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

Larry Cata Backer, Pennsylvania State University
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Larry Catá Backer*

Abstract

This article considers the role of transparency in corporate governance, focusing on the regulatory forms in international environmental law and policy. 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

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* W. Richard and Mary Eshelman Faculty Scholar & Professor of Law, Professor of International Affairs, Pennsylvania State University. The author may be reached at lcb911@gmail.com. This project would not have been realized without the able work of my research assistant Robert W. Marriott (Penn State ’13 Law expected). Some themes and materials in this article were previously introduced in and drawn from Larry Catá Backer, Transparency and Business in International Law—Governance Between Law and Technique, in TRANSPARENCY IN INTERNATIONAL LAW --- (Anne Peters and Andrea Bianchi, eds., Cambridge: Cambridge University Press, forthcoming 2013).
environmental governance, much of that 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 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 domestic law outward from the state. It concentrates on the environmental transparency effects of extraterritoriality, of the incorporation of international norms within domestic legal orders, and the internationalization of domestic rule frameworks. 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. Lastly, 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 the potential and 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, which also suggests both the possibilities and limits of domestic and international law, in its transparency aspects. 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 as both a means of conveying information to corporate insiders and outside stakeholders and 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 norm making and technique within the principles of property.

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I. Introduction.

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. 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 territoriarity and law to a “state of government” no longer defined by territory but by the “mass of

the population. The improvement of the condition of this mass of the population serves both as the final ends of government and as the instrument of that object. Those ends and means have produced a governmentalization of institutions around which populations are organized—states, international organizations, corporations, non-governmental actors and religious communities—understood as “the ensemble formed by the institutions, procedures, analyses and reflections, calculations and tactics that allow the exercise of this very specific power. 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”, which “enables the specific phenomena of the population to be quantified. These “statistics” enmesh both the generation of data and its availability to participants in governance. 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.” As technique, transparency is understood as the aggregate of methods of producing information for use in managing power relationships. As norms it serves as the expression and policing of the normal and thus the acceptable—

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3 Id. at 105.
4 Id.
6 Foucault, supra 108.
7 Id. at 104.
right conduct, right rule and right relations among individuals and the social organs that manage their relations. Both as norm and as technique, 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 law, which might explain the overall workings of what I would call a 'normalizing society.'\(^{10}\)

In the public sphere, transparency serves as a substitute for, a mask or veil disguising, the more difficult discussion of participation in, and the accountability of, institutional actors\(^{11}\) 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 spheres\(^{13}\) without invoking by name the normative framework it means to manage. It functions as a method of deflection, and in this sense transparency serves as a symptomatic discussion.\(^{14}\) The focus on the mechanics and techniques of transparency, on its symptomatic manifestations, obscures and deflects debate about its causes, that is the ramifications of acceptance of or resistance to the ideology of mass democracy in the public and private spheres. Yet this deflection produces both incoherence of legal norms and subjects the concept-symptom of transparency to its own indeterminacy and ultimately to incoherence even as symptom, an effect now well

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\(^{10}\) Id. at 38-39.


\(^{13}\) Joseph Stiglitz, *Transparency in Government*, in The Right to Tell: The Role of Mass Media in Economic Development 27-44 (Roumeen Islam, ed., The World Bank Institute, 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).

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

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

activities as a means of measuring, reporting and accounting. But these efforts both mask the objective—engagement in a normative discussion framed by law. These efforts create dissonance to the extent that the normative objectives attained through transparency regimes are opposed to the fundamental legal ordering structures and moves towards polycentricity in governance, accelerating the shift of governance power from the state. Transparency, removed from the orbit of law and the state, becomes the essential mechanics for the articulation of alternative normative standards as soft law.

Yet transparency is increasingly shaped by fundamentally statist notions, and in particular notions of property. As 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. This 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. In light of this, 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. That problem exposes transparency as mechanism, object and mediating mechanism. Transparency functions 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). As a commodity, transparency, like law within global governance markets, can be marketed, bought and consumed in the production of profit. This is transparency in its external context, emphasizing its component elements (technique) and its character as inventory bought/sold/combined to suit the needs of its users in context by both private and public manufacturers of systems transparency techniques. But transparency is also an object, one that is meant to produce the objects (information) to be consumed by internal and external stakeholders. It functions as the articulation of the normative framework that shape the character and scope of the commodities (information) it produces, one that both creates and satisfies demand for its product. This 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) between states, consumers, investors, NGOs, and international organizations. 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).

The possibilities and limits of transparency are most apparent in international environmental law.\(^{26}\) were nicely framed for our generation in the bedeviling Principle 10 of the Rio Declaration on Environment and Development:

Environmental issues are best handled with 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 and remedy, shall be provided.\(^{27}\)

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 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), which are to be controlled through the judicial and administrative organs of state. This 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).\(^{28}\) It is unconscious of the governance role of enterprises


\(^{28}\) JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, 2006 (Chapters 3–4).
and their role in monitoring, reporting and interacting with mass opinion\(^\text{29}\) (whether organized in politically sovereign units or otherwise in functionally differentiated governance communities\(^\text{30}\)), the role of civil society in developing and monitoring environmental reporting standards,\(^\text{31}\) or the role of transparency in markets as a mechanism of managing substantive objectives.\(^\text{32}\)

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.\(^\text{33}\) At the same time, public and private actors have deepened both an understanding of transparency as a


governance tool and in the development of transparency principles and implementation systems in domestic and international law. Sometimes, the two strains of developments are coordinated, for example in the elaboration of Guiding Principles for Business and Human Rights endorsed by the U.N. Human Rights Council in 2011. But 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 states.

Transparency as a value or concept in domestic environmental law has seen some coherent policy movement. But it has historically suffered problems of definition and application. For a number of

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37 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. L. Rev. 1227, 1227-339 (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’, also known as ‘Proposition 65’.

38 For one recent attempt at comprehensive definition, See, Ball, Carolyn, ‘What is Transparency?’, Public Integrity 11 (2009), 293-307.
reasons, including its employment simultaneous to its development,\footnote{See Hess, David, ‘Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through Transparency’, \emph{Business Ethics Quarterly} 17 (2007), 453-467, and Ball, ‘What is Transparency?’, 2009, at 295} its existence in a climate marked by intense translational and interdisciplinary requirements,\footnote{See, Pulver, Simone, ‘Making Sense of Corporate Environmentalism’, \emph{Organization & Environment} 20 (2007), 44-83.} and its interaction with at times personally and politically contentious issues of science, transparency in general and environmental transparency in particular faces particular problems of consideration and deployment. While scandal, history and prior involvement have worked to increase the role of government-mandated transparency in matters of finance\footnote{See, e.g., Troy A. Paredes, \emph{Enron: The Board, Corporate Governance, and Some Thoughts on the Role of Congress}, in \emph{Enron: Corporate Fiascos and Their Implications}, at 495 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).} (albeit primarily procedural in nature\footnote{Paredes, ‘Enron’ 2004, at 519.}), environmental transparency practices have remained the subject of disputes involving state sovereignty, acceptable formatting, and a continuous sense that entities that do claim transparency are doing so in a circuitous or even intentionally ineffective manner.

