Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics

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Over the last several years, the environmental regulatory system has undergone radical changes. Various private normative schemes, ranging from corporate codes to environmental management systems, environmental reporting standards, project-finance codes and green indexes, have assumed an increasingly important role in the regulatory arena. The emergence of private environmental governance as an important transnational phenomenon raises two interrelated puzzles: efficacy and legitimacy. Underlying the efficacy puzzle is a deep-seated suspicion toward "soft" legal instruments, which to some observers represent nothing but a coordinated form of "greenwash." The legitimacy question reflects a contrary concern — that these private regulatory structures represent new forms of global authority that are in need of distinctive legitimization. The Article begins with an outline of this new global terrain, exploring its historical evolution. It argues that the multiple links and cross-sensitivities between the different global private regimes have created a novel ensemble regulatory structure with positive enforcement and normative externalities. The Article then moves to examine the question of efficacy more generally, developing a nuanced understanding of the social dynamic of "soft-law" regulation, which rejects the binary logic underlying the "soft law"-"greenwash" narratives. Regarding the political dimension, the Article argues that this new ensemble network has brought about a new transnational political sphere which is associated with an extensive, cross-institutional quest

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for legitimacy. The Article then turns its focus to the field of sustainability indexes, focusing on the two leading global indexes: FTSE4Good Index Series and Dow Jones Sustainability Indexes (DJSI). These indexes are taken as a prototypical case of transnational private ordering. Drawing on a close analysis of the indexes’ guiding documents and on interviews with senior executives from both organizations, the Article considers the unique features of these indexes as forms of governance and the paths through which they claim to affect society. It then moves to explore the mechanisms of legitimacy employed by FTSE4Good and DJSI, highlighting their distinctive visions of legitimation. A close examination of sustainability indexes generates insights, I will argue, regarding the field of private global environmental governance as a whole. In particular, it highlights both the new political opportunities created by the evolving network of transnational governance and the limits this new structure sets for radical critique.

INTRODUCTION

Over the last several years the field of transnational environmental governance has changed its face. Once dominated by treaty-based mechanisms, this field is now populated by numerous private schemes, which include voluntary corporate codes, environmental management systems, "green label" schemes, environmental reporting standards, green financial


schemes and green indexes.\(^5\) These diverse schemes play an increasingly important role in the project of transnational environmental regulation.\(^6\) My first objective in this Article is to give a portrait of this new global terrain of private environmental ordering. In particular, I will argue that the field of private transnational governance has been subject to a process of standardization and convergence, which has led to the creation of new global centres of governance. While these transnational regimes have evolved in a highly fragmentary and polycentric fashion,\(^7\) there are, I will argue, multiple links and cross-sensitivities between the different regimes. These multiple cross-references have created a novel ensemble regulatory structure, with positive (network) enforcement and normative externalities.

The emergence of private environmental governance as an important transnational phenomenon raises two interrelated puzzles. The first puzzle involves the tension between the discursive facet of this process (the emergence of new normative clusters) and its ultimate environmental impact (in terms of its influence on firms’ environmental behavior). Underlying this tension is a widespread skepticism regarding the capacity of these private ordering regimes to generate social change, reflecting a deep-seated suspicion toward "soft" legal instruments.\(^8\) To some observers these private initiatives represent nothing but a façade of environmental regulation, part of a broader

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5 Green financial schemes include codes regulating lending practices and "ethical" investment standards. Green indexes include, for example, the Dow Jones Sustainability Indexes and the FTSE4Good series.

6 Some of the foregoing instruments, such as the GRI GUIDELINES, supra note 4, also cover non-environmental issues. There are similar instruments covering other aspects of the corporate responsibility issue, such as SOCIAL ACCOUNTABILITY INTERNATIONAL (SAI), SA8000 (2008), available at http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf (dealing with workers’ rights); see also Sandra Waddock, Building a New Institutional Infrastructure for Corporate Responsibility, 22 ACAD. MGMT. PERSP. 87 (2008).


"greenwash" ploy, whose only objective is to enable corporations to continue their ecologically destructive practices without disruption.9

I will argue, in contrast, that the way in which the concepts of "soft law" and "greenwash" are used in the academic literature and in popular discourse is analytically and empirically unconvincing. From an analytic perspective, the binary distinctions underlying these notions — soft law/hard law and greenwash/committed sustainability — do not capture the complexity of steering society through law. They fail to capture the nuanced nature of legal normativity, the multifaceted nature of the interaction between law and society, and the structural complexities of the modern corporation.10 The all-or-nothing approach underlying these distinctions is also incompatible with the findings of numerous empirical studies that have examined the dynamic of transnational governance, as will be elaborated in Part II.A below.

The second puzzle reflects a contrary concern — that these private legal structures represent a new form of global authority that cannot be dismissed as normatively vacuous, and as such needs to be legitimized. Indeed, this question has already been the subject of wide-ranging social critique,11 leading many of these transnational bodies to explore new mechanisms for


10 Niklas Luhmann, Limits of Steering, 14 THEORY, CULTURE & SOC’Y 41 (1997); Oren Perez, Regulation as the Art of Intuitive Judgment: A Critique of the Economic Approach to Environmental Regulation, 4 INT’L J.L. CONTEXT 291 (2008); Waddock, supra note 6.

Because these transnational regimes operate in a new non-statal space, they need to carve a new vision of legitimacy and legal validity, which departs from the conventions of the Westphalian edifice, with its focus on the state as the exclusive source of authority. The extent of this cross-institutional quest for legitimacy is not only a mark of the increasing normative and epistemological significance of these regimes, but also reflects the fact that they increasingly conceive themselves as political agents, which need to provide justification for their claimed authority. This cross-institutional search for legitimacy also reflects a growing understanding that epistemological and political legitimacy are a prerequisite for continued membership in this global regulatory ensemble. Overall, this process of normative agglomeration has created a new transnational political space, carving new routes for political action.

The Article begins with an outline of this new global terrain, highlighting its ensemble structure and analyzing its unique properties (Part I). In this context, it explores the tension between the discursive and efficacy dimensions, offering a more nuanced conceptualization of the social dynamic of ‘soft-law’ regulation (Part II). This exploration leads to further consideration of the new political sphere, which was established by this ensemble network and its architecture of legitimization. The Article then turns its focus to the field of sustainability indexes, which are taken as a prototypical case of transnational private ordering (Part III). Sustainability indexes form an interesting case study because, despite their current high-profile, they have not received sufficient attention in the literature. The Article considers, first, the unique features of sustainability indexes as instruments of global governance, highlighting the paths through which these indexes claim to affect society. It then moves on to explore the mechanisms of legitimacy employed by the major players in this field, distinguishing between the two leading global players: FTSE4Good Index Series and Dow Jones Sustainability Indexes (“DJSI”). A close examination of sustainability indexes can generate insights, I will argue, regarding the field of private global environmental governance as a whole. In particular, it highlights both the new political opportunities created by the evolving network of transnational governance and the limits this new structure sets for radical critique.

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I. **Ensemble Regulation: Environmental "Private Ordering" as a Globalized, Intertwined Process**

The emergence of private environmental schemes with global reach is a relatively new phenomenon. From the beginning of the 1980s to the mid-1990s, the field of private governance was highly fragmented, consisting of segregated contractual arrangements and uncoordinated organizational routines. However, since the mid-1990s the nature of the field has changed: new centers of global governance have emerged, transforming the field into a much more ordered domain. This change influenced all the facets of the governance game — from the norm-production process to implementation and enforcement. Further, these emerging regimes developed highly specified and articulated legal schemes, supported by intricate institutional structures. As such, the new regimes differ from some of the first-generation global codes, which lacked both the extensive specificity and the intricate institutional fabric that characterize their second-generation successors.13

The increasing importance of private environmental schemes can be linked to the rise of regulatory capitalism as the predominant form of capitalism at the beginning of the twenty-first century.14

One of the unique features of the emerging field of private environmental governance is the multiple links and cross-sensitivities between the distinct regimes, constituting what I call an *ensemble regulatory structure*. This ensemble structure characterizes, in particular, the corporate social responsibility (CSR) universe; it involves those instruments that seek to regulate generic aspects of the modern corporate economy, drawing on a vision of sustainability (CSR instruments). By ensemble regulation, I refer

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to a collection of autonomous regulatory schemes that form a regulatory
network, clustering around a common core of basic principles and exhibiting
positive enforcement and normative externalities. There are, in other words,
positive complementarities among the ensemble’s subsystems with respect
both to their impact on firms’ behaviour and to the normative standing of
their core principles.

