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The Global Reporting Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents

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INTRODUCTION

On September 29, 2015, Governor of the Bank of England Mark Carney delivered a major policy address to UK insurers gathered for a black-tie event at Lloyds of London in the City of London. Entitled "Breaking the Tragedy of the Horizon," Mr. Carney's after-dinner talk eschewed the usual conventions of humor and reasonably light fare to discuss the challenges facing the world from climate change.[1] While recognizing global risks to property, political stability and food and water security from climate change, the speech concentrated on three categories of

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1. Mark Carney, Governor, Bank of England, *Breaking the Tragedy of the Horizon: Climate Change and Financial Stability*, Address at Lloyd's of London City Dinner (Sept. 29, 2015), http://www.bankofengland.co.uk/publications/Documents/speeches/2015/speech844.pdf. Mr. Carney entitles the risks from climate change a "tragedy of the horizon" since the most serious consequences of today's emissions will eventuate beyond the time-frame of today's business cycles, political cycles and regulatory cycles, which are at maximum ten years.

financial stability risks: those caused by the physical changes induced by climate change; liability risks if "extractors and emitters" and/or their officers and directors were to be held liable for the negative effects of their products; and financial risks from the transition to a low-carbon economy. This latter category includes the risk of the value of "stranded [oil, gas and coal] assets" on the balance sheets of banks, insurance companies and pension funds being rapidly re-priced downward; and the potential that "an abrupt resolution of the tragedy of the horizons is itself a financial stability risk."[2]

Having laid out an imposing scenario, Mr. Carney then suggested that better information would help "the market itself to adjust efficiently," in a situation where multiple parameters will "influence the speed of transition to a low-carbon economy," including public policy, technology, investor preferences and physical events.[3] One approach Mr. Carney said the Financial Stability Board (FSB) was considering was to ask the G20 "to establish an industry-led group, a Climate Disclosure Task Force, to design and deliver a voluntary standard for disclosure by those companies that produce or emit carbon."[4] By having access to information about the carbon intensity of goods and services, investors can then "assess risks to companies' business models and . . . express their views in the market."[5] This information can also inform policy makers, who could "learn from markets' reactions and refine their stance, with better information allowing more informed reactions, and supporting better policy decisions including on targets and instruments."[6]

Mr. Carney recognized that information on carbon emissions is not lacking in the market: indeed, he stated that there are "nearly 400 initiatives"[7] that suggest or require the disclosure of companies' greenhouse gas emissions or environmental data. Still, with more consistent, comparable, reliable, clear and efficient information about companies' current emissions and the strategies companies plan to employ in their transition to the "net-zero world of the future,"[8] he asserted that both markets and government would have better tools to manage the transition to a low-carbon economy. The efficacy of these tools could be amplified by government "giving guidance on possible carbon price paths," a so-called "price corridor," plus stress testing to determine "the skews from climate change to the returns of various businesses."[9] But generally Mr. Carney has faith that by "managing what gets measured, we can break the Tragedy of the Horizon."[10]

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2. *Id.* at 11.
3. *Id.* at 11, 12.
4. *Id.* at 14.
5. *Id.* at 12.
6. *Id.* at 13.
7. *Id.*
8. *Id.* at 14.
9. *Id.* at 15.
10. *Id.* at 16.

In his view of markets being able to adapt and lead the transition to a low-carbon future if given appropriate information, albeit recognizing the importance of a supportive policy environment and with technological advances, Mr. Carney unwittingly joins social responsibility activists and socially responsible investors who for at least two decades have promoted disclosure and transparency as important levers for changing corporate behavior. Transnational, voluntary disclosure regimes for producing expanded environmental, social and governance (ESG) information, such as the Global Reporting Initiative (GRI) or the Carbon Disclosure Project (CDP), have proliferated, as have some government requirements for such disclosure, as discussed below. Yet these developments occur as automated trading replaces the kind of contextual, information-based trading that ESG disclosure might affect for a significant percentage of trades in the market;[11] and as global emissions continue to rise, notwithstanding voluntary greenhouse gas (GHG) disclosure by five-thousand of the world's largest operating companies using the CDP framework.[12] Thus, how powerful a mechanism voluntary disclosure is or can be for producing operational changes within companies, and how effective self-regulatory or multi-stakeholder corporate responsibility initiatives generally can be are both questions that bear further exploration. Given how ubiquitous disclosure and self-regulation have become in the transnational business context, this essay will start that exploration, while recognizing that each question deserves more substantial treatment than will be attempted here.

In this essay, the Author provides an overview in Part I of some initiatives to require or encourage companies to produce specific ESG data, authored both by governments and by private standard-setters. In Part II, one disclosure initiative in

11. Estimates of the percentage of trades that are computer generated vary between 39% (Europe) and 51% (U.S.) in one report, WORLD FED'N OF EXCHS., UNDERSTANDING HIGH FREQUENCY TRADING (2012), http://www.world-exchanges.org/home/index.php/files/23/Position%20Papers%20%20Educational%20Materials/71/Understanding%20High%20Frequency%20Trading%20(HFT).pdf, but other estimates suggest between 50% and 70% of all equities trades by volume are computer generated. *See* Yesha Yadav, *Insider Trading and Market Structure*, UCLA L. REV. (forthcoming 2016) (citing STAFF OF THE DIV. OF TRADING AND MKTS., U.S. SECS. AND EXCH. COMM'N, EQUITY MARKET STRUCTURE LITERATURE REVIEW: PART II: HIGH FREQUENCY TRADING, 4-7 (2014), https://www.sec.gov/marketstructure/research/hft_lit_review_march_2014.pdf). Regulators generally agree there are no good data on the phenomenon. Of course, automated trading relies upon information, but this is primarily financial information and trading trends, and not the expanded qualitative and quantitative ESG data that corporate accountability advocates promote or that GRI produces.

12. *See, e.g.,* JOHN MOORHEAD & TIM NIXON, GLOBAL 500 GREENHOUSE GASES PERFORMANCE 2010-2013: 2014 REPORT ON TRENDS, 3 (Thomson Reuters, 2014) (finding that greenhouse gas emissions by the top 500 global companies rose 3.1% from 2010 through 2013, whereas they should have decreased by 4.2% during that same period for the world to have a likely probability of staying under a 2 degree Celsius rise in global average temperatures). The key question to investigate is whether emissions have stabilized or gone down/per unit of revenue, for the 5,000 firms producing information to CDP. The variety in formats for CDP disclosure makes answering that question difficult. *See* Ans Kolk, David Levy & Jonatan Pinkse, *Corporate Responses in an Emerging Climate Regime: The Institutionalization and Commensuration of Carbon Disclosure*. 17(4) EUR. ACCT. REV. 719, 721 (2008) (concluding that voluntary carbon disclosure to CDP "remains inconsistent and difficult to interpret.").

particular will be discussed as an example of a transnational legal order (TLO), as defined by Professors Shaffer and Halliday,[13] and that is the Global Reporting Initiative, which has become the benchmark corporate social disclosure framework. Part III identifies a number of significant questions about our knowledge of the real power of information strategies to change corporate behavior, as the GRI seeks to do, as well as questions about the efficacy of self-regulation generally.

