessment are as likely to be scrutinized and tested. The legitimacy of their own efforts will depend on adherence to the same norms of production and assessment of data as they mean to hold others accountable for practicing.³⁵⁴

354. The producers of *This American Life* understood this when they announced their reaction to learning that a story they broadcasted had been falsified. They explained: “We’re horrified to have let something like this onto public radio. Many dedicated reporters and editors – our friends and colleagues – have worked for years to build the reputation for accuracy and integrity that the journalism on public radio enjoys. It’s trusted by so many people for good reason. Our program adheres to the same journalistic standards as the other national shows, and in this case, we did not live up to those standards.” Ira Glass, *Retracting “Mr. Daisey and the Apple Factory,”* THIS AM. LIFE (Mar. 16, 2012), <http://www.thisamericanlife.org/blog/2012/03/retracting-mr-daisey-and-the-apple-factory>.

C. TRANSPARENCY, PROPERTY, AND SYSTEMIC
COMMODIFICATION

Voluntary codes can work in the market, without formal bureaucratic structures or direct government intervention. They can serve as the governance structures of self-contained systems of behavior in which consumers, producers and taste-makers, not the state, play a critical role. Here is a very productive confluence of democracy and capitalism, but one in which there is very little room for the active participation of the state. The decision to invoke transparency on some condition or event and not others has profoundly important effects on managing behavior in response to these determinations. Transparency not only incarnates intangibles such as the corporation or action/impacts, but it also provides a method of managing the behavior of that incarnation as well. This concept is the expression of Foucault's "statistics"³⁵⁵ at the heart of the problem of transparency in international private law.

But this concept also suggests the importance of markets in the development and deployment of codes and suggests that the property character of transparency, and the codes through which they are deployed, points to the commodification of information and the transparency systems through which they are marketed to internal and external stakeholders. If economic entities may now effectively choose among private transparency regimes, deciding which transparency producing systems it will harvest and distribute information through, then the comprehensiveness of disclosure and behavior systems within which disclosure plays a part will depend upon the maturity of a non-state behavior regulatory system. These regulatory systems, in turn, will be affected by the legitimacy and maturity of the states in which they are called to operate. Where states have a less developed legal system, and an inexperienced or corrupt legal system, multinational corporations may be able to assert more effective control over their operations in that state. Conversely, where stability is desirable or where there is much money to be made, a multinational enterprise might be willing to put up with a more intrusive and sophisticated regulatory environment. In any case, in a global environment in which corporations compete for

355. FOUCAULT 1977–1978, *supra* note 2, at 104 (explaining the ability of statistics to break from their functional framework to become a main factor in unblocking the art of government).

markets and capital, transparency systems (and the frameworks through which they are given form) are commodities which are marketed by their operators as mechanisms for the enhancement of corporate operations. In the absence of states, these governance systems are themselves property, much like the information harvested and used through the employment of their methods. Transparency and the systems used to produce it are just commodities that can be offered for sale, even as a factor of production.

The public/private divide remains quite vibrant in the context of transparency in international law, particularly in international environmental law. Like national law, environmental law as a substantive governance field is focused on the use of transparency for engagement in the political process, including the bureaucratized structures of administrative regulation. Environmental law is meant to provide information in governmental activity and to provide a space for intervention in governmental processes tied to the state and other public bodies. But it is hardly geared to, and barely recognizes, the role of economic and other non-governmental enterprises in actions that have environmental impacts. To those actions, environmental law at the international level interposes the state. This is so even in the face of the significant changes to the structure and operation of enterprises within globalization. This pattern is illustrated in international environmental law efforts, but is by no means confined to this field of governance.

Ironically, private law governance has become the object of close regulation within the context of corporate governance at the international level. Here, environmental law is not privileged but instead is bound up in efforts to manage the behavior of corporate and other non-governmental organization activities with environmental, social, cultural, and human rights impacts. In those efforts, transparency has assumed a more prominent role, one in which the connection between the entity causing the impact and affected stakeholders is more direct.

As a consequence, movements towards regimes of transparency are bound up in issues of corporate governance and in the fundamental relationship between entities producing impacts, as well as individuals and others affected by those impacts. In this area, formal law has little to say. Soft law efforts, as well as regimes of monitoring and enforcement

that are tied to the disciplining behaviors of consumers and investors, tend to be the form in which transparency has been developed.³⁵⁶ Yet soft law does not imply a failure of governance; rather, it suggests the rise of governance systems through norms that are binding but not connected to the law–state systems or its forms and methods.³⁵⁷ The result is a tendency toward the commodification of transparency as information, bound up in notions of property.³⁵⁸ Transparency can also be commodified as systems, which themselves are designed for adoption of information harvesters in a competitive environment.