The emergence of this kind of positive network externality is not
a necessary consequence of the process of polymorphosis — the
parallel evolution of autonomous legal structures with a common
conceptual core.\textsuperscript{15} Indeed, various observers have pointed to the risks of
the fragmentation of the international legal realm, which could possibly
lead to frictions, inconsistencies and pathological paralysis.\textsuperscript{16} The fact that
these various schemes all operate within a common subject-matter domain
— environmental regulation — is a necessary, but not sufficient, condition
for the emergence of ensemble regulation.\textsuperscript{17} It is beyond the scope of this
Article to examine in detail the process that generated this unique ensemble
structure in the CSR universe. I can offer two tentative observations. First,
the idea of sustainable development provided the different regimes with a
common ideological framework, minimizing potential frictions. A second
point concerns the institutional characteristics of this regulatory ensemble.
First, the non-statal nature of the transnational institutions involved in this
network has allowed them to transcend the national frictions that tend to haunt
treaty-based regimes.\textsuperscript{18} Second, the fact that the distinct regimes composing
the ensemble have evolved in a \textit{non-imperialistic} fashion, each capturing a

\textsuperscript{15} For the concept of polymorphosis, albeit in a completely different context, see Paul

\textsuperscript{16} Eyal Benvenisti & George W. Downsny, The \textit{Empire’s New Clothes: Political
Economy and the Fragmentation of International Law}, 60 STA\textsc{n}L. REV. 595 (2007);
Gerhard Hafner, \textit{Pros and Cons Ensuing from Fragmentation of International Law},
25 MI\textsc{c}H. J. INT’L L. 849 (2004); Martti Koskenniemi & Paivi Leino, \textit{Fragmentation
of International Law? Postmodern Anxieties}, 15 LEIDEN J. INT’L L. 553 (2001);
Waddock, supra note 6, at 106.

\textsuperscript{17} A good counterexample is the field of international trade law, in which the
proliferation of bilateral free-trade treaties poses an increasing risk to the multilateral
framework of the WTO. See Jagdish Bhagwati, \textit{Reshaping the WTO}, 168 FAR E.

\textsuperscript{18} In the context of the global trade regime, see James Scott & Rorden Wilkinson,
\textit{What Happened to Doha in Geneva? Re-Engineering the WTO’s Image While
Missing Key Opportunities}, 22 EUR. J. DEV. RES. 141 (2010); Bernard Hoekman,
\textit{The Doha Round Impasse and the Trading System}, VOX (June 19, 2010), available
different segment of the CSR universe, has reduced the competitive tensions between the institutions, thereby facilitating the emergence of a synergic structure.

In the following section I provide a sketch of the historical transformation that led to the current configuration, highlighting the cross-sensitivities between the distinct regimes. In this context I would draw on three key examples: ISO 14001, the Global Reporting Initiative (GRI) Sustainability Reporting Guidelines, and sustainability indexes (with a special focus on the latter). What is common to these examples is that they all have an elaborated normative structure, supported by a developed institutional framework.19

A. ISO 14001 and Environmental Management Systems

Consider first the field of environmental management systems (EMS), which is dominated by the ISO 14001 environmental management system.20 ISO 14001 is a set of procedures and organizational practices, which are used to assist an organization in achieving its environmental goals through a process of continual improvement. The ISO 14001 scheme is supported by a broad system of external certification and auditing that draws on the institutional support of the International Organization for Standardization, and the National Standards Institutions affiliated with it. This private enforcement system is perceived, despite various limitations, as being relatively trustworthy and efficient.21

Before the publication of ISO 14001, countries employed numerous and often conflicting sets of environmental management programs.22 ISO 14001

19 By insisting on these two features, I exclude from my domain of interest a significant number of global initiatives, which lack one or the other. For a less restrictive portrait of this global private network, see Waddock, supra note 6.
20 ISO 14001, supra note 2. For further guidelines regarding the implementation of ISO 14001 EMS, see INTERNATIONAL STANDARDS ORGANIZATION (ISO), ISO 14004 ENVIRONMENTAL MANAGEMENT SYSTEMS — GENERAL GUIDELINES ON PRINCIPLES, SYSTEMS AND SUPPORT TECHNIQUES (2004).
21 These limitations include, in particular, limited sanctions and lack of transparency. It should be noted that ISO 14001 gives organizations the freedom to choose between self-certification and third-party certification and evaluation, although an increasing number of organizations have chosen the latter option. See Matthew Potoski & Aseem Prakash, Covenants with Weak Swords: ISO 14001 and Facilities’ Environmental Performance, 24 J. POL’Y ANALYSIS & MGMT. 745 (2005); Michael W. Toffel, Resolving Information Asymmetries in Supply Chains: The Role of Certified Management Programs (UC Berkeley, Hass Sch. Bus., Working Paper No. 19, 2005), available at http://ssrn.com/abstract=809406.
22 Steven A. Melnyk, Robert P. Sroufe & Roger Calantone, Assessing the
has, however, quickly positioned itself as the most prominent global EMS standard.\textsuperscript{23} The standard has received strong support from large multinational enterprises (MNEs), especially in environmentally conscious countries.\textsuperscript{24} Up to the end of December 2008, 188,815 certificates had been issued in 155 countries, reflecting a steady year to year increase.\textsuperscript{25} The adoption of ISO 14001 as the EMS of the EU EMAS scheme is another reflection of its global success.\textsuperscript{26} The rapid global diffusion of ISO 14001 has been associated with several factors, ranging from trade and investment flows\textsuperscript{27} to demand from environmental NGOs.\textsuperscript{28} Prakash and Potoski argue that in addition to creating instrumental incentives for local firms to join ISO 14001, foreign direct investment and trading networks may also serve to diffuse ideas and normative expectations about environmental policies as enshrined in the standard.\textsuperscript{29}

The ISO 14001 scheme does not refer particularly to external standards


\textsuperscript{26} See EMAS Regulation, supra note 2, Annex II.

\textsuperscript{27} Perkins \& Neumayer, supra note 25, at 28-29.


(as we will see below, it is frequently referred to by other standards). However, its structure offers several linkage points with other schemes. Thus, for example, while ISO 14001 does not require certified organizations to publish an environmental report, the requirement to establish an internal system of monitoring provides the informational platform, which is a prerequisite for producing environmental reporting that draws, for example, on the GRI Guidelines.\textsuperscript{30} Another example concerns the relationship between the organization and its external stakeholders. The standard requires certified organizations to develop communication strategies with external stakeholders; specifically, organizations are required to create a procedure for "receiving, documenting and responding to relevant communication from external interested parties."\textsuperscript{31} In developing their communication strategies, firms can draw on external standards such as the 2011 AA1000 Stakeholder Engagement Standard (AA1000SES).\textsuperscript{32}

**B. Sustainability Reporting: The GRI Guidelines**

Another example of the globalization of private environmental standards is the field of sustainability reporting, which has undergone a similar transformation from fragmented self-regulation to centralized global governance. Firms, especially MNEs, have been publishing non-financial information since the 1980s. However, these social-environmental reports varied greatly in their style and form.\textsuperscript{33} While there was a process of convergence and reciprocal learning between firms,\textsuperscript{34} there was no central coordination.