Part IV then asserts that the "legality" aspect is a centrally-important element of the TLO framework advanced by Shaffer and Halliday. Particularly regarding transnational corporate responsibility, reliance has been placed almost exclusively on "new governance" initiatives, which are generally non-binding, voluntary, collaboratively developed standards for responsible behavior. New governance standards have fascinated academics from a wide range of fields, including this author, leading to an explosion of literature on the cognate topics over the last ten to fifteen years.[14] Yet, during this same period of time, Bi-lateral Investment Treaties (BITs) and free-trade agreements, such as the North American Free Trade Agreement (NAFTA), have been negotiated throughout the world. These treaties generally permit private companies to challenge any government action—legislative, regulatory, or judicial—that is alleged to reduce the company's future profits.[15] These challenges are heard by private arbitrators and are not subject to judicial review.

The contrast is stark between new governance forms of collaborative, often industry-led, voluntary standards for responsible action, and the limits on sovereign regulatory authority being developed as a result of the expansion of the investor-state system for arbitration pursuant to BITs and trade agreements, leading this author to remember the line in the movie the *Wizard of Oz:* "pay no attention to the man behind the curtain." To badly mix literary references, we may have fixed our collective attention on the construction of a transnational regulatory Potemkin village even as the man behind the curtain progressively undermines the capacity of the strong form of regulation, that of sovereign domestic law. It is in emphasizing the importance of *legality* and how transnational norms "touch down" in binding processes, court proceedings, contracts, or public proceedings that Shaffer and Halliday's theory of Transnational Legal Orders reorients our thinking in a productive, and important, direction.[16] Part V concludes.

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13. TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer, eds., Cambridge University Press 2015).

14. *See* Part IV, footnotes 73 to 95, 101 to 111 for some of the standard references introducing this literature.

15. *See* GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS (Oxford University Press 2013) for a thorough discussion of this problem [hereinafter VAN HARTEN, SOVEREIGN CHOICES]. For a short introduction showing the expansion of investor-state arbitrations since the 1990s *see* Gus Van Harten, *Private Authority and Transnational Governance: The Contours of the International System of Investor Protection,* 12:4 REV. INT'L POL. ECON. 600 (2005) [hereinafter Van Harten, *Private Authority*].

16. TRANSNATIONAL LEGAL ORDERS, *supra* note 13.

I. Trends in Environmental, Social and Governance Reporting[17]

A. Voluntary ESG Reporting

Over the past two decades, corporate sustainability reporting has developed from an academic idea in critical accounting to a global business practice.[18] While some jurisdictions are starting to require ESG reporting (as described below), much of this reporting is still voluntary.

The most comprehensive source of data on ESG reporting is that done by KPMG in the Netherlands. KPMG published its first ESG report in 1993, and its most recent in 2013. In 1993, twelve percent of the top 100 companies in the OECD countries (ex. Japan) published an environmental or social report.[19] By 2013, seventy-six percent of the top 100 companies in the Americas publish a separate corporate responsibility report, as do seventy-three percent of top 100 companies in Europe and seventy-one percent in Asia.[20] Of the largest 250 companies globally, reporting rates are ninety-three percent.[21]

The Global Reporting Initiative's voluntary, multi-stakeholder framework for ESG reporting has emerged as the clear global benchmark: seventy-eight percent of reporting companies worldwide and eighty-two percent of the Global 250 use GRI as the basis for their corporate responsibility reporting.[22] GRI's development as a Transnational Legal Order (TLO) will be discussed in more detail below. Slightly over half (fifty-nine percent) of the Global 250 now have their reports "assured," most often (two-thirds of the time) by the specialist bureaus of the major accountancy firms.[23]

In addition to the quantity of corporate responsibility reporting, KPMG also evaluates the quality of reporting. Here, European companies generally do substantially better than those in Asia or the Americas (average quality scores of seventy-one out of 100 in Europe versus fifty-four for companies in the Americas

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17. Section I of this Article is based on portions of Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Georg Ringe, eds. Forthcoming March 2017).

18. For an excellent overview of the evolution of corporate responsibility as an academic theory in the management literature, *see* Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268 (1999).

19. *See* Ans Kolk, *A Decade of Sustainability Reporting: Developments and Significance*, 3 INT'L J. ENV'T & SUSTAINABLE DEV. 51, 52 fig.1 (2004). KPMG has changed the format of the report since its original 1993 report on corporate responsibility reporting, so direct comparisons are not possible between the Global 250 in 1993 and the Global 250 in 2013.

20. KPMG, *The KPMG Survey of CR Reporting 2013*, at 10, https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Documents/corporate-responsibility-reporting-survey-2013-exec-summary.pdf (last visited Dec. 5, 2015).

21. *See id.*

22. *See id.* at 11. The GRI is now in its fourth iteration. It has been developed by, and is used by, thousands of companies, governments, and non-profit entities around the world to report on the economic, environmental, and social and governance effects of entities' actions. *See* Global Reporting Initiative, http://www.globalreporting.org.

23. *See* KPMG, *supra* note 20, at 11.

and fifty in Asia Pacific).[24] Within the Global 250, companies are starting to see more opportunities than risks from social and environmental factors, such as for the development of new products and services. Eighty-seven percent of the Global 250 identify climate change, material resource scarcity and trends in energy and fuel as "megatrends" that will affect their business.[25] Ultimately KPMG concludes that "[m]any companies no longer see corporate responsibility as a moral issue, but as core business risks and opportunities."[26]

B. Required Sustainability Reporting

By 2015, many European countries or their stock exchanges, and the EU itself, require some environmental or social disclosure, to varying degrees of specificity.[27] The EU's requirement is a directive that entered into force on the sixth of December 2014; member states will need to transpose it into national legislation within two years.[28] It will require approximately 6,000 large companies and "public interest organizations," such as banks and insurance companies, to "prepare a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters."[29] This requirement builds upon EU accounting rules (the EU Accounts Modernization Directive) that have, since 2003, required companies to report on environmental and labor issues "to the extent necessary" to provide investors with an accurate view of the company's financial position and the risks to that position.[30]

In addition to the new EU non-financial disclosure requirements, the Nordic countries have been leaders in requiring corporate reporting that is more comprehensive than the reporting required by the EU's 2003 Accounts Modernization Directive. Since 2008, public companies in Sweden must make a sustainability report consistent with GRI.[31] Since January 2009, approximately 1,100

24. *See id.* at 14.

25. *See id.* at 14-15.

26. *See id.* at 15.

27. *See* Beate Sjåfjell & Linn Anker Sørensen, *Directors' Duties and Corporate Social Responsibility (CSR),* 25-27, *in* BOARDS OF DIRECTORS IN EUROPEAN COMPANIES: RESHAPING AND HARMONISING THEIR ORGANISATION AND DUTIES (Hanne Birkmose, Mette Neville & Karsten Engsig Sørensen eds. Kluwer Law Int'l 2013/2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322680.

28. *See* Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L330) 1, http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32014L0095.

29. *See id.* at ¶ 6.

30. *See* Sjåfjell & Sørensen*, supra* note 27, at 25, 35. For further discussion of the 2003 Accounts Modernization Directive, *see* Cynthia A. Williams & John M. Conley, *Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in the UK*, 31:2 WM & MARY ENV. L.J. 317 (2007).