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

Yet it is beyond the orbit of the state that the more interesting developments 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. Lastly, 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 the potential and 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, which also suggests both the possibilities and limits of domestic and international law, in its transparency aspects. 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 as both a means of conveying information to corporate insiders and outside stakeholders and 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 norm making and technique within the principles of property.


The foundation for international environmental law transparency might be found in the growing number of substantive conventions and

norms recently generated through internal organs of the community of states. 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.

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 Declaration,\textsuperscript{44} and the 1992 Rio Declaration.\textsuperscript{45} The Stockholm Declaration was the first major attempt at constructing some basis for international environmental policy obligations. Both aspirational and vague, the preliminary language of the Declaration makes no direct reference to transparency efforts. The closest thing to a transparency element is forum 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.” The Rio Declaration focused more directly on transparency, but was limited severely by the governance framework within which it was structured.\textsuperscript{46} The Rio Declaration focused solely on state actors, limited their transparency obligations to information held by the public authorities, and limited access outside to non-state actors through imposition of an “appropriateness principle.” 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, but not otherwise, along with access to administrative and judicial remedies.

Conventional law efforts did not advance transparency to any significant extent. Signed concurrent to the Rio Declaration, the Convention on Biological Diversity\textsuperscript{47} includes monitoring obligations, and references to the exchange of information, but only with regard to “…the conservation and sustainable use of biodiversity…”\textsuperscript{48} This accord, focusing as it does upon matters affected by, but not generally directly

\textsuperscript{45} Rio Declaration, supra n 2.
\textsuperscript{46} See discussion in the Introduction, supra.
\textsuperscript{48} Id. at Art. 17 § 1.
producing, environmental outcomes, does not focus on transparency. 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 Organization produced the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, commonly known in its most modern form as the London Protocol. This protocol contains no reference to transparency beyond a general assertion of monitoring responsibility.

The UN Framework Convention on Climate Change, and the subsequent implementation of the Kyoto Protocol, were 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. The reporting requirements were broad and directed toward state parties. 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.

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49 Id. at Art. 26.
55 One compromising factor is the possibility of corruption during the emissions trading process, for more information on the emissions trading process, see (Apr. 2, 2012, 3:39 AM), http://unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php.
Stockholm Declaration before, does not consider business actors as separate stakeholders in the compliance process,\(^58\) nor does it consider transparency as an independently important issue.\(^59\)

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 Species\(^60\) 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 law of the Party concerned.”\(^61\) Another example of this approach is Article 5 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.\(^62\) It describes in some detail reporting and informational obligations between party states, and to the administering secretariat. Absent, however, is any mention of public disclosure, or indeed any form of uncontrolled communication of information regarding the subjects of the Convention beyond interested state actors, hazardous materials and activities.\(^63\) A different approach is taken in the UN Convention to Combat Desertification.\(^64\) 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.” The effectiveness of this provision remains unclear.\(^65\)

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\(^58\) The paper Briefing on Kyoto Mechanism Eligibility for CARILEC Member Companies, illustrates that business participation recognition is contingent upon national ratification; (Apr. 1, 2012, 4:33 PM), http://toolkits.reeep.org/file_upload/10304040_1.pdf.

\(^59\) See, e.g., UN Climate Change Conference in Copenhagen http://unfccc.int/meetings/cop_15/items/5257.php


\(^61\) Id. at Art. VIII, § 8.


\(^63\) Id. at Art. 13.


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

Regional environmental conventional law appears to have placed more emphasis on transparency issues. The UN Economic Commission for Europe, in producing the Convention on Long-Range Transboundary Pollution, sought to address the political problems raised by the incomplete and at times perverse incentive systems arising from pollution across national boundaries. As an organization devoted to a narrower geographic area, and more closely aligned with its individual parties, the Convention has 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. 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 the internalization of the provisions of the Aarhus Convention within the E.U. “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.”\(^7\) 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”\(^7\) It also requires Public participation in decision making\(^7\) and access to justice.\(^7\) These provisions were transposed into European law through a series of directives and regulations.\(^7\) This structure, though, 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.\(^7\)

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 as the only subject of international law and direct regulation, standards and conduct commandments, as the principal vehicle for the realization of substantive objectives. Transparency and its related techniques\(^7\) are not understood to carry substantive regulatory possibilities, and non-state actors remain objects of international law.\(^8\) States for the most part retain substantially unlimited control over the


\(^7\) Aarhus Convention Art. 4(1). States are required to develop systems for the collection of information as well, *id.* at Art. 5.

\(^7\) *Id.* at Arts. 6-8.

\(^7\) *Id.* at Art. 9.


\(^7\) *See*, Math Noortman, et. al, Non-State Actors in International Relations, Ch. 4 (Ashgate, 2001).
types of information it might develop, harvest, and make available to non-state actors. Even where the state appears to be obligated to fully disclose, for example in the Desertification Convention, disclosure is limited to information publicly available. Regional accords provide a better model. Still, one cannot readily speak of transparency in substantive international economic law. The exception appears to be the Aarhus Convention. It is focused on transparency—but its character as an instrument of public governance—environmental democracy—reduces its 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. To some extent, the slack is taken up not in environmental governance frameworks but in international efforts to create governance frameworks for economic activity. 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. On the other hand, important soft law efforts have been emerging since the 1990s. The most successful of these seek to leverage social norm systems within international and domestic public institutional frameworks the context of to a soft law efforts. Section A highlights two important efforts: the OECD’s transparency provisions within its guidelines and principles of corporate governance, and the Guiding Principles of Business and Human Rights. Both are soft law efforts. 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

83 Ruggie, 2009 Report ¶ 48-54.
transparency component that touches on transparency in environmental impacts of corporate activity.

A. International Soft Law Frameworks: The OECD and Guiding Principles of Business and Human Rights. The OECD Principles of Corporate Governance (OECD 2004)\textsuperscript{84} 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. 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. These concerns form a foundation upon which other, more targeted agreements build.

The OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD 2005)\textsuperscript{85} were crafted specifically as a complement to the Principles of Corporate Governance.\textsuperscript{86} 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 and technological changes and emerging regimes of free movement of goods, services and capital across borders. Mirroring the Principles of Corporate Governance in structure, Chapter 5 of the state-owned enterprises (SOEs) document also addresses transparency and disclosure at length. 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.\textsuperscript{87}


\textsuperscript{86} OECD 2005, supra, Preamble 9; Principle 1.