The disordered landscape of the 1990s has been transformed over the last ten years into a much more ordered domain, with the emergence of global private codes that set out clear rules for sustainability reporting and external assurance. The most important code is the set of reporting standards produced by the GRI. The GRI published its first set of guidelines for

\textsuperscript{30} See ISO 14001, supra note 2, §§ 4.5.1–4.5.21; ISO 14004, supra note 20, § 4.5.1.

\textsuperscript{31} See ISO 14001, supra note 2, §§ 4.4.3, 4.6(b).


\textsuperscript{33} Josephine Maltby, Setting Its Own Standards and Meeting Those Standards: Voluntarism Versus Regulation in Environmental Reporting, 6 BUS. STRATEGY & ENV’T 83 (1997); Waddock, supra note 6, at 93.

\textsuperscript{34} Carol Ann Tile, The Content and Disclosure of Australian Corporate Environmental Policies, 14 ACCT. AUDITING & ACCOUNTABILITY J. 190 (2001).
sustainability reporting in 2002; the last version was published in 2006.35 The GRI Guidelines dominate the global market of sustainability reporting, with a particularly strong influence over the disclosure practices of MNEs.36 The objective of the GRI Guidelines is to provide a "trusted and credible framework for sustainability reporting that can be used by organizations of any size, sector, or location," and to facilitate clear and open communication about sustainability using a "globally shared framework of concepts, consistent language, and metrics."37 The 2006 Guidelines require organizations to provide information on the economic, environmental, and social aspects of their activities. The GRI Guidelines refer to external standards, by requiring organizations to list all the external economic, environmental, and social codes to which they subscribe, including any environment-related performance or certification system.38 The GRI Guidelines offer two complementary compliance mechanisms.39 GRI can check the reporter’s self-declaration of its reporting application level. Another alternative is to have the report reviewed by a third party.40

The growth of the market of sustainable reporting has generated a substantial demand for independent external assurance.41 Two prominent global codes that seek to regulate the emerging field of external assurance are the International Standard on Assurance Engagements (ISAE 3000).
promulgated by the International Auditing and Assurance Standards Board, and the AccountAbility AA1000 Assurance Standard.

The process of global convergence within the fields of environmental reporting and external assurance was supported by two intertwined processes. The first was the incorporation of disclosure requirements in other private CSR instruments. Thus, for example, the EU EMAS scheme, Responsible Care, and the Equator Principles, all include extensive disclosure requirements. Disclosure requirements also form part of the evaluative criteria used by FTSE4Good and the Dow Jones Sustainability Index series (DJSI).

Governmental intervention has provided a second line of support. First, national securities regulators, such as the U.S. Securities and Exchange Commission, have started to require more extensive disclosure of environmental data. Second, sustainable reporting has also been supported by the emergence of mandatory environmental disclosure programs. The GRI scheme, however, goes beyond the requirements of these state-sponsored


44 EMAS Regulation, supra note 2, Annex IV.


49 See, e.g., Toxics Release Inventory Program, UNITED STATES ENVIRONMENTAL
disclosure programs, by extending the disclosure requirements to ethical and labor issues, by expanding the scope and scale of the ecological data that must be disclosed, and by not basing the disclosure requirement on an economically defined notion of materiality.50

C. Sustainability Indexes

A third example of private ordering "going global" is the field of sustainability indexes. These indexes should be considered in the broader context of the new movement of socially responsible investment (SRI). SRI is the "process of identifying and investing in companies that meet certain baseline standards or criteria of Corporate Social Responsibility (CSR)."51 From a legal perspective, SRI represents a form of private rule-making, in which private investors contract with financial institutions to invest on their behalf, subject to certain investment rules that are designed by the financial institution. It is thus a process of both self-regulation and standard contracting. This process has evolved in a highly fragmented environment,52 with each financial institution devising its own set of investment criteria, sometimes relying on external consultancies.53 This disordered picture has


52 EU-COMMISSION, GREEN PAPER ON PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY 20-21 (2001).

changed with the evolution of new centers of governance. I will focus here on
the role of sustainability indexes in this new governance field.54

The primary providers of sustainability indexes are the Dow Jones Indexes
and the FTSE Group, the world leaders in the stock index market. I will
defer the detailed discussion of these instruments to the third Part of the
Article. At this stage I would just like to highlight the way in which these
regimes fit into the ensemble structure described above. The ranking criteria
used by both indexes include various references to other global codes.55
Thus, for example, the FTSE4Good Inclusion Criteria state that high-impact
companies with ISO or EMAS certification are considered to meet several
core indicators, which are required from such companies; such firms are also
subject to stricter disclosure requirements.56 The Dow Jones ranking process,
as reflected in the Corporate Sustainability Assessment Questionnaire which is
sent to firms as part of the ranking process, similarly emphasizes the existence
of EMS certification and the firm’s commitment to environmental (and social)
reporting.57

The global convergence process depicted above is captured by the
following table.

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54 For further discussion, see Oren Perez, The New Universe of Green Finance: From
Self-Governance to Multi-Polar Governance, in RESPONSIBLE BUSINESS: SELF-
GOVERNANCE IN TRANSNATIONAL ECONOMIC TRANSACTIONS 151 (Olaf Dilling,
Martin Herberg & Gerd. Winter eds., 2008).
55 See Aaron K. Chatterji & David I. Levine, Breaking Down the Wall of Codes:
Evaluating Non-Financial Performance Measurement, 48 CAL. MGMT. REV. 29
56 FTSE, Supra note 47, at 3.
57 See SAM Group, Research Corporate Sustainability Assessment Questionnaire,
Table 1: the Universe of Global Private Environmental Ordering  
(Partial Picture\textsuperscript{58})

<table>
<thead>
<tr>
<th>Field</th>
<th>Past Governance Structure</th>
<th>Current Governance Structure: Global Code</th>
<th>Level of Specificity</th>
<th>Responsible Organization</th>
<th>Compliance Mechanisms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Management</td>
<td>Uncoordinated, organizational management programs</td>
<td>ISO 14001, Responsible Care</td>
<td>High</td>
<td>International Organization for Standardization (ISO), International Council of Chemical Associations (ICCA)</td>
<td>Private external verification (relatively robust in the case of ISO 14001)</td>
</tr>
<tr>
<td>Environmental Impact Assessment in the Private Financial Sector</td>
<td>Uncoordinated, organizational risk-assessment schemes</td>
<td>Equator Principles</td>
<td>High</td>
<td>Joint Governance by Participating Banks</td>
<td>Voluntary reporting mechanism (e.g., Equator Principles, principle 10)</td>
</tr>
<tr>
<td>Sustainability Reporting</td>
<td>Uncoordinated, organizational disclosure formats</td>
<td>GRI Guidelines\textsuperscript{59}</td>
<td>High</td>
<td>Global Reporting Initiative</td>
<td>GRI (documents check), Private External Assurance (drawing on global codes)</td>
</tr>
<tr>
<td>Assurance Practices</td>
<td>None</td>
<td>ISAE 3000, AA1000 Assurance Standard</td>
<td>High</td>
<td>the International Auditing and Assurance Standards Board; AccountAbility</td>
<td>None</td>
</tr>
<tr>
<td>Sustainability Indexes</td>
<td>None</td>
<td>FTSE4Good, DJSI</td>
<td>High</td>
<td>FTSE, Dow Jones</td>
<td>Private compliance governed by FTSE and Dow Jones and drawing on external consultants (Eiris and SAM)\textsuperscript{60}</td>
</tr>
</tbody>
</table>

\textsuperscript{58} For additional codes which were not included in the table for lack of space, see Bernstein & Cashore, \textit{supra} note 12, at 369-71.