31. *See* JAN BERTIL ANDERSON & FRIDA SEGENMARK, SUSTAINABLE COMPANIES: BARRIERS AND POSSIBILITIES IN SWEDISH COMPANY LAW (University of Oslo Res. Paper No. 2013-09 2013), at 13, http://www.ssrn.com/abstract=2248584.

large companies in Denmark, as well as institutional investors and loan providers, have been required to publish an annual corporate responsibility report, following a 2008 government Action Plan on Corporate Responsibility.[32] Companies may use their annual reporting to the U.N. Global Compact as the framework for their public disclosure, and institutional investors may report on their incorporation of the Principles of Responsible Investment (PRI) developed by the U.N. Environment Programme.[33] And as of 1 July 2013, Norwegian companies must report on labor issues, gender equality, anti-discrimination and environmental issues, including reporting on what they are doing to incorporate these issues and human rights concerns into management practices.[34]

These examples are indicative of a global trend towards required corporate responsibility reporting. According to a 2015 report by the Initiative for Responsible Investment of the Hauser Institute for Civil Society at the Kennedy School, Harvard University, twenty-two countries and the European Union have enacted legislation within the last fifteen years to require public companies to issue reports including environmental and/or social information.[35] These countries include Argentina, China, Denmark, the EU, Ecuador, Finland, France, Germany Greece, Hungary, India, Indonesia, Ireland (specific to state-supported financial institutions after the 2008 financial crisis), Italy, Japan, Malaysia, The Netherlands, Norway, South Africa, Spain, Sweden, Taiwan, and the U.K.[36] Of these countries, France is particularly noteworthy, having been a leader by requiring publicly-listed companies to report data on forty labor and social criteria since 2002, followed by requirements in 2009 for companies with more than five-hundred employees in high-emitting sectors to publish their greenhouse-gas (GHG) emissions.[37]

In addition to these reporting initiatives, seven stock exchanges require social and/or environmental disclosure as part of their listing requirements: Australia's ASX, Brazil's Bovespa, India's Securities and Exchange Board, the Bursa Malaysia, Oslo's Børs, the Johannesburg Stock Exchange, and the London Stock Exchange.[38] Moreover, seven countries have enacted policies following those of the U.K. and Sweden, which since 2000 have required pension funds to disclose the extent to which the fund incorporates social and environmental information into their

32. *See* Karin Buhmann, *Company Law as an Agent for Migration of CR-Related International Law into Company Self-Regulation? The Case of the CR Reporting Requirement*, 8:2-3 EUR. COMPANY L. 65, 68 (2011).

33. *See id*. For more information on the PRI, *see* About the PRI, http://www.unpri.org/about.

34. *See* Sjåfjell & Sørensen, *supra* note 27, at 26-27.

35. *See* Initiative for Responsible Investment, *Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges* (March 12, 2015), http://hausercenter.org/iri/wp-content /uploads/2015/04/CSR-3-27-15.pdf.

36. *See id.*

37. *See id., citing* the New Economic Regulations Act in France, 2002.

38. *See id.*

investment decisions.[39] These countries include Australia, Belgium, Canada, France, Germany, Italy, and Japan.[40]

II. THE GLOBAL REPORTING INITIATIVE

A. Description

One particularly significant voluntary disclosure initiative is GRI. As stated above, GRI's voluntary framework for ESG reporting has emerged as the global benchmark: eighty-two percent of the Global 250 companies use GRI as the basis for their corporate responsibility reporting.[41] And as of 2015, ninety-three percent of the global 250 companies publish a stand-alone social report,[42] so this is no longer a fringe activity.

GRI is now in its fourth iteration, called G4, having begun in 1997 as a project of two Boston-based NGOs that promote environmental transparency, and supported from the beginning by the United Nations Environment Programme.[43] The two founding NGOs were CERES, the Coalition of Environmentally Responsible Economies, then led by Rev. Robert Massie, and the Tellus Institute, of which GRI developed from a project initiated by Dr. Allen White.[44] GRI soon moved its headquarters to Amsterdam, and expanded its scope beyond environmental reporting to social reporting as well. It has been developed by, and is used by, thousands of companies, governments, and non-profit entities around the world to report on the economic, environmental, social, and governance aspects of their organization and actions.[45]

The goal of GRI is to provide a standard, high-quality framework for organizations to use and adapt for purposes of their "triple bottom line" reporting, which is reporting on their most "critical impacts—positive or negative—on the environment, society and the economy."[46] The framework includes two parts: "general standard disclosures" for all organizations, and "specific standard disclosures" based on the industry and social and environmental risks and

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39. For a discussion of this requirement in the U.K., and other early social and environmental disclosure requirements, *see* Cynthia A. Williams & John M. Conley, *An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493 (2005) (arguing that differences in the "shareholder wealth maximizing" norm between the U.K. and U.S. were substantial enough to cast doubt on the idea of an "Anglo-American corporate governance" system).

40. *See* Initiative for Responsible Investment, *supra* note 35.

41. *See* KPMG, *supra* note 20, at 11.

42. *See id.* at 10.

43. *See* "Our History" *in* GRI, GRI: EMPOWERING SUSTAINABLE DECISIONS, OUR FIVE-YEAR FOCUS 2015-2020, https://www.globalreporting.org/information/news-and-press-center/Documents/GRI-Five-year-focus-2015.pdf.

44. *See* David Levy, Halina S. Brown, & Martin de Jong, *The Contested Politics of Corporate Governance: The Case of the Global Reporting Initiative,* 49 BUS. & SOC'Y 88, (2010) (discussing role of Massie and White in creating GRI).

45. *See Global Reporting Initiative,* http://www.globalreporting.org.

46. *Id.*

opportunities in that particular industry. The general standard disclosures comprise seven categories, those being "strategy and analysis; organizational profile; identified material aspects and boundaries; stakeholder engagement; report profile; governance; and ethics and integrity."[47] The specific standard disclosures include Disclosure on Management's Approach (DMA) to identifying and managing its material Aspects; and then ninety-one potential indicators describing various social, economic and environmental material Aspects that might be affected by a company's operations. Sector specific frameworks are being developed to identify specific standard disclosures for airport operators; construction and real estate; electric utilities; event organizers; financial services; food processing; media; mining and metals; NGOs and oil and gas. New to G4, organizations are asked to identify the boundaries they are using in defining the scope of reporting, recognizing that the boundaries of an organization's effects can be both within its organization and outside of its organization, such as in its supply chain or in the communities where it operates.

B. Analysis

In 2015, GRI articulated five premises that inform its work and strategy for the subsequent five years. Those are:

"We believe:

- In the power of a multi-stakeholder process and inclusive network
- Transparency is a catalyst for change
- Our standards empower informed decision making
- A global perspective is needed to change the world
- Public interest should drive every decision an organization makes"[48]

That producing GRI reports has not necessarily led to more systematic consideration of sustainability issues in corporations' decision-making is implicit in GRI's observation as part of its five-year plan that it is now time to move beyond reporting. As it states:

> Our focus has always been on the reporting process and the value of the information that comes from it. While the sustainability report remains a crucial output of the reporting process, we must now move beyond the report itself to ensure that decision makers have access to the high quality and reliable information they are increasingly demanding . . . .
>
> But for this information to truly empower sustainable decisions in every organization, it must be more accessible, comparable and available in real-time.[49]

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47. *See* GRI, *G4 FAQS*, https://www.globalreporting.org/information/FAQs/G4FAQ/Pages/default.aspx.

48. *See* GRI, GRI: EMPOWERING SUSTAINABLE DECISIONS; OUR FIVE-YEAR FOCUS 2015-2020, https://www.globalreporting.org/information/news-and-press-center/Documents/GRI-Five-year-focus-2015.pdf.

49. *Id.*

While comparability of information has been an articulated goal for GRI's triple bottom line disclosure, just as it is for financial disclosure, in fact GRI's framework allows for quite non-comparable reports among organizations. This is because organizations can choose to report in accordance with GRI's G4 framework based on one of two options, just as they've been able to choose their approach to reporting in prior versions of GRI. "Core" reporting requires a generic DMA (Disclosure of Management's Approach) and use of at least one indicator for each material Aspect of an organization's operations; while "comprehensive" reporting requires a generic DMA and use of all indicators that GRI has identified for each material aspect. While organizations are encouraged to report on indicators that give a comprehensive and balanced view of material aspects, there is no enforcement mechanism to advance that normative suggestion. As a result, even where companies are in the same sector, their reports cannot easily be compared.