\textsuperscript{87} Paragraph E further emphasizes the need for additional disclosure in 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
The Guidelines on Multinational Enterprises (2010) provide a comprehensive framework for guiding the behavior of economic activity that crosses borders. “The common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise.” The object of these Guidelines, among many, is to encourage positive contributions “to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise.” Like the Principles of Corporate Governance and Guidelines for SOEs, the Guidelines for Multinationals focuses disclosure on financial matters geared toward shareholder concerns. But because disclosure is grounded on “all material matters regarding their activities, structure, financial situation, performance, ownership and governance”, enterprises are also “encouraged” to include additional information that “could include” values statements or statements of business conduct, policies or other codes of conduct adopted by the enterprise and performance in relation to those codes, information on internal audits and information on relationships with labor and stakeholders.

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. It suggests the outlines of a social norm standard for transparency in general, including environmental effects transparency. Such social norms are then meant to be enabled—facilitated—through the instrumentalities of states, without invoking the formal structures of the domestic legal orders of participating states. The effects can be quite substantial, but they remain grounded in politics and the social norm systems that fall outside the comfortable and well-established parameters of law and the state system.

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90 For a discussion from earlier work, see Larry Catá Backer, Governance without Government: An Overview, in “Extraterritoriality”: Transnational Legal
Like the OECD framework, the U.N. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework, endorsed in June 2011 by the U.N. Human Rights Council (UNGP), also posits a soft law framework for business conduct, with respect to which transparency plays a substantial part. The UNGP posts 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. The state duty is grounded on and limited by each state’s legal commitments under international law. The corporate responsibility to respect is built 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. The remedial obligation is constructed from the premise that states are obligated to provide a formal system of


94 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 incorporated into the domestic legal 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, 24 Pacific McGeorge Global Business & Development Law Journal – (forthcoming 2012).
grievance resolution, to be supplemented by informal public alternatives and private systems of dispute resolution.

The transparency elements of the Guiding Principles reflect their substantive assumptions. The state duty describes its transparency elements in general terms. 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.\(^95\) The Guiding Principles are clear about their limits—they merely structure existing state obligations,\(^96\) though they also suggest a hierarchy of law in which international obligations are superior to national legislation.\(^97\) Within this limited scope, the Guiding Principles focus on transparency through the lens of policy coherence, within the state,\(^98\) and in relationships with others.\(^99\) Otherwise, states are encouraged to share information, and to obtain information from non-state actors, in aid of their effective implementation of legislation or the advancement of policy.\(^100\) States are also encouraged to develop national standards, including performance-monitoring rules.\(^101\)

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.\(^102\) That breadth is developed through the elaboration of

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\(^95\) “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.” UNGP, supra, ¶3 Commentary.

\(^96\) “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.” UNGP General Principles.

\(^97\) UNGP Principle 1.

\(^98\) UNGP Principle 8.

\(^99\) UNGP Principle 9-10.

\(^100\) UNGP Principle 7.


\(^102\) UNGP Principle 16(d) provides that corporate policy should be publicly available and communicated to all internal and external relevant parties.
a system of human rights due diligence,\textsuperscript{103} the core means through which the corporate responsibility to respect human rights is implemented and made transparent.\textsuperscript{104} 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,\textsuperscript{105} and reporting can be consolidated with social and environmental reporting as well.\textsuperscript{106} Companies are advised either to build self-standing human rights due diligence processes or to integrate them with corporate environmental impact assessments,\textsuperscript{107} and can be integrated with corporate internal tracking systems for environmental performance.\textsuperscript{108} Severe human rights impacts that may trigger both the reporting obligations and mitigation/remediation include the delayed effects of environmental harm.\textsuperscript{109}

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

\textsuperscript{103} UNGP Principles 17-22.
\textsuperscript{104} Showing that companies respect human rights requires “a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.” UNGP Principle 21 Commentary.
\textsuperscript{105} United Nations Office of the High Commissioner for Human Rights, The Corporate Responsibility to Protect Human Rights: An Interpretive Guide (Advance unedited version (November 2011)), ¶6.6 (p. 31) (Apr. 2, 2012, 5:54 AM), \url{http://www.business-humanrights.org/Links/Repository/1009746/jump}. However, these processes for assessment cannot change the focus on all internationally recognized human rights. UNGP, ¶18 Commentary.
\textsuperscript{106} Id. at ¶10.4 (53).
\textsuperscript{107} Id. at ¶7.5 (37).
\textsuperscript{108} Id. at ¶9.2 (48). There is an assumption that the technical standards applicable to environmental impacts will all be used as a model. Id. at ¶9.4 (49).
\textsuperscript{109} Id. at 7 (Pt. II, key Concepts), and ¶15.2 (71).
domestic law, and the internationalization of domestic law. Of these, 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 UN GP, discussed above, when the domestic legal order has transposed international standards. 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 effects in permitting a given corporate action. 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. Tragedies such as the Bhopal

110 “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.” UNGP Principle 2 Commentary.

111 See e.g. Exec. Order No. 12114, 44 Fed. Reg. 1957 (Jan. 4 1979). Environmental Effects Abroad of Major Federal Actions - 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 et seq. (1969). - seeks to ensure that government decision-making takes account of the environmental consequences expected to result from governmental actions and approvals.

chemical leak have produced calls for greater extraterritorial measures, but these calls have been most successful within academic circles.

Bilateral Investment Treaties may also produce some extraterritorial effect. The boldest move in exporting accountability for environmental effects came directly from the 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\(^{113}\). This relatively unprecedented move has not been replicated since, and its enactment was the source of considerable criticism as a purportedly protectionist policy. Beyond actions of legislative and executive fiat, the US justice system continues to struggle with the issues of jurisdictional conflict that our attempted exportation of prescriptive corporate law has given rise to.\(^{114}\)

2. Incorporation of International Norms Within Domestic Legal Orders. For many jurisdictions, international law remains merely an obligation between states, with no internal legal effect, until 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 practice,\(^{115}\) or to adopt harmonized best practices,\(^{116}\) with the effectiveness of international wildlife agreements; 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 et seq. (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.


\(^{114}\) 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 Corporation v. Gilbert, 330 U.S. 501 (1947) - identifying factors for determining when jurisdiction would be refused on the basis of forum non conveniens.

object of adding to customary international law, these have not produced a body of law in that respect.