\textsuperscript{59} There are close links between the Equator Principles and the GRI Financial Services Sector Supplement.

\textsuperscript{60} See \textit{infra} Part III, for further discussion of the role Eiris and SAM in this context.
II. **Greenwash or Double Think: The Socio-Legal Dynamic of the New Ensemble Regulation**

Greenwash: Disinformation disseminated by an organization, etc., so as to present an environmentally responsible public image.62

Doublethink: Winston sank his arms to his sides and slowly refilled his lungs with air. His mind slid away into the labyrinthine world of doublethink. To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them, to use logic against logic, to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy, to forget whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again: and above all, to apply the same process to the process itself. That was the ultimate subtlety: consciously to induce unconsciousness, and then, once again, to become unconscious of the act of hypnosis you had just performed. Even to understand the word 'doublethink’ involved the use of doublethink.63

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A. Graded Normativity, Network Effects and the Dynamic of Social Change

Private environmental codes have undoubtedly captured a highly visible place in the global arena. But what exactly is the nature of this beast? Is it just another case of greenwash — an environmental variant of Orwell’s doublethink? I will argue that there is more to that beast than empty words, and that the use of the concepts of "soft law" and "greenwash" in the context of private environmental governance is conceptually and empirically unconvincing.

Let me first elaborate what is problematic with these notions at the conceptual level. The soft law/hard law distinction, as it is commonly invoked, is overshadowed by a positivist, crisp concept of legal normativity. Taking the positivist conceptualization as a premise entails a reinterpretation of the soft law/hard law distinction in terms of a juxtaposition between law and non-law, making the reliance on soft law as a means of generating social change somewhat suspicious.64 This binary interpretation of legal normativity is, however, not more than a working hypothesis,65 It disregards the possibility of conceptualizing legal normativity as a fuzzy concept (or predicate) which may be realized in degrees.66 "Softness" under this alternative conceptualization does not designate a state of lawlessness, but a state of graded normativity, with differing levels of normative force. This interpretation invites us to understand legal normativity in terms of a continuum closed by the two ideal types of "non-law" and "crisp" (or absolute) law. In-between one finds varying degrees of softness/hardness.

The normative force of a legal regime — its degree of hardness/softness — is determined by a multidimensional matrix, composed of various institutional dimensions, such as the existence of independent legal tribunals (and the extent of their independence), the dynamic of institutional reflexivity (e.g.,

64 See, e.g., Schwartz & Tilling, supra note 11 (with respect to ISO 26000).
65 In the sense offered by John Dewey, Logical Method and Law, 10 CORNELL L.Q. 17, 26 (1914).
the existence of an appeal procedure), and more.67 The structure of the matrix is itself contingent; it is subject to social construction.

What are the operational implications of this more nuanced conception of legality? First, it anticipates that soft legal structures could generate normative expectations, although their strength may vary.68 Further, these normative expectations are also likely to be picked up as themes for communication, generating a rich and self-sustained communicative dynamic. Second, the fuzzy conceptualization of normativity needs to be situated also in a more complex understanding of the ways in which law can effectuate social change. Regulatory intervention can have multiple effects: behavioral, organizational, discursive and psychological; the study of the social impact of fuzzy legal structures has to be conducted within this nuanced framework. The foregoing critique receives support from the empirical literature which has studied private global environmental regimes. This literature exposes a complex social dynamic that cannot be explained through simple binary distinctions such as soft law/hard law. Generally, one finds within the literature evidence that soft legal instruments succeed in effectuating social change — across a wide range of social variables.69

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68 This requires us to fuzzify also the systems-theory distinction between normative and cognitive expectations. For the system-theory view, see Gunther Teubner, Two Faces of Janus: Rethinking Legal Pluralism, 13 CARDOZO L. REV. 1443, 1449-50 (1991-1992). One has to distinguish in this context also between the psychic and social processing of expectations. See EMILIOS A. CHRISTODOULIDIS, LAW AND REFLEXIVE POLITICS 122 (1998).

69 Although the impact could vary between schemes. See, e.g., Bernstein & Cashore, supra note 12; Aaron K. Chatterji & Michael W. Toffel, How Firms Respond to Being Rated, 31 STRATEGIC MGMT. J. 917 (2010); Oren Perez, Yair Amichai-Hamburger & Tammy Shterental, The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior, 43 LAW & SOC’Y REV. 593 (2009); Waddock, supra note 6, at 105; Rieneke Slager, What Gets Measured Gets Managed: Exploring the Link Between Sustainability Indices and Responsible Corporate Behaviour, paper presented at Oikos PRI Young Scholars Academy: Responsible Investment: Integration, Engagement, Transparency (2009).
The interaction between the new normative order generated by private environmental regimes and the internal world of global firms is also influenced by the ensemble structure of the transnational CSR regulatory universe. This influence has two aspects. First, the cross-linkages between the different standards create a system of positive enforcement externalities, in which the compliance mechanisms of each regime also serve as an enforcement agent of the other regimes in the network, generating an amplified compliance effect. The consequence of this effect is that firms entering into the world of CSR will find it increasingly more difficult to reap the reputational gains associated with voluntary CSR codes without undertaking real organizational efforts.\(^7\) Once a firm starts publishing environmental reports drawing on the GRI guidelines, adopts a certified EMS (ISO 14001 or Responsible Care), incorporates EIA principles such as the Equator Principles, and enters the reputable list of either FTSE4Good or DJSI, it becomes increasingly more difficult to renege on its multidimensional commitments. Ensemble regulation makes it therefore much more difficult to maintain a schizophrenic decoupling between the organization’s stated policies and its (actual) internal culture.\(^7\)

But the ensemble structure of this new private order has also another, more subtle effect. There is a positive feedback between the multi-focal invocation of the idea of sustainability across the ensemble, the social standing of the idea as a moral-political principle, and the perceived legitimacy of the ensemble and each of its constituent regimes. The mutual engagement with the concept of sustainability through the distinct regime-spaces and the normative cross-reference it facilitates is thus a source of positive normative externality.

The soft law/greenwash conceptualization is further undermined by a new political sphere that is evolving around these new CSR instruments. This new and intricate political universe is constituted by an extensive, cross-institutional quest for legitimacy. All of the institutions that were described in the previous part are engaged in some form of legitimacy-building, drawing on both political and epistemic mechanisms. Thus, for example, the GRI has developed a complex, multi-stakeholder governance structure, which, as the GRI notes, "helps GRI to retain the credibility it has

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\(^7\) This cross-regime effect is neglected by some authors. See, e.g., Schwartz & Tilling, \textit{supra} note 11, at 296.

\(^7\) For the notion of decoupling, see Peer C. Fiss & Edward J. Zajac, \textit{The Symbolic Management of Strategic Change: Sensegiving Via Framing and Decoupling}, 49 \textit{ACAD. MGMT. J.} 1173, 1175 (2006).
established for the guidance in the Framework.”72 AccountAbility has used an innovative Wiki, supported by offline meetings held at various countries around the world, to develop its new set of global assurance and engagement standards.73 In developing its new CSR standard — ISO 26000 — ISO has established a process that seeks to ensure broad stakeholder engagement and to facilitate participation of stakeholders with limited resources, such as developing countries, non-governmental organizations and consumers.74 While these efforts may fail to meet the expectations of utopian democratic theory,75 they have jointly generated a new domain of ensemble politics with new political addressees and channels of action.76 It seems hard to make sense of this emerging political universe if we take the matrix of CSR instruments to be nothing but "cheap talk."