One study comparing GRI reports in the automotive industry sought to evaluate whether the information being produced by GRI reporters can be used in the way GRI suggests—to affect organizations' decisions, to promote sustainability and to empower outside stakeholders—and concluded as follows:

> In sum, our brief analysis of actual GRI reports suggests that even though all [automotive] companies claim full coverage of the GHG indicators, the information they provide is of limited practical use. A look at other indicators confirms this finding. Thus, quantitative data are not always gathered systematically and reported completely, while qualitative information appears unbalanced and often fails to include a credible assessment of the sustainability impacts of various measures taken by a reporting organization. These findings are consistent with a GRI study on human rights reporting, according to which only [seven] percent of all reports examined complied with the information requirements of quantitative human rights indicators.[50]

Other academic studies have observed similar problems with the comparability of the information being reported.[51]

As also stated in its 2015 five-year strategic plan, an additional premise underlying GRI's sustainability reporting is that it "ensures organizations consider their impacts on these sustainability issues . . . ."[52] This claim has also been subjected to academic analysis, and was found wanting. Thus, Markus Milne, Amanda Ball, and Rob Gray, a pioneer in social accounting, surveyed the existing literature on

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50. Klaus Dingwerth & Margot Eichinger, *Tamed Transparency: How Information Disclosure under the Global Reporting Initiative Fails to Empower*, 10:3 GLOBAL ENV. POL. 74, 88 (2010), *citing* GLOBAL REPORTING INITIATIVE AND ROBERTS ENVIRONMENT CENTER, REPORTING ON HUMAN RIGHTS: A SURVEY CONDUCTED BY THE GLOBAL REPORTING INITIATIVE AND THE ROBERTS ENVIRONMENT CENTER, (Claremont McKenna College 2008).

51. *See, e.g.,* Levy, Brown, & de Jong, *supra* note 44; Carl-Johan Hedberg & Fredrik von Malmborg, *The Global Reporting Initiative and Corporate Sustainability Reporting in Swedish Companies,* 10 CORP. SOC. RESP. & ENVTL. MGMT. 153, 163 (2003).

52. *See* GRI, *supra* note 48.

GRI as a preeminent example of triple bottom line reporting, and evaluated the potential of GRI reports to promote actual sustainability. Their evaluation found serious gaps.[53] As summarized in their research from 2012-13:

> The quality—and, especially, the *completeness*—of many TBL [triple bottom line] reports are not high. Despite increased awareness, recent reporting remains little better than that of the early European pioneers in the early 1990s. And with a few notable exceptions, the reports cover few stakeholders, cherry pick elements of news and generally ignore the major social issues that arise from corporate activity such as lobbying, advertising, increased consumption, distributions of wealth and so on. The reports often refer to "sustainability" and "sustainable development," but virtually unaddressed are issues of equity and social justice, and completely unaddressed are issues of the scale of development, limits and constraints to that development, and future generations: issues we identified in the previous section [of this Article] as core to sustainability concerns.[54]

Milne, Ball and Gray concluded that "current efforts of environmental or sustainability reporting are woefully inadequate means on which to form ideas about 'success' in terms of the ecological logic needed to reorganise and 'control' economic activity."[55] In fact, their conclusion is that triple bottom line reporting may actually impede sustainability, because companies and possibly NGOs are putting so much emphasis on reporting, which may amount "to little more than soothing palliatives that, in fact, may be moving us towards greater levels of unsustainability" by permitting business as usual.[56]

These negative assessments may suggest that GRI has not achieved very much, a suggestion that is inaccurate. GRI at least has the ambition of promoting systematic, useful sustainability reporting by emphasizing the disclosure of *objective facts* about environmental, economic and social performance,[57] rather than encouraging soft statements about commitments and management approaches. As a normative commitment, that is important, presumably having an influence on other disclosure initiatives. As set out above, GRI standards are being reflected in some domestic laws and stock exchange listing requirements, which suggests that GRI's technical expertise in developing useful ESG metrics is being recognized. Moreover, its adoption by thousands of companies, including eighty-two percent of the global 250 companies, shows that it is the benchmark voluntary standard for ESG disclosure. Such diffusion at least suggests a realistic potential for continuous improvement to advance GRI's own strategic goals of greater comparability

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53. Markus J. Milne, Amanda Ball & Rob Gray, *Wither Ecology? The Triple Bottom Line, the Global Reporting Initiative, and the Institutionalization of Corporate Sustainability Reporting,* 188(1) J. BUS. ETHICS 1 (2013).

54. *Id.* at 9 (citation omitted).

55. *Id.* at 16.

56. *Id.* at 17.

57. *See* Peter M. Clarkson, Yue Li, Gordon D. Richardson & Florin P. Vasvari, *Revisiting the Relation Between Environmental Performance and Environmental Disclosure: An Empirical Analysis,* 33 ACCT., ORGS. & SOC'Y 303, 309 (2008).

between different companies' sustainability analyses and greater depth of coverage within companies. Yet, in order for GRI disclosure to ultimately to have a positive effect on company action it must be true that companies manage what they measure, not only for financial data but for ESG data as well. We now turn to that question.

III. DISCLOSURE STRATEGIES GENERALLY

With respect to ESG disclosure, significant questions remain about the accuracy of the oft-repeated maxim that "you manage what you measure." With financial disclosure, such as results of operations, or earnings per share, tens of thousands of securities analysts and tens of thousands of security firms' computers stand ready to absorb the information when it is disclosed, use it in calculations and algorithms, and make decisions about buying, selling, holding, hedging, limiting, splitting, aggregating and generally transacting in securities and derivatives on the basis of the information. Thus, as we know, companies do manage what they measure, sometimes even making decisions to sacrifice longer-term, net positive present value transactions in order to show current quarter financial results in line with analysts' expectations,[58] referred to as "earnings management." US academic research has found that pressure on corporate managers to deliver short-term investment results has become so strong that nearly eighty percent of chief financial officers report they would sacrifice future economic value to manage short-term earnings so as to meet investor expectations.[59]

Moreover, much of this financial disclosure in the U.S. is required by Securities and Exchange Commission (SEC) regulations. Companies cannot leave out bad news, as they can with voluntary ESG disclosure, and so attention gets paid to managing bad financial news. Even where not legally required, such as some forward-looking statements and financial projections, pressures by market participants for financial projections and other future-looking information make issuing such statements a strongly-observed norm by close to all companies reporting in the U.S. and trading on its exchanges.

But what evidence is there that ESG disclosure has a similar external effect, sending thousands of analysts and computers into action, and thus a similarly powerful internal effect on managers' time and attention? In short, what evidence is there of the core corporate accountability premise that collecting, analyzing, and disclosing greater ESG information will cause managers to pay more attention to these matters, that they will "manage what they measure?"

58. For a concise discussion of concerns about this phenomenon, *see* CLAIRE A. HILL & BRETT H. MCDONNELL, SHORT AND LONG TERM INVESTORS (AND OTHER STAKEHOLDERS TOO): MUST (AND DO) THEIR INTERESTS CONFLICT?, (U. Mn. Legal Stud. Res. Paper No. 15-37 2015), http://www.ssrn.com/abstract=2699324.