Perhaps the most interesting experiment in incorporation is regional—and the European Union provides the most evolved example.\footnote{Perhaps the most interesting experiment in incorporation is regional—and the European Union provides the most evolved example. The European Union has focused on product standards, and environmental quality standards. As in other areas of regulation, the form of regulatory intervention has shifted form 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’). The institutional form appears to shift governance form foreign to environmental ministries, and from a singular focus on Member State governments to a more networked approach including international organizations and civil society actors. But, like governance efforts at the international level, the E.U. has also advanced voluntary or soft law approaches. The Eco-Management Audit Scheme operative since (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 (Jan. 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.” Principle 2.4)}

\footnote{Transparency Accountability Initiative, Environmental Transparency Participation and Justice (Open Society Foundation 2011) (guide to best practices in transparency, accountability and civic engagement)}

\footnote{See, e.g., Environmental policy in Europe. The Europeanization of national environmental policy (Andrew Jordan & Duncan Liefferink eds., Routledge 2004).}

\footnote{This is the so-called regulatory new approach, Council Resolution of 7 May 1985, On a New Approach to Technical Harmonization and Standards, 1985 O.J. (C 136) 1-9.}

\footnote{E.g., Royal Commission on Environmental Pollution, Twenty-first Report, Setting Environmental Standards (1998) Cm 4053, Annex C.}

\footnote{Consider the movement from Birds Directive (1979), to the Habitats Directive (1992) to Natura (2000).}

\footnote{See, e.g., essays in Environmental policy convergence in Europe: The impact of international institutions and trade (Katharina Holzinger, et al., eds., Cambridge University Press 2008). For example, see Water Framework Directive (2000).}

1995 and last revised in 2010, is structured as a voluntary program that
provides participants with certain incentives. It’s key elements include
annual updates of environmental policy targets, including
implementation assessments, third party verification, and the circulation
of statement. There is some effort to harmonize EMAS with ISO
14001 standards, but the systems are not interchangeable, potentially
creating some inter-systemic dissonance. The EU Ecolabel is
structured as a voluntary product certification scheme accrediting
products and services.

In the United States, 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

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123 EUROP-Ass, Environment, Key Elements of EMAS, (Apr. 1, 2012, 11:09 AM),
124 European Commission on Environment, EMAS, Frequently Asked Questions
(Question 1.2), (Apr. 1, 2012, 11:13 AM),
http://ec.europa.eu/environment/emas/tools/faq_en.htm#Section1Question1.
125 The European Commission on Environment noted:
The adoption of EN ISO 14001:2004 as the 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.
European Commission on Environment, EMAS, Frequently Asked Questions
(Question 2), (Apr. 2, 2012, 2:48 AM),
http://ec.europa.eu/environment/emas/tools/faq_en.htm#Section1Question2.
126 The FAQs describe 13 points of difference with ISO 14001 standards, some
of which require adoption of metrics and procedures that are different enough to
make adoption of both programs difficult. European Commission on
Environment, EMAS, Frequently Asked Questions (Question 3), (Apr. 2, 2012,
2:48 AM),
http://ec.europa.eu/environment/emas/tools/faq_en.htm#Section1Question3. 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).
See also, European Commission, Ecolabel, (Apr. 2, 2012, 2:55 AM),
http://ec.europa.eu/environment/ecolabel/.
wealth,128 low profit limited liability companies,129 or which can be operated in an environmentally and socially responsible manner.130 The provisions of Maryland law are illustrative. There, benefit corporations are to be operated for both general and specific public benefit,131 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 applied consistently with the prior year's benefit report or accompanied by an explanation of the reasons for any inconsistent application.”132 The third party standard setters can include any entity that meets statutory standards.133 These providers include private or public entities.134 More importantly, the statutes indirectly provide a method for incorporation of international norms within domestic law. “Certifiers 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.”135 Some standard setters are also actively engaged in the development of this sort of enterprise136—a case of the standard setter as substantive regulator.137

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129 Elizabeth Schmidt, Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder, 35 Vt. L. Rev. 163, 170 (2010).
131 MD CORP & ASSNS § 5-6C-01(b) & (c).
132 MD CORP & ASSNS § 5-6C-08(a)(2).
133 In Maryland these include Independence from the benefit corporation, and 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 CORP & ASSNS § 5-6C-01(e). See also N.J.S.A. 14A:18-1.
134 Brakeman Reiser identifies potential private providers. Brakman Reiser, supra, at 601-603.
135 Id. at 602-603.
136 Among them is B Labs. “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.” GIIRS.org, (Apr. 2, 2012, 3:07 AM), http://giirs.org/powered-by-b-lab. See also, Marquis, Christopher; Klaber, Andrew; Thomason, Bobbi “B Lab: Building a New Sector of the Economy.” Harvard Business School Case Study (9/27/2010).
137 On the regulatory effects of mandatory disclosure regimes, 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). For
3. Internationalization of Domestic Rules. A number of domestic rules of transparency affect global actors because of their effective reach. This section considers two efforts—disclosure through securities’ transaction regulation, and the regulation of markets for trading in corporate securities. These, in turn, arise to respond either to changes in national law creating liability for certain environmental effects of corporate activity or to the evolution of social norms, for example “ethical” investment standards. In the United States, the disclosure rules under federal law have tracked the growth of liability for certain environmental activity. Disclosure is usually predicated on the possibility that such action will have a material effect on the financial condition of the company.\(^{138}\) Securities markets, on the other hand, have served as a nexus of domestic and international norms through the development of indexes of shares of companies conforming to particular requirements. The Dow Jones Sustainability Indexes and the FTSE4Good series are among the most well known “green” indexes. A social return on investment analysis has also been developed, fashioned to apply the sensibilities of conventional financial reporting to certain environmental and social activities.\(^{139}\) Principle 8 emphasizes transparency as essential.\(^{140}\)

IV. Transparency Frameworks Beyond Public Law.

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\(^{140}\) "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.” SROI Network, Seven Principles, *supra*, Principle 8.
First, 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. It also considers the UNGC framework. Second, the section considers private efforts, focusing on GRI CSR mechanisms, with an eye toward coherence with the ISO definitions, and potential gaps or conflicts of method between the two systems, and briefly on the transparency elements in product certification programs. Third, private corporate governance transparency regimes are considered.

**A. Hybrid Governance Efforts: ISO and Global Compact.** ISO has produced two sets of standards with some applicability to the issue of environmental transparency. The first, the ISO 14000 standards are more focused on substantive and internal management issues. ISO 14000 comprises what is termed a “family” of standards: two standards deal with environmental management systems (EMS), the requirements for an EMS, 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.

ISO 14001 says nothing at all 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.

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ISO 14001:2004 and ISO 14004:2004
ISO 14004:2004
ISO 14001:2004
Id.
The second, International Guidance Standard on Organizational Social Responsibility, ISO 26000, released in September 2010, represents perhaps the only complete and coherent attempt at a description of effective CSR practices. It has become an influential standard of reference, reflecting a greater willingness to assert governance authority through soft law measures by international organizations. 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.

While the 26000 standard has specific sections devoted to topics such as environmental or labor CSR activity, it is at most useful in discussing general practices necessary to all forms of CSR. 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.” The corresponding sections of the standard cover transparency and the role of communication in social responsibility, that is this trend of providing detailed and tremendously effective criteria against which to measure CSR regimes.

Despite strong criticism from some quarters that the ISO 26000 family was part of a long-term effort towards mandatory hard law CSR requirements, the series of standards has remained advisory in nature, and has not been applied as part of any overt push toward mandatory disclosure regimes. Instead, the application of the ISO 26000 has been through its recent incorporation as advisory guidance in the predominant

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147 For example, ‘social responsibility’ is defined within the document as “Responsibility 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” *International Organization for Standardization*, ISO 26000 (2010), at 2.18.