B. The Multifaceted Nature of the Corporate Order — the Polyphonic Organization

The distinction between greenwash and committed sustainability, which is commonly invoked in the context of the social critique of soft law instruments, is based on a simplistic understanding of the modern corporation. This distinction invites us to choose between two equally implausible portraits of the firm: a completely amoral corporate machine driven solely by a search for profits (the economic-optimizer corporation), set against an ideal image of a benevolent corporation, driven by an absolute desire to do good, unconcerned with profit calculations. Neither of these ideal-types makes sense from a sociological perspective.77

The model of the firm as amoral optimizer leads to a highly skeptical view

72 Governance Bodies, GLOBAL REPORTING INITIATIVE, www.globalreporting.org/AboutGRI/WhoWeAre/GovernanceBodies/GovernanceBodiesLandingPage.htm (last visited Dec. 19, 2010).
75 See, e.g., Schwartz & Tilling, supra note 11.
76 See Bernstein & Cashore, supra note 12, at 353.
77 Rejecting these simplistic conceptualizations puts into question other derivative distinctions such as the distinction between absolute sincerity and absolute suppression. This distinction is incompatible with the disclosure practices of the
of the capacity of soft-law instruments to trigger behavioral change.\textsuperscript{78} In this context, economic writers distinguish between economically justified CSR — \textit{strategic CSR} — and \textit{altruistic CSR}, which requires firms to forgo profits.\textsuperscript{79} Under the economic-optimizer model, firms will never adopt altruistic CSR;\textsuperscript{80} CSR instruments are not expected to have any effect on corporate behavior unless this effect could also be justified by normal business considerations.\textsuperscript{81} But this argument is inconsistent with the empirical evidence, which demonstrates that the effect of CSR instruments cannot be explained solely through economic considerations.\textsuperscript{82}

The model of the corporation as \textit{benevolent} is similarly problematic because it does not give sufficient regard to the economic constraints that characterize the corporate order. It leads to a view of CSR as a purely normative prescription — stating that managers ought to pursue the interests of multiple stakeholders, not just those of shareholders.\textsuperscript{83} By distancin...
this model loses its force both as a normative precept and as a sociological narrative.

Replacing these two ideal-type models with a more nuanced view of the firm offers a better starting point for thinking (sociologically!) about the complex interaction between soft law instruments and the corporate order. In this context, I want to highlight one alternative model of the firm — the polyphonic model.84 The polyphonic model conceptualizes the firm as a dynamic, self-organized decisions-processing system, which can accommodate multiple logics.85 These parallel logics coexist in a dynamic equilibrium, which enmeshes together economic, environmental and other goals. While this model assumes that firms can host a variety of rationalities, only a limited combination of goals and routines offers a viable trajectory for the firm, given the external constraints it faces. Firms can be viable, however, without being economic optimizers. The tension between the different logics is not resolved by some meta-theory (whether economic optimization, ecological ethics, or other), but through pragmatic micro decisions and decisions rules in various sections of the organizations (which may generate spatial and temporal inconsistencies).

The polyphonic model provides a more open-ended framework for thinking about the reasons why firms adopt voluntary schemes and the impact of such schemes on firms’ behavior and internal structure. First, recognizing the possibility that firms are governed by multiple logics allows for the possibility that a decision to adopt a CSR code will not be driven by economic considerations alone. Second, the polyphonic model also better captures the institutional dynamic generated by CSR instruments. The adoption of standards such as ISO 14001, the Equator Principles or the GRI Guidelines can change the firm’s internal dynamic, moving it into a more environmentally sensitive equilibrium trajectory. This change is generated through the various routines that these standards introduce into the firm’s internal structure. New routines for selecting, ordering and

84 Perez, Amichai-Hamburger & Shterental, supra note 69.
processing information change the organization’s cognitive horizon, enabling the generation of new environmentally-related data which would not have been available to the organization beforehand. Overall, these new routines ensure that environmental concerns will receive a stronger presence in the firm’s decision-making process, allowing for the discursive expression of motivations and ideas that may have been suppressed under the previous regime.

The viability of this structural change does not rest on economic calculations alone. One of the novel insights of the polyphonic model lies in pointing out a potential virtuous cycle that the adoption of voluntary schemes can generate between the new organizational reality and the attitudes and beliefs of the employees. It can facilitate a positive feedback between the organizational and individual levels, in which the transformation of the institutional structure induces psychological changes at the workers’ level (e.g., in terms of the workers’ attitudes toward the environment and the organization), which in turn supports the institutional changes instigated by the voluntary standard. The virtuous cycle between the organizational and individual levels can unleash economic resources which were not available in the previous organizational setting, both by affecting the employees’ internally-driven willingness to engage in pro-environmental behaviors and by increasing employees’ commitment to the organization.

The endorsement of private green schemes can thus form an important part in the creation of a corporate culture that draws on social norms, rather than relying exclusively on economic incentives.

The emergence of ensemble regulation fits into the foregoing narrative in two ways. First, the enforcement externalities generated by the ensemble structure make it more costly for firms to renege on their multiple commitments. But more importantly, the normative externalities associated

86 For example, by increasing the employees’ willingness to invoke the new conceptual apparatus introduced by the standard and to implement its routines.

87 For empirical analysis supporting this claim, see Perez, Amichai-Hamburger & Shterental, supra note 69.

with the new regulatory ensemble enhance the social standing of the ethos of sustainable development, reinforcing both the virtuous cycle pointed out above and the emergence of a social-norms dynamic within the corporation, providing further support to the new internal regulatory order.

III. SUSTAINABILITY INDEXES: SOCIAL INFLUENCE AND POLITICS OF LEGITIMACY

The field of sustainability indexes provides an interesting case study for exploring the foregoing reflections. The market of sustainability indexes is dominated by the Dow Jones Indexes and the FTSE Group.\(^{89}\) Both indexes draw on the expertise of leading environmental research agencies: the SAM Group (in the case of DJSI) and Eiris (in the case of FTSE4Good).\(^{90}\)

The Dow Jones Sustainability Indexes series, which was established in 1999, tracks the financial performance of the leading sustainability-driven companies worldwide. It seeks to provide asset managers with objective benchmarks to manage sustainability portfolios. The first index in this "family" — the Dow Jones Sustainability World Index (DJSI World) — covers the top ten percent of the leading sustainability companies out of the biggest 2500 companies in the Dow Jones Global Total Stock Market.


Index.91 Since the launch of the DJSI World in 1999, other indexes have been added to the series.92

The FTSE4Good Index Series was launched in July 2001. It was designed with three objectives in mind: to provide a tool for responsible investors to identify and invest in companies that meet globally recognised corporate responsibility standards; to provide asset managers with a socially responsible investment (SRI) benchmark and a tool for socially responsible investment products; and to contribute to the development of responsible business practice around the world.93 The firms that pass the eligibility criteria detailed in the FTSE4Good Index Series Inclusion Criteria document are automatically included in the appropriate FTSE4Good Benchmark Index.94

The Dow Jones and FTSE indexes both focus on positive criteria to select companies.95 However, the indexes are based on different selection philosophies. The DJSI is based on a "best performers" approach — seeking to choose the best performers within each industrial sub-sector. FTSE4Good is based on an "absolute threshold" approach,96 creating a crisp distinction.