59. John Graham, Campbell Harvey & Shivaram Rajgopal, *Value Destruction and Financial Reporting Decisions*, 62 FIN. ANALYSTS' J. 27, 27-29 (2006), http://ssrn.com/abstract=871215 (finding that some of the actions that these managers say they would take to meet analysts' expectations include delaying long-term investments, reducing research and development expenditures, or eliminating planned marketing campaigns).

The answer, so far as this author can determine, is that there are very few empirical studies of the accuracy of that premise. Empirical papers showing important external, financial effects of corporate sustainability initiatives (such as lower costs of capital, higher valuations, and lower stock-price volatility) are abundant, and many of those studies evaluate companies' commitments to sustainability through their disclosure.[60] Thus, empirical papers about investors' reactions to expanded ESG disclosure are readily available.[61] Given that financial markets do react to companies' ESG disclosure, there is reason to believe that some companies might well manage what they measure in this realm, and might particularly start to do so in regions such as the EU where mandatory ESG disclosure requirements are coming on-line.[62]

Regarding the internal effects of voluntary ESG disclosure, though, this author could find few empirical papers. Academic pioneers publish case studies about the potential for positive internal effects of expanded disclosure,[63] as do accounting firms that have a business interest in promoting expanded disclosure, such as KPMG.[64] There is some evidence that firms with better environmental performance disclose more environmental information, but that does not indicate that the disclosure itself causes the better environmental performance.[65] If anything, the authors' analysis seems to indicate that causation goes the other way, that is, better environmental performers decide to disclose more, including emphasizing objective

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60. An excellent overview of this literature is found in GORDON L. CLARK, ANDREAS FEINER & MICHAEL VIEHS, FROM THE STOCKHOLDER TO THE STAKEHOLDER: HOW SUSTAINABILITY CAN DRIVE FINANCIAL OUTPERFORMANCE (2015) (overview of empirical studies investigating the relationships between corporate sustainability initiatives and better financial performance, lower stock market volatility, higher valuations, lower costs of capital, and so forth).

61. *See id.*

62. *See* Jody Grewal, Edward J. Riedl & George Serafeim, *Market Reactions to Mandatory Nonfinancial Disclosure* (Sept. 9, 2015), http://www.ssrn.com/abstract=2657712. That paper reviews prior findings about the external effects of disclosure, and also identifies three studies of the operational (internal) effects of mandatory disclosure, which papers are discussed below. The paper's main contribution is to evaluate the equity market reaction to the EU's new (as of 2014) mandatory ESG disclosure requirements, and finds, in general, a statistically significant negative reaction, which is more pronounced with respect to companies that did not engage in ESG disclosure prior to the requirement coming into effect. The authors interpret the generally negative market reaction to be an expression of investors' views that the cost of complying with the new disclosure obligations outweigh the benefit of the new information that will be brought to the market.

63. Two such expanded disclosure pioneers are Bob Eccles, until recently a professor at Harvard Business School, and Allen White, co-founder of the GRI. *See* ROBERT G. ECCLES & MICHAEL P. KRZUS, INTEGRATED REPORTING FOR A SUSTAINABLE STRATEGY (John Wiley & Sons 2010); *Allen L. White, New Wine, New Bottles: The Rise of Non-Financial Reporting, A Business Brief by Business for Social Responsibility*, June 20, 2005, http://www.businesswire.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/services/ir_and_pr/ir_resource_center/editorials/2005/BSR.pdf.

64. *See, e.g.,* https://home.kpmg.com/xx/en/home/insights/2013/04/integrated-reporting.html (discussing Integrated Reporting initiative) (last visited Jan. 21, 2016).

65. *See* Clarkson, Li, Richardson & Vasvari, *supra* note 57, 319-20 (using voluntary environmental disclosure and evaluating environmental performance using Toxic Release Inventory data, finding a statistically significant positive relationship between superior environmental performance and more environmental disclosure of facts about a company's record).

facts about their performance (such as percentages of toxic releases per dollar of profit).[66]

This author could find little empirical testing of the underlying accountability premise that collecting, collating and disclosing ESG information itself causes important changes within companies, such that those companies start to improve their ESG performance. One recent article discussing the internal, transformative effects thought to be associated with greater information collection and disclosure was Eccles and Serafeim's *Corporate and Integrated Reporting: A Functional Perspective*, which discusses both the external "information function" of ESG disclosure, and the internal "transformative function."[67] That article discusses the relatively new (since 2002) integrated reporting concept, <IR>, which incorporates financial and ESG reporting into one report using a framework evaluating the six types of capital every company uses to create value, those being financial, manufactured, natural, intellectual, human, and social and relationship capital. While the article discusses the transformative potential within the firm from the cross-functional collaborations and "joined-up thinking" necessary to produce an integrated report, the authors concluded (in 2014) that:

> While it is clearly too soon to claim that many companies and investors are reaping the information and transformation benefits of integrated reporting, that is clearly the intent of companies that are its early practitioners, people who have written on the subject, and the new <IR> framework.[68]

Eccles and Serafeim then use a case study approach to compare two companies' integrated reports, focusing on the external, informational function of the reports.[69] Ultimately the article concludes that without a mandatory regulatory framework monitoring and enforcing regulatory standards to ensure accuracy, comparability and reliability, integrated reporting, like sustainability reporting generally, will be limited in its usefulness.[70]

It could be that this author's inability to find quantitative empirical work evaluating the maxim "you manage what you measure" in the ESG context is simply a function of inadequate research skills, although the author's informal efforts to research the topic have also failed.[71] At the least, one can reasonably conclude that

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66. *See id.*

67. Robert G. Eccles & George Serafeim, *Corporate and Integrated Reporting: A Functional Perspective*, *in* CORPORATE STEWARDSHIP: ACHIEVING SUSTAINABLE EFFECTIVENESS (Susan Albers Mohrman, James O'Toole &Edward E. Lawler III eds., Greenleaf Publishing 2015), http://www.ssrn.com/abstract=2388716.

68. *Id.* at 12. This author is among the "people who have written on the subject," as is Bob Eccles himself. *See* Eccles & Krzus, *supra* note 63; Cynthia A. Williams & John M. Conley, *The Social Reform of Banking*, 39(3) J. CORP. L. 459 (2014).

69. *Id.* at 15.

70. *Id.* at 18.

71. The author is a member of various listservs related to sustainability, sustainable financial markets, and socially responsible investment, and sent queries to those lists after being unable to find empirical studies. The author also sent queries to researchers known to be interested in the topic of

there is not a lot of quantitative empirical work testing the premise in the ESG context. As Delmas and Lessem have stated in 2014 regarding environmental disclosure policies, "[d]espite the popularity of environmental information policies, we still have little understanding of their effectiveness."[72] Certainly there is not a readily available body of evidence showing that companies are making significant improvements in their social and environmental performance because they have been engaging in voluntary ESG disclosure pursuant to GRI or any other framework.