CSR initiatives of the present day. 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 CSR activities, as well as the behavior of corporate actors seeking to adhere to bring regimes, whether merely in word or in reality. Perhaps above all else, what stands out in examining the ISO is its economy of necessity. Each list of recommendations for CSR practice is clear in its own terms, and each element in each such list communicates by implication the absolute necessity that it be followed. A CSR 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 UN Global Compact is one the most recognizable and easy-to-follow initiatives relating to gathering and asserting CSR disclosures.150 Organized around ten conduct oriented principles, a set of aspirational statements covering subjects of human rights, labor, environmental and anticorruption values, the UNGC seeks to create a framework for corporate accountability, though it is one that continues to suffer issues of legitimacy.151 Organizations wishing to adhere to the UNGC are required to provide an annual Communication of Progress (CoP) indicating via self-reporting their continued aspiration to greater adherence to the Ten Principles.152 This self-reporting is mandatory and meant to protect the integrity of the Global Compact system as applied.153 Failure to comply can result in listing the company as ‘non-

150 An excellent discussion of the Global Compact and its environmental principles can be found at Afshin Akhtarkhavari, Global Governance of the Environment: Environmental Principles and Change in International Law and Politics 151-92 (Edward Elgar 2010).
151 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.” Id. at 25)
communicating’ or ‘inactive.’ The UNGC ‘has reported that it has made 600 companies ‘inactive’ for not having submitted their CoPs.”

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.” This is intended to simplify and broaden the communication of UNGC compliance. A simple form is provided for organizations. 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. Expulsion is the only real sanction faced by an organization that seeks to enjoy the reputational benefits of the UNCG. Beyond that, critics have suggested that NGOs have been effectively delegated responsibility for monitoring and reporting conformity to the UNGC standards. Despite this 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 ‘bluewashing.’

154 UN Global Compact Policy on Reporting Progress, at 1 (requiring a statement of commitment, description of practical actions, and description of outcome measures).
155 Akhtarkhavari, supra, at 162.
156 UN Global Compact Policy on Reporting Progress, at 3.
157 These criticisms have spawned organized critical engagement with the UNGC and its institutions. See, e.g., the web site, Global Compact Critics, at http://globalcompactcritics.blogspot.com/.
159 Jonathan Cohen, Socially Responsible Business: Global Trends, in A Future for Everyone: Innovative Social Responsibility and Community Partnerships 3-20 (David Maurrasse & Cynthia Jones eds., Routledge, 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.” Id. at 7).
160 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
and in reaction, to moves by the UNGC to protect the integrity of its system.  

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. 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. This section considers an important example of NGO sourced standards—the Global Reporting Initiative Sustainability Reporting Framework (GRI)—and an important variant, product and process certification systems.

The GRI “is a non-profit organization that promotes economic sustainability. GRI provides all companies and organizations with a comprehensive sustainability reporting framework that is widely used around the world.” It is organized as a multi-stakeholder network governed through a structure that is similar to those of public international organizations. Transparency is central to the development of the GRI standards. “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.\textsuperscript{165}

Where 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 tremendously greater level of detail in its requests for disclosure. In place of 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.\textsuperscript{166} Each performance indicator has a specified code that allows knowledgeable researchers to rapidly determine the degree and nature of the organization's response to each indicator. For additional customization, there are ‘sector supplements’ reflecting corporate activity in specific industries.

Organizations are to determine use of different performance indicators, but are ultimately able to self-evaluate and publicized their level of disclosure by grading their responses according to a formula that produces an ‘application level’, a letter grade which the organization can promulgate signifying its degree of performance. Alongside this complex system of self-adjudication exists a procedure for a GRI Application Level Check, a means by which organizations can ask the GRI to evaluate and confirm their application level. Beyond even this level of certification, organizations which seek out External Assurance, analysis by a third-party confirming their stated application level and the presentation of their disclosure, may place a plus symbol next to their application level when promoting their level of disclosure compliance. There is much the same flavor of the GRI's approach to the design and implementation of reporting and disclosure. 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. Of

\textsuperscript{165} GRI, Global Reporting Initiative Sustainability Reporting Framework G3.1 Guidelines (2010), supra, at 2.
\textsuperscript{166} The reporting system is divided between the general Sustainability Reporting Guidelines, Sector Supplements, National Annexes and a set of what is called Boundary and Technical Protocols. The Sustainability Reporting Guidelines itself is divided between a set of general principles on reporting, an elaboration of disclosures on management approaches and performance indicators, divided among economic, environmental and social categories. See GRI G3.1 Guidelines.
particular note is the application level system, which produces a strong incentive for accountability among CSR practitioners without implying any of the even the mild encroachment of negative publicity or binding commitment but the UNGC does through its expulsion system. Though its devotion to granularity, however, the GRI framework unfortunately also sacrifices its communicability. The description of the system above is a gross oversimplification, scratching the surface of a regime that is frequently updated and requires adherents to read multiple manuals to attain basic levels of comprehension. Despite some binding status, the GRI by its complex methodology resembles a regulatory classification system as complex as some US federal regulatory regimes. This has a consequence of being virtually indecipherable to the lay public, and leaves open the possibility of the system being complex enough that enforcement of effective disclosure may sometimes slip through the cracks.

While GRI is a well-known and influential standards developing project, including disclosure standards for environmental activity, 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 merely the mechanics of reporting, but also the standards and methodologies for measurement in specific fields. Some provide more general structures. These include, for example, the AccountAbility stakeholder engagement standards.167 Some have arisen in the context of the development of CSR focus on social and environmental issues. One is the Global Impact Investing Ratings System.168 Others target specific sub-categories of corporate economic activity, for example the new benefit corporations discussed above.169 “The proliferation of codes of conduct and other related activities in the areas of environmental and social management, and auditing, has created

168 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.” GIIRS, (Apr. 2, 2012, 7:22 AM), http://www.giirs.org. (“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.”).
169 B Labs, a non-profit NGO has been developing a certification system for benefit corporations. See B Corp Certification Overview, (Apr. 3, 2012, 6:30 AM), http://www.bcorporation.net/Certification-Overview.
a rapidly growing sector of consultants and verifiers who have an interest in the growth of these activities.\textsuperscript{170}

Product certification represents a relatively recent effort to use market oriented incentives to induce corporate actors to agree to modify their behavior to comport with international norms that are not legally binding as a matter of international or domestic law.\textsuperscript{171} These certification organizations are generally private and non-profit organizations, and usually non-governmental organizations or civil society elements.\textsuperscript{172} While these efforts tend to target labor conditions, they may also produce effects touching on environmental issues, and within those on issues of environmental transparency. The rapid development of a crop of industry-produced certifications, however, has served to undercut the short-term effectiveness of most certifications, as consumers are usually insufficiently literate to distinguish certifications that indicate environmentally friendly production from environmental stewardship that is recital at best. A significant criticism of these processes have been charges of their use as ‘greenwashing,’ the potentially deceptive use of the appearance of compliance with environmental norms.\textsuperscript{173} Individual producers have also demonstrated success by sidestepping formal certification processes in favor of direct-to-consumer claims regarding their environmental practices—an issue of marketing versus transparency that is thrown in sharp relief by its abuse by BP in the time following the Deepwater Horizon spill.