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91 The ranking is performed in each of the DJSI sectors. Similar methodology is employed in the other indexes in the series. See, e.g., DOW JONES INDEXES, supra note 47, at 7, 17.
92 For the full list, see Overview, DOW JONES SUSTAINABILITY INDEXES, http://www.sustainability-index.com/07_htmle/indexes/overview.html (last visited Dec. 20, 2010).
93 See FTSE, supra note 47, at 1; see also FTSE4good Index Series, FTSE: THE INDEX COMPANY, www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp (last visited Dec. 20, 2010). The FTSE4Good Index Series encompasses four tradable and five benchmark indices, representing Global, European, US, Australia, Japan and UK markets. The FTSE group launched two additional indexes: FTSE4Good Environmental Leaders Europe 40 Index and FTSE4Good IBEX Index.
94 The firms are taken from the baseline universe index. The FTSE4Good UK and Europe tradable indices consist of the largest fifty companies in the relevant FTSE4Good Benchmark Index, by full market value. The FTSE4Good USA and Global tradable indices consist of the largest one hundred companies in the relevant FTSE4Good Benchmark Index, by full market values. For further discussion, see FTSE, GROUND RULES FOR THE MANAGEMENT OF THE FTSE4GOOD INDEX SERIES, VERSION 1.3, at 7 (2005).
95 FTSE uses some built-in exclusion criteria, while DJSI which does not rely on negative screening in its general indexes, offers some exclusion indexes. For a detailed description of the selection methodologies of both index families, see Chatterji & Levine, supra note 55, at 14-18; FTSE, supra note 47; DOW JONES INDEXES, supra note 47.
96 This was the phrase used by two of the FTSE interviewees. See infra note 97, for a description of the interviews. For DJSI approach, see SAM, THE SUSTAINABILITY YEARBOOK 2010, at 19 (2010).
between those firms that pass the eligibility criteria and those that fail. There is no similar crisp “fail” line in the DJSI discourse. These different philosophies also influence the institutional structure underlying each index, as will be elaborated below.

Two key questions arise in the study of sustainability indexes. The first concerns their functional operation as instruments of social steering; the second concerns their strategies of legitimization. The following two sections discuss these issues from a theoretical and empirical perspective, exploring the differences between FTSE4Good and DJSI. I draw in this analysis both on an extensive literature review and on several exploratory interviews I conducted with key people at the DJSI and FTSE4Good, and the Israeli Maala CSR Index.97

A. Sustainability Indexes as Instruments of Social Steering

There are several potential causal paths through which sustainability indexes can influence the corporate universe and society as a whole. Because this question has not been studied extensively so far, the following arguments require further empirical work. The first steering effect of sustainability indexes concerns firms’ behavior. The ranking process underlying the work of these indexes provides firms with an incentive to improve their socio-environmental profile through three causal routes.

First, firms may be driven to improve their behavior due to reputational concerns (associated with the repercussions of being included in or thrown out of the index). Second, sustainability indexes may have a more subtle influence through their capacity to create a widespread evaluation matrix that can permeate the corporate order, irrespective of any instrumental calculations.98 As noted by other scholars looking at the influence of sustainability indexes, these effects can be profound and far-reaching.

97 The interviews were conducted between May and August 2010 (using telephone, email exchange and in the Israeli case a face to face meeting). From DJSI: Rodrigo Amandi, Managing Director Indexes, SAM Indexes GmbH and a member of DJSI Advisory Committee) and another member who preferred to remain anonymous. From FTSE4Good: David Harris, Director of Responsible Investment, Jayn Harding, Principal Advisor, Responsible Investment, both from FTSE Group, and Patrick Mallon, International Director and Director Benchmarking and Reporting Business in the Community (member of FTSE4Good Policy Committee). I also met for a background talk with Momo Mahavad, president of Maala, the Israeli CSR index. All of the interviewees whose names are mentioned gave permission to mention their names.

98 See Steven Scalet & Thomas F. Kelly, CSR Rating Agencies: What is Their Global Impact?, 94 J. BUS. ETHICS 69, 80 & nn.12-13 (2010). Other ranking mechanisms, such the influential U.S. News & World Report rankings of law schools and
of ranking schemes, rankings can affect organizational practices and cognitive structures, leading to changes in organizational self-perceptions. By creating a continuous process of observation, measurement and evaluation, rankings can generate a reflexive process of institutional change as organizations develop anticipatory, self-disciplinary structures, which react to the evaluative metrics.99

The second route of influence concerns the impact of sustainability indexes on the SRI market itself: the methodologies used by the two index families to select and rank companies and their ultimate selections could constitute a normative benchmark for the SRI market as a whole.100 Through their influence on ethical investors, sustainability indexes may have a further effect on firms, by indirectly influencing their capital costs.101

A third and overarching causal path concerns the influence of sustainability

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99 See Espeland & Sauder, supra note 98; Wendy Nelson Espeland & Mitchell L. Stevens, A Sociology of Quantification, 49 EUR. J. SOC. 401 (2008); Scalet & Kelly, supra note 97; Slager, supra note 69, at 5-7.

100 Another related area of research focuses on the considerations leading individuals to invest in ethical funds. See Eva Hofmann, Erik Hoelzl & Erich Kirchler, A Comparison of Models Describing the Impact of Moral Decision Making on Investment Decisions, 82 J. BUS. ETHICS 171 (2008); Eva Hofmann, Katja Meier-Pesti & Erich Kirchler, The Decision Process for Ethical Investment, 12 J. FIN. SERV. MARKETING 4 (2007).

indexes on the thematic horizon of the entire CSR market. A good example of this phenomenon is the inclusion of new climate change criteria in the FTSE4Good criteria in 2007.

The empirical work which has been done so far in this area provides only partial answers to these tentative hypotheses. A recent study exploring the FTSE4Good index examined its effect on corporate behavior through a questionnaire-based survey of companies listed on the FTSE4Good UK and Europe indices, conducted in May 2004. The results suggest that the FTSE4Good initiative had some impact on the internal dynamics of listed companies, especially with respect to reporting and management procedures. A study of the KLD Indexes by Chatterji and Toffel provides additional support for the findings of this study. Chatterji and Toffel draw on the reputational effect of the index (similarly to Potoski and Prakash’s "green club" model), arguing that poor ratings shame firms and threaten their legitimacy. Poorly rated firms, they argue, will be particularly likely to respond in ways that improve their ranking, causing managers to implement practices aimed at improving their firms’ standing with the independent rating agencies. They further propose that the subset of poorly rated firms that face lower-cost improvement opportunities will be especially likely to make the investments needed to improve their ratings. They find that firms that initially received poor KLD ratings subsequently improved their environmental performance more than other firms, and that this difference was driven by firms in highly regulated industries and by firms with more low-cost opportunities to exploit.

Both FTSE4Good and DJSI have an engagement program with firms (based on continuous dialogue), with seemingly positive outcomes. The interviewees from the FTSE Responsible Investment team noted that FTSE had (on average) a sixty percent success rate in helping companies move towards meeting the various inclusion criteria for FTSE4Good, with over four hundred companies moving to meet new criteria. A recent report by SAM gives a similar assessment of the DJSI engagement program. The

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102 This issue was raised by the president of Maala.
104 Chatterji & Toffel, supra note 69.
106 Interview with FTSE Director of Responsible Investment and FTSE Principal Advisor, Responsible Investment.
107 This positive assessment of the engagement program was confirmed by another member of the FTSE4Good Policy Committee (Patrick Mallon).
engagement process draws on a company-specific benchmarking report which is sent to firms annually by SAM, and allows firms to understand where they are lagging behind their peers and often triggers a dialogue between SAM and the firms. During 2001-2009 seventy percent of participating firms have improved their total scores (on average).\(^{108}\)

Further support for the integrity of the FTSE4Good engagement program can be found by examining the way in which FTSE Inclusion Criteria have been applied. To study this question I have analyzed all the additions and deletions from the FTSE Index universe from September 2003 to March 2010, distinguishing between the different subject areas.\(^{109}\) The results are summarized in the table below. The findings demonstrate that the criteria were frequently used to throw out laggards — they had, in other words, a significant "bite." They also reflect a dominance of environmental considerations, which constitute sixty-seven percent of the total deletions.\(^{110}\) While this analysis does not settle the question whether the engagement process has an impact on firms' behavior, it does signal that the threat of being "thrown out" is real.