IV. MANDATORY REGIMES AND THE POWER OF LEGALITY

A. Disclosure Regimes

It may be that the problem with finding powerful indicators of internal transformation from ESG disclosure is thus that most of the regimes are still voluntary. Although disclosure frameworks like the GRI request that companies provide a balanced view of company results, companies can choose whether to engage in the ESG disclosure project, when to disclose, what to disclose, whether to discuss negative facts, trends, or data, what to emphasize, and what to ignore. A number of studies of specific, *mandatory* non-financial disclosure regimes have found operational effects. For instance, Bennear and Olmstead found that required disclosure to water customers in Massachusetts of companies' water quality results and violations of safety standards produced between a thirty- and forty-four-percent reduction in violations by large companies, and a reduction in severe violations of between forty- and fifty-seven-percent.[73] Similarly, Jin and Leslie found that when restaurants in Los Angeles County were required to post their health and hygiene inspection results in the window of the restaurant, subsequent health inspection scores increased by about five percent, the revenue of restaurants with an "A" grade was about five percent higher than those with a B, and the number of food-borne hospitalizations in the area decreased by twenty percent, which the authors interpreted as showing that restaurants were making quality improvements.[74] The Toxic Release Inventory, which requires companies to disclose releases to air, ground and water of identified toxins, has been credited with substantial reductions

ESG disclosure. There were no quantitative empirical studies of the "internal transformative effects" of expanded disclosure brought to the author's attention through these methods, although there were many studies showing external effects brought to the author's attention.

72. Magali A. Delmas & Neil Lessem, *Saving power to conserve your reputation? The effectiveness of private versus public information,* 67 J. ENVTL. ECON. & MGMT. 353, 354 (2014) (providing individual feedback to college students on their energy use in their dorms had no effect on reducing energy use until the results of each room's energy use were publicly posted, at which point high-energy users reduced their energy use by 20%).

73. *See* Lori S. Bennear & Sheila M. Olmstead, *The Impacts of the "Right to Know": Information Disclosure and the Violation of Drinking Water Standards*, 56 J. ENVTL. ECON. & MGMT. 117, 129 (2008).

74. *See* Ginger Zhe Jin & Phillip Leslie, *The Effect of Information on Product Quality: Evidence from Restaurant Hygiene Grade Cards*, 118(2) Q.J. ECON. 409, 410 (2003).

in toxic emissions from industrial plants,[75] although questions remain about the accuracy of those reported reductions.[76] And a recent study of required mine safety disclosure enacted as part of Dodd-Frank showed a decrease in mining related citations of eleven percent and a decrease in mining injuries of thirteen percent as a result of the disclosure, an effect on company operations mediated through the stock market.[77]

Thus, what evidence there is of the power of non-financial disclosure is consistent with what we've seen in the financial disclosure arena: to have operational effects, disclosure must be mandatory (so that disclosers cannot be selective in what they disclose), specific, and targeted to clearly identified users. As with any regulatory regime, a disclosure regime needs to be well-designed (have intelligent metrics and proper scope), and be backed by well-resourced monitoring and enforcement in order to advance its underlying regulatory goals.[78] Analysis by Fung, Graham and Weil of eight different mandatory transparency regimes concluded that to be highly effective in advancing the goals of the regime, the regime needs to become "doubly embedded,"[79] by which they mean producing information that is valuable, comprehensible and useful to users of the information, which then cause shifts in user behavior, which then produces shifts in disclosers' behavior.[80] Applying that analysis suggests that expanded ESG disclosure has some distance to go to become broadly effective in altering corporate behavior: it must become mandatory, and then specific users such as investors or regulators must alter their behavior in ways that companies perceive as tied to the information being disclosed so that market or policy signals are amplified. This evaluation is also consistent with what Levy, Brown and de Jong concluded was one of the reasons that GRI has "stalled:" that "[t]here is widespread agreement that non-financial reports are rarely studied in any detail."[81]

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75. *See* MARY GRAHAM, DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM 17 (Brookings Institution Press 2002) (TRI "recognized as one of the nation's most successful environmental regulation and was widely credited with encouraging target companies to cut toxic release by nearly 50 percent in ten years.").

76. *See* ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 86 (Cambridge University Press 2008) (noting concerns with inaccurate data, possibilities that some reductions were an artifact of differences in reporting procedures).

77. *See* Hans B. Christensen, Eric Floyd, Lisa Yao Liu & Mark Maffett, *The Real Effects of Mandatory Dissemination of Non-Financial Information Through Financial Reports,* at 3, http://www.ssrn.com/abstract=2680296 (last visited Apr. 19, 2016).

78. *See* GRAHAM, *supra* note 75, at 5.

79. FUNG, GRAHAM & WEIL, *supra* note 76, at 68.

80. *See id.* at 62-66. By that analysis, Fung et. al. concluded that corporate financial disclosure by publicly-traded companies, restaurant hygiene disclosure in Los Angeles, and the Community Reinvestment Act disclosure of mortgage rates according to race, gender and income are highly effective disclosure regimes, all having produced information that is useful to the relevant users, and those users of the information having changed their behavior, thus producing incentives for the reporters to change their behavior. *Id.* at 82-84.

81. Levy, Brown & de Jong, *supra* note 44, at 22. Other reasons the authors discuss for GRI's current "stall," based on qualitative research, is that the business case for expanded ESG disclosure,

B. Transnational Corporate Responsibility Regimes

Broadening the focus of analysis from voluntary, transnational transparency regimes to voluntary transnational corporate social responsibility (CSR) regimes generally, of which ESG disclosure is a sub-set and key mechanism, we see a bewildering proliferation of voluntary initiatives that seek to set substantive standards and that are, in many instances, shaping norms of responsible corporate behavior. This CSR proliferation is one example of the regulatory terrain that has produced what Shaffer aptly calls "a jungle" of literature[82] describing, theorizing and empirically examining these different transnational regulatory approaches.[83] In the CSR terrain alone we observe, broadly speaking, public regulatory networks, public/private co-regulation, industry self-regulation, NGO collaborative regulation, and multi-lateral and multi-sectoral regulation.[84] Organizations such as the Corporate Responsibility Association and the Corporate Social Responsibility Officers Association have been established to professionalize the role of corporate responsibility managers and to provide networks of such individuals across companies and industries,[85] and businesses that produce conferences, websites and magazines to promote the corporate responsibility trend have proliferated.[86]

Over the last two decades, scholarship on these new forms of regulation has also proliferated, understandably, given the fascination of the new, under such names as "new governance," "global administrative law," "soft law," "reflexive law," "responsive regulation," and so on.[87] As Professor Orly Lobel discussed in an

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that it would lead to material financial benefits, which had been emphasized by GRI to produce corporate take-up, has not been substantiated in businesses' experience (*id. at* 21-22); participation by labor, NGOs and financial analysts in GRI has either declined (labor and NGOs) or failed to materialize (financial analysts) (*id. at* 23-24); and socially-responsible investment firms, which might be expected to be the primary users of GRI reports, have developed their own, proprietary data-bases of information that is more specific and useful than that produced by GIR reports (*id. at* 24-26). Thus, the authors conclude, "[t]he stakeholders who have derived the most tangible economic benefits from non-financial reporting are the auditors, consultants and certifiers of corporate social performance reports." *Id.* at 26.

82. Gregory Shaffer, *Theorizing Transnational Legal Ordering,* ANN. REV. L. & SOC. SCI. 2 (forthcoming 2016).

83. Peer Zumbansen does a masterful job of summarizing and analyzing that literature. *See* Peer Zumbansen, *Where the Wild Things Are: Transnational Legal Ordering, the Public/Private Distinction and the Western Legal Imagination* (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723990, (particularly 13-14 for a summary of some of the different frameworks that have been used to try to understand the proliferation of hybrid public/private regimes).

84. For a description of some of the most prominent transnational regulatory initiatives in the corporate responsibility field, *see* Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Georg Ringe, eds.) (forthcoming 2016).

85. *See* Corporate Responsibility Association at www.corporateresponsibilityassociation.org and Corporate Responsibility Officers Association at www.croassociation.org.