\textbf{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.\textsuperscript{174} Industry leaders now recognize corporate social responsibility reporting as a compelling social norm obligation of


\textsuperscript{172} See id.

\textsuperscript{173} 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).

\textsuperscript{174} 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).
The 2011 KPMG International Corporate Responsibility Reporting Survey 2011 reported that “[n]inety-five percent of the 250 largest companies in the world (G250 companies) now report on their corporate responsibility (CR) activities, two-thirds of non-reporters are based in the US.” Of this group, 80% used GRI as the standard metric for assessment and reporting. 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, they either support or have been influenced by them. According to KPMG, the problem continues to be communication to stakeholders—both as to the content and form of disclosure. The problem is regulatory incoherence—sustainability metrics, including environmental metrics, are unregulated and harmonization of standards is not yet realized. That problem produces another—the lack of a direct relationship between environmental reporting and environmental performance.

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”, within which national regulation is unable to reach and international binding structures are absent. Yet, in the context of transparency, these private efforts have

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175 “While the continued adoption of Corporate Responsibility (CR) reporting may not surprise those active in the field, the details of how CR reporting is evolving deliver a compelling view into the expectations that companies now face.” KPMG, Corporate responsibility (CR) reporting has become the de facto law for business (2011), (Apr. 2, 2012, 6:52 AM), http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Pages/de-facto-business-law.aspx.


177 Id. at 6.

178 Id. at 20.


180 Id. at 22-27.

181 Id. at 26.

182 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 (2010) (“study suggests that financial and environmental performance does not affect the propensity of a company to engage in CR reporting.” Id. at 513).
also produced “gaps.” Current scholarship has not yet produced a common theoretical approach. Although numerous individual studies 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, with few researchers attempting to make broad comparisons between governance systems or across different reporting mechanisms. The result of 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.

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, the first looking to environmental transparency by BP in the context of the Deepwater Horizon disaster, and the second to reporting independence and the transparency of corporate activity supply chain impacts in Wal-Mart Stores, Inc.


For another example, see, Lee A. Tavis, *Novartis and the U.N. Global Compact Initiative*, 36(2) Vand. J. Transnat’l L. 735 (2003). Additional examples from other transparency regimes will be noted in the footnotes that follow.
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 selected. The initial accident, the subsequent failure to immediately prevent the leak, and a variety of controversies involving the attitude of BP executives toward the spill, restitution payments to those whose livelihoods were lost or reduced by the disaster, and allegations of ‘greenwashing’ regarding subsequent behavior by the petroleum company all received tremendous amounts of play in media around the world. BP responded to scrutiny by promising an increased degree of transparency regarding its response to the spill and its ongoing cleanup efforts. Questions remained about the nature of the failures of efforts toward greater transparency regarding the environmental effects of international business to anticipate and prevent this event.

Before the spill, BP enjoyed an international reputation as a model of transparency, winning over “many of the industry’s toughest skeptics, including environmental groups and social investing mutual funds.” It routinely was rated as among the most transparent companies in assessments of governance and transparency. BP’s annual reports contained substantial reporting on social and environmental issues. Its CoPs for the years 2009 and 2010 conformed to the UNGC requirements. The reports were not technical and detailed. Instead the sustainability reports reflect an attempt to simultaneously 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. Among the

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188 On the Deepwater Horizon Oil Spill, see, e.g., Lawrence C. Smith et al., Analysis Of Environmental And Economic Damages From British Petroleum's Deepwater Horizon Oil Spill, 74 Alb. L. Rev. 563 (2010-2011).
190 For its most pronounced declarations in this regard, see, e.g., the BP-created Gulf of Mexico Research Initiative, at http://www.gulfresearchinitiative.org/.
192 Id. at 61-63.
195 See, e.g., in the 2009 CoP graphs describing the frequency of recordable injuries, normalized greenhouse emissions, employee satisfaction, and super
features of the 2009 CoP were a faux question-and-answer session with then-Group Chief Executive, Tony Hayward\textsuperscript{196}, magazine style articles describing recent low carbon energy investments by BP\textsuperscript{197}, a so-called special feature describing issues of contention relating to Canadian sand oil expiration\textsuperscript{198}, 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)\textsuperscript{199}. Each of these pages also contains a link to a separate BP website, maintaining recent information on a topic related to that of the page on which the link appears in the CoP. These websites form parts of the BP sustainability hub site, which contains a single body of information as a sort of continuously refreshing version of the assurances provided by the CoP.

An important part of the report was taken up with reports of company compliance with some of the different reporting initiatives to which the company subscribed. That suggests both the availability of corporate choices among disclosure systems and the overlapping and cumulative character of disclosure regimes. BP’s 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,\textsuperscript{200} and the GRI\textsuperscript{201}. The UNGC is mentioned in both CoPs, but is not included or described in the reporting efforts on this page. In addition, the 2010 Report includes an inset statement by the VP of Sustainability, discussing the sincerity of BP’s dialogue with NGOs and stakeholders in the time period following the explosion on Deepwater Horizon. Both the 2009 and 2010 sustainability reports also include the results of an independent assurance qua the optional mechanism described by the GRI.

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

\textsuperscript{196} Id. at 2-3.
\textsuperscript{197} Id. at 8-11.
\textsuperscript{198} Id. at 12.
\textsuperscript{199} Id. at 23.
\textsuperscript{200} Id. at 35.
\textsuperscript{201} BP, \textit{Sustainability Report 2010}, at 40.
extensions of the British Petroleum brand; a continuous, highly developed and relentlessly focused effort to persuade rather than to inform. This approach to disclosure is particularly stark in the 2010 report, in which this rhetorically universalist approach to communication is pushed to its very limits by the undeniable events in the Gulf of Mexico. The same simplified statistics presented in the 2009 report are available closer to the beginning of 2010 report, emphasizing to the skeptical viewer that this is a document of substantive evidence. The footnote mentioning that damages caused by the Deepwater Horizon instead 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. Rather than downplaying the disaster as less sophisticated marketers might prefer to do, BP fully owned the environmental disaster, placing the oil spill and photographs of BP’s cleanup efforts at the very beginning of the report, and changing the language and tone of much of the document to reflect how BP aspired to become stronger, and more prepared in response to the incident, through changes of policy that the company aspired to ensure would occur at some point in the future.

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.\(^2\)

Despite these distinctions, what is perhaps most striking about the BP CoPs is 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 actual detail of disclosed information or statistics regarding the sustainability performance of the company. The BP Communication on Progress for 2010 actually lacked required elements for continued active participant status under the UNGC. As a result, BP is now placed on probationary ‘learner’ status for 12

\(^{2}\) *Id.* at 10.
months. 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, with the risk of being publicly expelled if they do not reverse their error.