| Table 2: additions and deletions, FTSE Index: September 2003 — March 2010 |
|--------------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
|                          | Sep 03 | Mar 04 | Sep 05 | Mar 06 | Sep 07 | Mar 08 | Sep 09 | Mar 10 |
| Additions                | 72     | 75     | 79     | 61     | 42     | 40     | 24     | 25     | 42     | 41     | 36     | 23     | 33     | 23     |
| Deletions                | 43     | 29     | 23     | 27     | 24     | 19     | 17     | 24     | 15     | 12     | 16     | 15     | 5      |
| Deletions by subject     |        |        |        |        |        |        |        |        |        |        |        |        |        |
| Climate Change           | –      | –      | –      | –      | –      | –      | –      | –      | 7      | 1      | 4      | 1      | –      |
| Countering Bribery       | –      | –      | –      | –      | –      | –      | –      | 2      | 7      | 4      | 6      | 9      | 3      | –      |
| Environment              | 18     | 19     | 17     | 23     | 22     | 18     | 7      | 12     | 12     | 4      | 2      | 2      | 4      | 2      |

\(^{108}\) SAM, supra note 96, at 19, 21. This evaluation of the DJSI engagement program was confirmed by the Managing Director Indexes, SAM Indexes.

\(^{109}\) Review Summaries, FTSE4GOOD, www.ftse.com/Indices/FTSE4Good_Index_Series/Index_Reviews.jsp (last visited Dec. 20, 2010). The analysis in this Article uses the subject-headings of FTSE.

\(^{110}\) 162 out of a total of 242.
What kind of influence do sustainability indexes have on the structure of the SRI market? Fowler and Hope examined this question by looking at total investment funds managed using sustainable indices.\textsuperscript{111} Drawing on this data, they find that the impact of sustainable indices to date has been limited.\textsuperscript{112} While the methodology used by Fowler and Hope is certainly relevant, it does not necessarily capture the impact of the indexes, which can be reflected also in their indirect influence on the methodologies and choices of investment agents. Chatterji et al. also assume that ratings have a substantial influence over the SRI market; however, they only offer anecdotal evidence for this claim and their study actually focuses on another question — to what extent sustainability ratings (in their context — the KLD index) help stakeholders to identify companies which are truly "environmentally responsible."\textsuperscript{113} The

\begin{tabular}{lcccccccc}
Human & Labor & 7 & 11 & 2 & 2 & – & 1 & – & 6 & 2 & 5 & 5 & 7 & 3 \\
Rights & & & & & & & & & & & & & & \\
\hline
Exclusion & & & & & & & & & & & & & & \\
\hline
Labour & Standards & & & & & & & & & & & & & & \\
\hline
Changes & & & & & & & & & & & & & & \\
\end{tabular}


\textsuperscript{112} They found that as of December 2003 2.45 billion Euros was managed by funds tracking the DJSI index, with less of that amount using the FTSE4Good. This is a relatively small figure compared with the total SRI funds in the United States. However, since the paper was published the number of index-based financial products has increased significantly and as of the end of February 2010 the assets managed in these products totaled more than eight billion dollars. \textit{See Licensing, DOW JONES SUSTAINABILITY INDEXES, www.sustainability-index.com/07_html/other/licensing.html} (last visited Feb. 28, 2010).

interview with FTSE Responsible Investment provided further support for this claim. The FTSE team noted that "there are currently around eighty clients and eight billion Euros AUM linked to FTSE4Good Index Series." In addition, they note, many asset managers use the "FTSE4Good inclusion criteria and review results as a benchmark to engage with companies in their own portfolio." The recent SAM report notes that there is currently eight billion dollars worth of assets invested based on the DJSI, and that other investors draw on the indexes in designing their ethical investment strategy.

The foregoing evidence provides tentative support for the argument that sustainability indexes have some steering capacity. It is clear, however, that more work needs to be done in order to unfold their exact sociological impact. Thus, for example, while the data provided by FTSE and DJSI regarding their respective engagement programs seems to indicate a substantial steering potential, it also leaves many open questions pertaining, for example, to the causal linkage between the ranking (or engagement) process and the firms’ projected progress in FTSE/DJSI scores.

B. In Search of Legitimacy: Different Legitimization Philosophies Across the Atlantic

Both the DJSI and FTSE4Good are engaged in legitimization efforts, seeking to establish their epistemological authority and political legitimacy. They are concerned both with demonstrating their expertise in devising (and implementing) CSR criteria and with justifying their normative authority. These dual strategies are reflective of the legitimization discourse that characterize other transnational institutions, which engage in the production of global environmental norms. In this context there are striking differences

—— that being dropped from a CSR ranking appears to do little to encourage firms to acknowledge and address problems related to their social and environmental performance. However, the authors themselves note that their methodology cannot capture all the possible impacts of ranking institutions and consider their study primarily as an exploratory exercise. See Scalet & Kelly, supra note 98.

114 FTSE Director of Responsible Investment and FTSE Principal Advisor, Responsible Investment.

115 See SAM, supra note 96, at 22.

116 I will not be able within the scope of this Article to engage in a critical evaluation of the selection criteria developed by DJSI and FTSE4Good. On this point, see Chatterji & Levine, supra note 55, at 14-18.

117 See Bernstein & Cashore, supra note 12 (on the importance of democratization norms for achieving legitimacy); Dieter Kerwer, Rules That Many Use: Standards and Global Regulation, 18 GOVERNANCE 611 (2005) (on the role of expertise).
between the two schemes. FTSE4Good has developed a twofold strategy drawing both on a long tradition of financial expertise, which was augmented by the environmental and social expertise of Eiris, and on an elaborated system of public consultation and public representation in its decision-making processes. By contrast, the DJSI draws exclusively on the epistemic authority of SAM, which is one of the leading global investment groups focusing on the field of sustainability investment and on its own expertise in developing stock indexes.118

Let me elaborate on the way in which these distinct strategies have been implemented at the institutional level. FTSE has developed an elaborated consultation process led by the FTSE4Good Policy Committee together with FTSE’s Responsible Investment Unit (which acts as a secretariat). The Policy Committee manages the evolution of the FTSE4Good Index Series. It is an independent body consisting of experts from the fields of corporate responsibility, fund management, academia and the business community.119 The FTSE4Good Policy Committee’s role is to:

• Act as an independent judge of the ability of constituent companies to meet the FTSE4Good Index Series criteria;
• Oversee the consultation process undertaken to develop criteria;
• Approve criteria revisions or new criteria.

All the interviewees from FTSE have emphasized the autonomy of the Committee, noting that it "provides independent feedback and decisions" and highlighting its independence from both FTSE’s Responsible Investment Unit and Eiris.121 The engagement program has not compromised, they noted, the rigor and integrity of TSE4Good inclusion criteria. During the operation of the index, they noted, "The

118 Unlike Eiris, which is a not-for-profit organization that offers independent assessments of companies and advice on integrating them with investment decisions, SAM is a for-profit investment group (although driven by a strong sustainability ethos).
119 For a list of the Committee members, see Index Rules, FTSE: THE INDEXING COMPANY, www.ftse.com/Indices/FTSE4Good_Index_Series/Index_Rules.jsp (last visited Dec. 20, 2010).
120 The Committee’s authority is set in the ground rules for the management of the FTSE, supra note 94.
121 Interview with the Director of Responsible Investment and Principal Advisor, Responsible Investment. I received further confirmation of this view in the interview I conducted with Patrick Mallon, an independent member of the Committee.
FTSE4Good Policy Committee has approved the deletion of some very large and significant companies . . . as well as smaller ones.”¹²² One of the interviewees also noted in this context that the executive team uses the Committee’s authority to justify decisions before companies as part of the engagement process.¹²³

FTSE has also committed itself to a rigorous and inclusive process of criteria development. The process consists of five stages which are overseen by the FTSE4Good Criteria Development Subcommittee:

1. Issues identified with experts;
2. Focus groups to find or test potential criteria that could be used and to find areas of consensus that different stakeholders (e.g., investors, NGOs and companies) can all support;
3. Market consultation on proposed criteria options;
4. The results from the consultation and recommendations are given to the FTSE4Good Policy Committee, which makes the final decisions and approves the final criteria;
5. Criteria implementation is then carried out in a staged manner.¹²⁴

The consultation process is illustrated in the following diagram¹²⁵:

¹²² Interview with the Director of Responsible Investment and Principal Advisor, Responsible Investment. This positive assessment of FTSE engagement program is also shared by external observers. See, e.g., Slager, supra note 69, at 14-16.
¹²³ Interview with Patrick Mallon, an independent Committee member.
As noted above, the Policy Committee also has the ultimate authority to approve changes to the constituents of the FTSE4Good universe (that is, any deletions or additions to the indexes).\textsuperscript{126} The underlying philosophy of the FTSE4Good — a commitment to an absolute threshold approach — has led to the development of a semi-legalistic structure, which includes an appeal procedure, dealing with cases in which companies disagree with the decisions of the Committee.\textsuperscript{127}

In contrast to the relatively open and inclusive decision-making process of the FTSE4Good scheme DJSI, has taken a more opaque and less open approach, reflecting a different legitimization strategy which draws on its epistemic credentials. Indeed, when I asked the Managing Director Indexes (SAM) about the importance of the Advisory Board for the legitimacy of the DJSI index series, he noted that DJSI relies primarily on its in-house expertise and internal knowledge. Until the end of 2009, the decision-making process in the context of the Dow Jones sustainability indexes was governed by two committees.\textsuperscript{128} The DJSI World Index Design Committee is solely responsible for all changes to the index methodology and for auditing the index composition at the annual and quarterly reviews.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} FTSE, \textit{supra} note 94, at 13. The appeals are heard a Controversies Subcommittee which has been combined with the Criteria Development subcommittee. In reality the process tends to be less legalistic, taking the shape of "informed discussion." Interview with FTSE Director of Responsible Investment and FTSE Principal Advisor, Responsible Investment

\textsuperscript{128} \textsc{Dow Jones Indexes}, \textit{supra} note 47.
It is an internal committee, closed to external stakeholders, consisting of two representatives from each — Dow Jones & Company and the SAM Group (the consulting agency responsible for collecting and analyzing the data on which the index is based). The second committee, the DJSI Advisory Committee, which was replaced at the end of 2010 by a different body called SAM Faculty, was open to external stakeholders. The DJSI Advisory Committee was composed of independent, third-party professionals from the financial sector and the field of corporate sustainability performance. Its powers and functions were limited, however, to "provide insights into the field of sustainability and investing, give advice on possible implications for sustainability-driven portfolio management and offer input regarding the methodology, marketing as well as product development for the Dow Jones Sustainability Indexes."\(^{129}\)

The DJSI Advisory Committee was replaced by the new "SAM Faculty." The Faculty consists of five to ten members (one of whom is a Dow Jones employee or designee) who can provide a broad range of perspectives in terms of sustainability subjects. The establishment of the new body was driven by an attempt to create a broad pool of knowledge with people representing different voices.\(^{131}\) The vision behind this new body seems then to be primarily epistemological — not political. SAM Faculty was incorporated into the new version of the DJSI Guide Book, which was published in November 2010.\(^{132}\)

It is reflective of the apolitical nature of this new body that the decision to establish it was made public only several months after it was taken, without any consultation with the public (leaving the irrelevant data about the Advisory Committee on the SAM and DJSI websites).\(^{133}\)

FTSE4Good and DJSI seem to represent therefore different approaches to legitimacy building. While FTSE has adopted a twofold strategy, which

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129 Id.
130 www.sam-group.com/html/djsi/advisory_board.cfm (last visited Aug. 1, 2010). With the establishment of the new "SAM Faculty" this data was removed.
131 Interview with Managing Director Indexes, SAM Indexes; email exchange with a member of DJSI Advisory Committee.
132 DOW JONES INDEXES, Supra note 47, at 40.
133 As of August 1, 2010, neither the SAM nor the DJSI website has included data about the new body; both continued to refer to the (then) irrelevant Advisory Committee.
draws both on its epistemic authority and on an elaborated system of public consultation and civic representation, DJSI seems to rely primarily on its epistemic authority and business reputation. FTSE’s dual strategy is a reflection of a “growing normative consensus on the need to ‘democratize’ global governance.” Indeed, global environmental organizations, such as the GRI, AccountAbility and the newly established Equator Principles Financial Institutions Association, have developed progressive consultation and deliberative schemes as well as far-reaching transparency mechanisms.

These processes, combined with mutual observation between distinct regimes, have created network pressures pushing for democratization. This push towards democratization is not just driven by expanding social expectations and network pressures; it is also codified in an emerging global administrative law. In that respect, DJSI’s exclusive reliance on expertise as a source of legitimacy is a kind of anomaly that goes against this overall trend. One possible answer to this anomaly is that the strong position of the Dow Jones Indexes group in the United States market, together with the epistemic reputation of Dow Jones and SAM, allows it to sidestep these pressures. Whether DJSI can sustain this legitimization structure against the calls for greater democratization of transnational governance remains to be seen.

CONCLUSIONS

The new universe of private environmental governance constitutes an intensely interconnected network of governance. It is a mistake to observe this network — especially the subset of CSR instruments — through the dual prisms of “greenwash” and “soft law.” First, because this conceptual apparatus disregards the positive enforcement and normative externalities generated by the ensemble structure of this private regulatory network, and second, because these two notions underestimate the virtuous, reciprocal

134 Bernstien & Cashore, supra note 12, at 353.
dynamic that the adoption of voluntary environmental codes may instill in firms adopting them.

The expansion of private regulation over the last decade represents a robust social process, which is likely to further expand in the next decade. The ISO CSR standard, ISO 26000, represents a recent new entrant into this network. In parallel, existing schemes, such as ISO 14001 and GRI, are constantly expanding. As the boundaries and depth of this regulatory ensemble expand, the question of its legitimacy becomes more important — normatively and sociologically. The case of sustainability indexes demonstrates the interplay between two legitimization strategies — epistemic and political. The pressure towards further democratization of decision-making processes within transnational bodies creates a tension between epistemic and political notions of legitimacy. Finding institutional solutions to this tension is a significant challenge for transnational institutions. In the case of FTSE4Good and DJSI, it will require continued experimentation with modes of participation that can coexist with these institutions’ claim to epistemic authority.

While this Article has argued that it is a mistake to dismiss these private CSR instruments as cheap talk, one has to be realistic about their capacity to trigger radical changes. These instruments, and the political realm they have created, remain constrained by the precepts of modern capitalism. The participatory opportunities that have been created by FTSE (and to a lesser extent by DJSI) are limited by the broad institutional framework in which they are situated. There is no room within this political setting for challenging, for example, the basic characterization of sustainability indexes as financial instruments that are intertwined with the current global financial system. Any radical changes to the way in which corporations manage their environmental profile will require global, coordinated political action. The new political opportunities which have been created by this new regulatory ensemble do not provide a suitable vehicle for such radical change, because their innate structure delimits the horizon of political action. Indeed, as environmental groups adapt to the new political structure and react to the opportunities for action it provides, they forgo more radical options of resistance and critique, which might question the basic presuppositions upon which the current global capitalist order is based.

137 INTERNATIONAL STANDARDS ORGANIZATION (ISO), ISO 26000 (2010).
138 Radical critique is different, in that sense, from social protest. See Niklas Luhmann, Risk: A Sociological Theory 126 (1993) ("The form of protest remains a form that presupposes the other side that is to react to the protest").