86. For an early, qualitative research report on this trend *see* John M. Conley & Cynthia A. Williams, *Engage, Embed and Embellish: The Theory and Practice of Corporate Social Responsibility*, 31 J. CORP. L. 1 (2005).

87. For an overview of the literature, including sources for these and other terms for new regulatory forms, *see* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 262 (2004).

insightful early analysis, these regulatory forms have been based upon participation and partnership between public and private entities; collaboration among multi-stakeholder groups; diversity and competition between regulatory regimes; better integration of related policy domains; and the potential for regulatory and quasi-regulatory flexibility, adaptability and dynamic learning.[88]

And yet, scholarly fascination with these new, often voluntary, and certainly softer transnational regulatory forms may have allowed our collective attention to be diverted while old school, so-called "command and control", domestic hard law[89] has started to be systematically undermined by the expansion since the 1990s of large parts of the world covered by bilateral investment treaties (BITs) that include compulsory investor-state arbitration provisions.[90] Of particular concern, investor-state arbitration clauses are also included in current versions of treaties such as the Transatlantic Trade and Investment Partnership (TTIP) and Trans-Pacific Trade Treaties being negotiated in Spring of 2016 as this essay is being written. By virtue of these provisions, as they've been interpreted by private arbitrators, any investor, typically a multi-national enterprise, can challenge in private arbitration any legislation, regulation or even court decision that the investor can argue has undermined its future profits, without the possibility of public judicial review.[91] As leading scholar Professor Gus van Harten has written, these BITs and other treaties such as NAFTA give private arbitrators the power to "decide upon the permissible scope of public powers to tax businesses, deliver public services, establish regulatory standards, control land use, and so on."[92] The potential for this litigation may also give governments pause when new regulations are being considered, as uncovered by Professors Van Harten and Scott in qualitative research on the regulatory processes in Ontario's trade and environment ministries.[93] That local regulators take the potential for investor/state arbitration into account when considering new

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88. *Id.*

89. The term "command and control" as used to describe old governance forms of law often has a demeaning quality about it, in this author's view, as the term is frequently used at least implicitly in a critical sense, and in contrast to the presumably more flexible, pragmatic forms of new governance. As argued by Joel Bakan, this argumentative contrast can make invisible both the ways in which corporations use "old governance" to advance their private interests, and can also conceptually undermine the importance of "command and control" approaches to advance the public interest and (sometimes) limit the harms private actors can cause. *See* Joel Bakan, *The Invisible Hand of Law: Private Regulation and the Rule of Law*, 48 CORNELL INT'L L.J. 279 (2015) (arguing that transnational private regulatory regimes cannot properly be understood as responding to a lack of domestic legal capacity in light of globalization, given the various ways in which corporations use domestic law to further their economic interests).

90. *See* VAN HARTEN, SOVEREIGN CHOICES, *supra* note 15 for a thorough discussion of this problem. For a short introduction showing the expansion of investor-state arbitrations since the 1990s, *see* Van Harten, *Private Authority*, *supra* note 15.

91. *See* Van Harten, *Private Authority*, *supra* note 15, at 612-13.

92. *Id.* at 608.

93. *See* Gus Van Harten & Dayna Nadine Scott, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada*, http://www.ssrn.com/abstract=2700238 (describing results of interview-based study of how regulators within Ontario's trade and environment ministries think about potential trade and ISDS litigation when considering new regulations).

regulations suggests that investor/state dispute settlement procedures also constitute an emerging transnational legal order ("TLO")—one that involves contestation at local and state levels, and one that is having effects on local, state and national laws and institutions.

The scope of the investor/state arbitration system as an emerging TLO bears further elaboration. Its most problematic implication is that public, sovereign processes that seek to assert some social control over market forces, including by improving labor conditions, raising minimum wages, protecting consumers or addressing environmental problems, can be challenged by any company ("investor" in the treaties' terms) in any country that has a BIT that generally consents to investor-state compulsory arbitration. Today there are over 2,800 BITs in place, the first having been signed by Turkey and Germany in 1959; but it is only since the late 1990s that companies have started aggressively to use these treaty provisions to challenge state actions around the world.[94] It is estimated that there are now four-hundred active arbitrations on-going.[95]

Two examples of this litigation will illustrate some concerns with these challenges to state regulatory authority. Because of the problems in nuclear power plants in Fukushima, Japan, after the earthquake and tsunami in 2011, Germany closed its oldest nuclear plants immediately, as part of a comprehensive plan to phase out nuclear power between 2011 and 2020. This decision by the German government had the effect of closing even those plants it had in 2010 agreed to allow to have an "extended lifetime" beyond what had been the projected (and designed) end of operation for those plants. A Swedish energy company, Vattenfall, and its German subsidiary, sued Germany in 2012 for €3.7 billion using the investor-state dispute settlement (ISDS) procedure because two of Vattenfall's oldest plants were shut down as a result of this decision—even though one of those plants (Krummel) had not been in operation since 2007, given safety concerns, and even though Vattenfall's own financial statements in 2011 had estimated its losses as €1.1 billion in reaction to the German government's decision.[96] Another recent example is TransCanada's lawsuit against the U.S. for $15 billion in reaction to the Obama administration's decision not to give a permit to the Keystone XL pipeline, which would have carried oil from the Canadian tar-sands to Nebraska, in order to connect to a pipeline to Louisiana for refining and shipment overseas.[97]

Whether Vatenfall's or TransCanada's particular action is right or wrong, or the damages claim inflated or not, is not a question this author has a particularly

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94. *See* Nathalie Bernasconi-Osterwalder & Rhea Tamara Hoffman, *The German Nuclear Phase Out Put to the Test in International Investment Arbitration?,* 2 (2013), https://www.tni.org/files/download/vattenfall-icsid-case_oct2013.pdf. *See also* Van Harten, *Private Authority*, *supra* note 15, at 609-10 (data on increasing numbers of investor-state arbitrations since the late 1990s).

95. *See* Benasconi-Osterwalder & Hoffman, *supra* note 94.

96. *See id.*

97. *See* Rebecca Penty, *TransCanada Fights Keystone Denial with $15 Billion Appeal*, BLOOMBERG BUSINESS, Jan. 6, 2016, http://www.bloomberg.com/news/articles/2016-01-06/transcanada-files-suit-over-keystone-xl-will-take-writedown.

well-informed view upon. It is necessary for companies making long-term investments in infrastructure to have protections against rapid changes in the political environment that can rightly be called "expropriation" or "unfair or discriminatory treatment," and those are the protections the BITs are meant to provide. Yet, it has been argued that the concepts of "expropriation" and "unfair or discriminatory treatment" have been interpreted far too broadly by many of the private arbitrators,[98] and that the countervailing public interests in the challenged regulations interpreted too narrowly, undermining domestic regulatory capacity. Certainly TransCanada's argument that the Keystone XL denial was based on "political" reasons and not the merits of the application[99] supports the view that these investment treaties can undermine domestic, sovereign legal capacity. It should be unproblematic for countries to make decisions for political reasons such as to advance environmental values or to meet the country's climate change commitments made in international agreements, both of which the Obama administration articulated as rationales for its rejection of the Keystone XL.[100]

The concern that the investor/state arbitration system undermines democratic values of rule of law, transparency and accountability has not only been discussed by academics and NGOs, but has been examined within global policy fora such as the U.N.'s Human Rights Council and the Council of Europe. In a 2015 report to the U.N. Human Rights Council, an Independent Expert given a mandate to study the matter, Professor Alfred-Maurice de Zayas, stated that "[m]any observers have expressed concern about certain investor–State dispute settlement arbitrations that have effectively overridden the State's fulfilment of its function to regulate domestic labour, health and environmental policies, and have had adverse human rights impacts, also on third parties, including a 'chilling effect' with regard to the exercise of democratic governance."[101] Ultimately the Independent Expert concluded that these concerns are well-founded, indeed that the situation presents an "extraordinary problem,"[102] and he proposed that the validity of BITs and free-trade agreements should be tested under the rules of the Vienna Convention on the Law of Treaties,[103] and under states' Constitutions,[104] with an expectation that they would not be upheld. As he concluded about the latter point, it is unlikely under the Constitutions of most states that a state can "waive its ontological function to legislate in the public interest."[105] Professor de Zayas gave similar testimony in 2016 to a Parliamentary Assembly Committee on Legal Affairs and Human Rights of the

98. *See* Van Harten, *Private Authority*, *supra* note 15, at 27.