Yet markets also produce a certain incoherence, even as market participants generally move toward the production of similar products. “Current international environmental law and international human rights law developed without regard for each other and are not sufficient in this global economy.”³⁵⁹ Likewise, international environmental law and international development of corporate governance soft and hard law regimes exhibit a marked incoherence.

During the last two decades, it has become clear that the existing national and supra–national regulatory regimes are not enough to pursue the goals of social, environmental, and competition policy within the global economic and trade systems. Political steering has not kept up with the networking of markets and societies. There are huge gaps in international law, national law, and in the implementation of the law. And although the political arena can establish the right framework and incentives, it is the rest of society that must breathe life into this structure. Hence, voluntary standards have emerged to fill the gap and to contribute to shaping a just and

356. See Bede Nwete, *Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?*, 8 GERMAN L. J. 311, 328 (2007) (explaining the adoption of a soft law approach for businesses in regards to transparency).

357. See *id.* at 312 (discussing the emergence of soft law attempting to hold businesses to human rights, environmental, and transparency concerns).

358. See Backer, *Moral Obligation*, *supra* note 29, at 625 (“Information can serve as both a commodity and the currency of a governmentality . . .”).

359. Alison Lindsay Shinsato, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NW. J. INT'L HUM. RTS. 186, 197 (2005).

sustainable economic globalisation.³⁶⁰

This brief examination of transparency in international environmental law suggests fragmentation as the structural foundation of the regulatory environment in soft and hard law, which, in turn, might be sourced in either public or non-state actors. Substantive international environmental law provides few standards for monitoring or disclosure of activities or operations that might produce environmental impacts. Corporate governance standards, mostly in the form of international soft law standards sourced from a variety of actors, provide a more coherent regulatory structure for transparency in the context of corporate internal operations and policies. Codes of corporate social responsibility, especially those with an environmental aspect, provide a corresponding structure for transparency with respect to business activity with an environmental impact, including business activity that touches on human right's concerns.

VII. CONCLUSION

This essay has considered the problem of transparency in the private sector within the triangular relationship between governmentalization, mass politics as the basis of authenticity and legitimacy of institutional action, and the "statistics" which serve as the form that transparency takes in the twenty-first century. I have sought to demonstrate through a brief review of governance instruments at the international level and the private efforts of international economic actors, that transparency functions as a mechanism for accountability, for risk management, of autonomous private governance beyond the state, and as a mediating mechanism for communication between public and private, internal and external stakeholders. In the field of private governance especially, it also functions as commodity, and as object.

Underlying all of these intersections is the ideology of property. It may be useful to consider transparency through the lens of transparency as property. When transparency is understood from within notions of property, its instrumental and process characteristics become clearer. When one speaks of

360. FED. MINISTRY FOR ECON. COOP. & DEV., *Shaping Globalisation – Scaling Up Voluntary Standards Conference 4* (Oct. 29–30, 2008), *available at* http://www.zadek.net/wp-content/uploads/2011/04/More-is-Not-Enough_Shaping-Globalisation_Scaling-up-Voluntary-Standards_October2008.pdf.

property in this context, it is most useful to understand it as control of the production, use, and application of information. Ownership, in this sense, emphasizes control and exploitation, but it also suggests a power to determine whether or not specific data is itself generated.

Lastly, transparency in private law at the international level suggests that it is unlikely that systems of transparency, and especially the underlying normative presumptions that help structure its form and objectives, will be harmonized. Transparency regimes contribute to the move towards polycentricity in governance, accelerating the shift of governance power from the state. Removed from the orbit of law and the state, transparency becomes two things. First, it is an essential mechanism for the articulation of alternative normative standards such as soft law, used to that effect by international organizations and civil society elements. Second, it is another means of protecting the fundamental governance ideology of economic organizations under globalization.

The proliferation of standards and the overlap of standard setting entities produce a level of miscommunication and policy incoherence that may work against a seamless delivery of material information. "With information comes an ability to judge. Judgment permits action, which in the aggregate can be substantial. The rest can be left to the market."³⁶¹ The development of transparency in international environmental law is likely to be much more the product of the evolution of international standards of corporate governance and CSR than a reflection of substantive advances in environmental governance. To the extent that transparency itself has substantive effects, it will be as likely driven by policy considerations of CSR and corporate governance as by the policy or logic of substantive environmental policy. But those standards, in turn, will be grounded in the assumptions of property inherent in the basic nature of the objects of transparency and in market principles of commodity sales which is the consequence of competition among systems of disclosure, monitoring, and engagement. To that extent, investor and consumer tastes, not science and policy, will control the scope and quality of environmental transparency.

361. Backer, *Moral Obligation*, *supra* note 29, at 653.