More importantly, the BP reports, while they appeared simple and easy to understand, did not necessarily convey material information in an easy to use manner. 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: a fundamental difference in perception between corporate actors and transparency advocates regarding the purpose of environmental disclosure and, indeed, 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 continue to lack the precision of financial reporting rules and continues to run the risk that reporting might be reduced to communication commercial in purpose and rhetorical in form.

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 are similar to that of British Petroleum. Both companies have faced severe domestic and international criticism for their effect on the environment, and both companies maintain annual reports and an online presence to display the well-maintained, ethically commercial face of corporate conduct, with images of smiling workers, an intimate comment from an executive, and carefully presented data to back up the company’s


\[204\] It is not clear, for example, that the BP documents comply with ISO 26000’s guidance regarding the communication of information, most crucially in the statement that information relating to social responsibility should 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]ISO, ISO 26000, at 7.5.2.
assertion of beneficent business. Despite appearances, however, BP and Wal-Mart Stores, Inc. have taken wildly divergent approaches to environmental transparency, in two different senses. 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. 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 the actions of its own employees and administrators in the wake of the gulf incident, Walmart faces a greater set of challenges as the administrator of an incredibly complex global supply chain. A faulty manufacturing batch or an expose of worker abuse by a supplier abroad still poses a serious risk to Walmart’s image as the distributor of products sold under the company’s imprimatur. In a climate of increased scrutiny of foreign manufacturers, environmental impacts are a source of heightened risk for the company. In this area, too, however, Walmart has capably managed the components of its supply chain, and found ways to leverage disclosure requirements to maintain and enhance supply chain control.

Wal-Mart Stores, Inc. maintains one of the most well-organized and impressive online and documentary records of its corporate performance, especially its “sustainability” section. Many companies struggle to implement disclosure systems that meaningfully fit global standards, caught much as BP was between commercial and communication interests. Despite facing the same set of problems in an arguably more complex industry to track, Walmart has chosen to ‘go it alone,’ bearing the increased burden of developing and maintaining its own disclosure techniques, despite the increased scrutiny such practices invite.

206 The implications of Wal-Mart Stores, Inc.’s international behavior and global supply chain control are a literature unto themselves. This article discusses the company’s behavior only in the context of environmental disclosure implications, for the purpose of contrast with other corporate actors. For an excellent introduction to one of Walmart’s most active vectors for supply chain control, see, Walmart in China (Anita Chan ed., Cornell University Press 2011).
208 An excellent example of these risks is the Apple corporation, which has faced scandal over lapses in its own independently developed labor and environmental disclosure systems. Even this less functional disclosure regime is providing the company with dividends, however: for more information, see,
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 its management of its own supply chain. As the indirect arbiters of appropriate behavior for its suppliers, Walmart is thus able to not only control the flow and coordination of supplier information, but to dictate supplier behavior through the leveraging of its market power in coordination with an internally developed set of supplier sustainability standards. The presence of clear, strict supplier standards allows 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. Where supply practices conflict, the greater source of demand is likely to win out.

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’. Like the supplier standards that existed before, Walmart’s supply chain reporting mechanism will occupy a niche filled by, and therefore compete with, a previously existing international practice set, in this case the GRI reporting guidelines. 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.

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209 Current standards for suppliers, covering a range of labor, workflow and environmental issues, are available in both an exhaustive and far less aesthetically controlled manual and a convenient workplace poster, from the Walmart corporate supplier website at http://walmartstores.com/Suppliers/.


has foundered 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. 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 commodified and markets
based approach to multi-systemic production of environmental reporting
that has evolved over the last half generation. Almost a decade ago,
Brad Karkkainen suggested incoherence in environmental information
policy.212 Little has changed at the national level, and the incoherence
has grown as international environmental informatics systems have
proliferated.213 The resulting governance regimens have produced a
number of governance systems that might be applied simultaneously and
to different effect and for different constituencies.214 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.215 The result produces both incoherence and

212 Bradley C. Karkkainen, Information as Environmental Regulation: TRI and
Performance Benchmarking, Precursor to a New Paradigm?, 89 Geo.L.J. 257,
213 See, e.g., Iris H-Y Chiu, Standardization In Corporate Social Responsibility
Reporting And A Universalist Concept Of CSR?--A Path Paved With Good
214 See Oren Perez, Purity Lost: The Paradoxical Face of the New Transnational
Legal Body, 33 Brook. J. Int'l L. 1 (2007); Gunther Teubner & Andreas Fischer-
Lescano, Regime-Collisions: The Vain Search for Legal Unity in the
215 “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.”
Ronen Shamir, Socially Responsible Private Regulation: World-Culture Or
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. 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 transnational markets. It was recently noted that

“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.”

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

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differentiated consuming communities (of governments, enterprises, civil society actors, investors and consumers). These standards do not speak to each other. They compete for consumers. They do not apply the same language with respect to standards, metrics, communication, and scope. 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.”219 And verification, even within well-developed systems, is not helpful where system objectives differ between producers and consumers of information.

In the aggregate, these transparency systems are incoherent, making miscommunication likely and assessment across systems difficult. 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. “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.”220 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. The point was driven home with an example:

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

219 ISO, ISO 26000, at 7.8.2.
fully apprised of all the possible consequences of BITs,” including for human rights.\footnote{Id., at 2-3.}

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 that appear to be able to take advantage of sloppy government and the structural limitations of law based systems. 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. 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.

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. It also increases compliance costs—even when compliance is mandatory only within social norm systems and not legally compelling. Companies required to modify their disclosure systems as they move across territories or between governance communities may be required to produce multiple metrics, or abandon disclosure, or substitute their own. These mis-communications of course speak to the recurring problems of compelling or persuading proper corporate interest in transparency practices.\footnote{See, e.g., Hess, Social Reporting and New Governance Regulation, 2007, at 455.} But it also speaks to its potential as a markets-based regulatory framework, grounded in information,\footnote{See, Cherie Metcalf, Corporate Social Responsibility As Global Public Law: Third Party Rankings As Regulation By Information, 28 Pace Envtl. L. Rev. 145 (2010).} and propelled by the ability of significant stakeholders to make consumption, investment, lending and other decisions on the basis, in part, of disclosure.\footnote{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, 592-93 (2008); Roberta S. Karmel, Reform of Public Company Disclosure in Europe, 26 U. Pa. J. Int'l Econ. L. 379, 379 (2005).}
The issue of standardization of environmental reporting has been an important subject of national debate in the United States and elsewhere. But it is clear that the need for harmonization, or at least coordination, has become important at the transnational level as well. But proliferation also suggests a broadening taste for environmental transparency. In this context, it is not surprising that some large producers and consumers of these products have been moving, at least tentatively, toward cooperation.