99. Penty, *supra* note 97.

100. *See id.*

101. Alfred-Maurice de Zayas, *Report of the Independent Expert on the promotion of a democratic and equitable international order,* Human Rights Council, A/HRC/30/44 (14 July 2015), ¶ 5, http://ohchr.org /EN/HRBodies/HRC/RegularSessions/Session30/Pages/ListReports.aspx.

102. *Id.* ¶ 41.

103. *Id.* ¶ 42

104. *Id.* ¶ 44.

105. *Id.*

Council of Europe, which is examining investor/state dispute settlement procedures for a report to be issued in 2017.[106]

What is worth emphasizing at a general level is that Shaffer and Halliday's framework of transnational legal orders brings attention to a key issue: how do particular transnational frameworks "touch down" in legal processes, contracts, or proceedings, which by definition will involve local specification and an attention to hard law and legal power; and what are the conflicts and contestations that the transnational regime engenders in the process? As they state the point, "key to the TLO framework is 'the production of *order*, or, in our terms, the *normative settlement* of law," a process that involves "the *institutionalization* of a TLO, which occurs multi-directionally and recursively up from and down to the national and local levels."[107] It is thus both a theoretical and analytic framework, but also a call for empirical evidence that can be brought to bear to understand, among many other questions, the interaction of specific transnational regulatory regimes and domestic (or even municipal) law in specific instances.

In the corporate responsibility context, private, voluntary, soft law regimes are proliferating, in many heterogeneous forms. A recent report commissioned by one of the EU's largest conservation organizations, the Royal Society for the Protection of Birds, suggests that most (eighty-two percent) of the 161 voluntary regimes it surveyed are not effective, though, either not being ambitious enough, not achieving their ambitions, even if ambitious, or not having enough industry take-up to make a serious difference.[108] This finding is provocative, but invites systematic evaluation of how individual trans-regulatory initiatives fare, and under what conditions might we expect such CSR regimes to be effective.[109] Shaffer and Halliday's work suggests individual regimes need to be the focus of analysis, and in specific, focuses analysis on how such regimes "touch down." Which CSR regimes, if any, are powerfully effective in shaping company behavior? Which, if any, are ambitious enough to meet the policy challenges that gave rise to the regime, that achieve their ambition, and that have substantial industry take-up? And if such individual initiatives do exist, this author would add that it is important to evaluate whether there are collisions

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106. *See* Press Release, U.N. Human Rights Office of the High Commissioner, *Investor-State Dispute Settlement Undermines Rule of Law and Democracy, U.N. Expert Tells Council of Europe*, (Apr. 19, 2016), http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19839&LangID=E.

107. TRANSNATIONAL LEGAL ORDERS, *supra* note 13, at 5.

108. *See* D. McCarthy & P. Morling, *Using Regulation as a Last Resort? Assessing the Performance of Voluntary Approaches,* ROYAL SOCIETY FOR THE PROTECTION OF BIRDS (2015), https://www.rspb.org.uk/Images/usingregulation_tcm9-408677.pdf.

109. There is some excellent empirical work on individual regimes, but there needs to be much more, including evaluations of effectiveness. *See, e.g.,* Colin Scott, Fabrizio Cafaggi & Linda Senden, eds., *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates*, 38(1) J.L. & SOC'Y 1 (2011) (introducing empirical studies of regimes in food, security, and finance, and including evaluations of legitimacy, enforcement, and efficacy); Erroll Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, 17 EUR. J. INT'L L. 47 (2006) (discussing Forest Stewardship Council in forestry); Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297 (2007) (discussing supply chains and private regulation).

between the apparent progress being achieved by the regime, and challenges in the same field to domestic regulation enabled by investor-state dispute settlement processes, which is itself a rapidly-developing TLO providing legal protections for investors.

The context of looking at "collisions" needs both a global and local focus, since investor-state dispute procedures are not the only way in which some companies are undermining domestic law. Professor John Coates has collected data showing that half of First Amendment cases in the United States today are used to defend corporate interests and deflect regulation, particularly required disclosure, which trend in the case law, he concludes, shows that "in aggregate, [these cases] degrade the rule of law, rendering it less predictable, general and clear. This corruption risks significant economic harms in addition to [risking] the loss of a republican form of government."[110] Nor is the "collision" between transnational private regulation and investor-state dispute settlement procedures the only way private regulation has been incompletely understood. As Professor Joel Bakan argues, transnational private regulatory regimes cannot fully be understood as responding to a lack of domestic legal capacity in light of globalization, as they are often conceptualized, given the various ways in which corporations use domestic law to further their economic interests.[111] In other words, Professor Bakan argues, it is not a lack of domestic legal capacity that gives rise to lacunae that private transnational regimes address, but rather decisions by domestic legislators not to use their legislative powers in robust fashion to address human rights, consumer protection, environmental concerns, or labor rights in an extraterritorial context that give rise to a need for private transnational regimes.

V. CONCLUSION

As set out in the Introduction, my view is that the academic attention that has been paid to transnational, private, social and environmental CSR regimes (including in my own work) has been understandable and possibly even necessary: after all, this is one of the important regulatory developments that we see intensified by the processes of financialization and continuing globalization. Yet our attention to these developments has likely deflected adequate attention from the powerful ways transnational corporations are undermining and challenging domestic laws that seek to advance social and environmental goals similar to those of many of the transnational regimes we study and even celebrate.

What Shaffer and Halliday have done is provide a clear, empirically informed framework for evaluating and understanding these collisions of regimes. Which

110. John C. Coates, IV, *Corporate Speech and the First Amendment: History, Data and Implications*, 30 CONST. COMMENT. 223, 223 (2015).

111. *See* Joel Bakan, *The Invisible Hand of Law: Private Regulation and the Rule of Law*, 48 Cornell Int'l L.J. 279 (2015). *See also* Ronen Shamir, *Socially Responsible Private Regulation: World-Culture or World-Capitalism?,* 45 L. & SOC. REV. 313 (2011) (challenging the view that CSR is a response to a lack of legal capacity, but rather arguing that it is a business-created mechanism to deflect regulation).

norms, really, have settled where, in which legal processes, and why? Looking at the investor-state dispute settlement processes, being heard by private arbitrators, often in the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), with little to no public transparency, accountability or public participation, versus the world of CSR, suggests that in many cases the settled norms are not those of transnational corporate responsibility and expanded ESG disclosure. But it is not at a general level that the next investigations should occur; rather, it is regime by regime, country by country, litigation by litigation. Shaffer and Halliday and their contributing authors have shown how this can be done in their excellent book *Transnational Legal Orders*, challenging those of us interested in CSR and regulatory theory to do the same.