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. Theirs tends to be a functional approach to CSR, arranged within orders that are informal and tied to norm-governance frameworks. 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. The object here is convergence. In this respect, the UNGC has sought to play a central role as a nexus point for convergence of standards and harmonization at the international level among both private and public efforts. The first is between the Global Compact and the International Organization for Standardization (ISO), International Standard ISO 26000 Guidance on Social Responsibility. The second is between the Global Compact and the Global Reporting Initiative and its G3 Guidelines.


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. The MoU also indicated that the two organizations would continue to support and consult with one another as they refine their respective regimes. In addition, a MoU regarding future collaboration was signed between GRI and the ISO in September of 2011. 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.” With respect to the second, the object 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.” The UNGC would provide the substantive element and GRI would provide the methodology, including guidance on transparency and the mechanics of reporting.

Additional important connections have developed in the form of coordination exercised through the OECD. The OECD has incorporated the substance of the UNGP into its governance and reporting framework for corporate governance. The OECD has also entered into memoranda of agreement with the ISO and GRI. These documents, aspirational,
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. 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 endorsement". The modus of these entities, especially at the UN level, is less convergence than engagement, like state parties to a military treaty, all parties are eager to prevent conflict, while leaving all options open for the future.

The GRI works closely with international organizations and with other civil society actors in increasingly close networks cooperation in governance projects. 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 this is the case, other gaps in disclosure guidance may be closed as well.

http://www.oecd.org/document/23/0,3746,en_2649_34889_46674519_1_1_1_1,00.html; OECD, OECD and ISO Memorandum of Understanding in the area of social responsibility, (Apr. 2, 2012, 1:17 AM),
http://www.oecd.org/LongAbstract/0,3425,en_2649_34889_45330482_1_1_1_1,00&&en-USS_01DBC.html.

236 Id. at Art. 2, § 2.5-6.

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. 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. 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. In particular, transparency swerves as the stage on which, at the international 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, between 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

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focuses on the precise metrics and assessments that are usefully extracted from harvested data. Private international ordering systems, like the GRI and ISO transparency systems tend to emphasize data harvesting and metrics over an overt focus on the normative effects of transparency. But the choice of metrics produces normative effects and that choice is left, to a great extent, on 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 disjoint. It also suggests the quality of transparency as a commodity that can be marketed. ISO, GRI, UNGC, 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 form that are useful to the producer. That, 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 (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, this 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 nonstate 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 ‘best-practice’ reporting standards that, underdefined, allow participants wide latitude in presenting their own interpretation alongside social criteria. 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. 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 develops its own sustainability index. 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.

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 which can determine the extent to which it 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. Potentially large divide between internal and external transparency has 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. It also explains 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.

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. That control, in part also reflects the 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, and 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. It also explains 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—governments, assessment agencies, product/process certification organizations, civil society actors producing standards and the like—may by their assessment or governance roles provide a basis for supplying information, but they have no real control over the generation of information and little power to audit. As a consequence, ownership is split between the data generators and the data assessment entities, the former owning data, the later 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. This is also, in some respects, a basis for the emergence of the international or intra-industry agencies and standards- whether it be the FLA or the UNGC, these programs can forward 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 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- at the same time the company, despite its brazen market power approach is still more communicative now than it has been in the past. This is 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 indices, as well as the non-certifying nature of the ISO standards.

Data ownership may itself limit the ability of outsiders to exploit data for its own profit. It is possible that data, even data supplied through processes of transparency, may like the words in books or images transmitted, 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. It is possible that data, even data supplied through processes of transparency, may like the words in books or images transmitted, belong to the producer who may acquire rights to control additional exploitation. 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 where 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 and international soft law frameworks touch on this lightly at best. Walmart and BP have both faced criticism for their commercial management of CSR communication. It would seem strange to criticize the corporate actor from a legal standpoint, however, for refusing to choose between third-party access and information ownership, and an impossibly expensive doctrine of internally developed and maintained absolute and comprehensive disclosure.
Ownership motions deeper 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. Ownership consequences, then, requires 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 through manipulation of its format, suggests that even organizations that surrender information to dominant, 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.

Taken together, 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 exploitation of information can be contested by those who seek to substitute other frameworks of economic organization and control principles for property. But transparency itself is a complex 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 out of 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 is the hallmark of transparency in fields such as environmental impacts.
Thus the lesson: 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, this works very well indeed, even if it is uncomfortable for the affected companies; that is only business. For the stakeholders, including NGOs, this works well, too. They are able to skip the governmental middleman, so-to-speak, and directly affect corporate behaviour in a precise and targeted way. For NGOs weaned on the need for government intervention, this 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 was 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 is accomplished will necessarily apply as strongly against monitors as it does against the monitored. Civil society elements deeply engaged in efforts to broaden transparency and to use its monitoring roles to affect corporate conduct should take heed—their own systems of data harvesting and assessment is as likely to be scrutinized and tested, and the legitimacy of their own efforts will depend, on adherence to the norms of production and assessment of data as they mean to hold the objects of their actions.240

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

240 The producers of This American Life understood this when in announcing their retraction 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.

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, in effect, not merely incarnates intangibles—the corporation or action/impacts—but it also provides a method of managing the behavior of that incarnation as well. This, then, is the expression of the Foucault’s “statistics”241 at the heart of the problem of transparency in international private law.

But it also suggests the importance of markets in the development and deployment of codes and thus 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, that is, decide which among transparency producing systems it will harvest and distribute information, then the comprehensiveness of disclosure and behavior systems within which disclosure plays a part, the maturity of a non-state behavior regulatory system will have a significant regulatory effect. These, 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 markets and capital, transparency systems (and the frameworks through which they are given form) are themselves 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, then, is just another commodity, offered for sale, or perhaps as a factor of production.

The public-private divide remains quite vibrant in the context of transparency in international law in general, and international environmental law in particular. Like its national law analogues, 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. It 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 more closely the object of 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 of the fundamental relationship between entities producing impacts and individuals and others affected by those impacts. In this area formal law has little to say. Soft law efforts, and regimes of monitoring and enforcement, tied to the disciplining behaviors of consumers and investors, tend to be the form in which transparency has been developed. Yet soft law does not imply a failure of governance. Rather it suggests the rise of governance systems through norms that while binding, are not connected to the law-state systems or its forms and methods. The result is a tendency toward the commodification of transparency as information, bound up in notions of property, and 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." 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 sustainable economic globalisation.

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 precious little by way of 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 21st 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, though, it also functions as commodity, and as object. But underlying all of these intersections is that of the ideology of property—it may be useful, then, 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 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 contributes to the moves towards polycentricity in governance, accelerating the shift of governance power from the state. Removed from the orbit of law and the state, transparency becomes both an essential mechanics for the articulation of alternative normative standards as soft law used to that effect by international organizations and civil society elements, and another means of protecting the fundamental governance ideology of economic organizations under globalization.

The proliferation of standards, and the overlap of standard setting entities produces 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.” 244 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 it is 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

244 Backer, From Moral Obligation to International Law, supra, at 247.
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.