

University at Buffalo School of Law

## Digital Commons @ University at Buffalo School of Law

---

Contributions to Books

Faculty Scholarship

---

10-18-2024

### Transnational Private Environmental Regulation: Are States Striking Back?

Errol E. Meidinger

*University at Buffalo School of Law*, [eemeid@buffalo.edu](mailto:eemeid@buffalo.edu)

Follow this and additional works at: [https://digitalcommons.law.buffalo.edu/book\\_sections](https://digitalcommons.law.buffalo.edu/book_sections)



Part of the [Environmental Law Commons](#), and the [International Law Commons](#)

---

#### Recommended Citation

Errol E. Meidinger, *Transnational Private Environmental Regulation: Are States Striking Back?* in *Research Handbook on Environmental Regulation* (David Williamson, Gary Lynch-Wood & Agne Prochorskaite, eds., Forthcoming).

This Book is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Contributions to Books by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

# Transnational Private Environmental Regulation: Are States Striking Back?#

(Draft of October 6, 2024)

Errol Meidinger\*

Keywords: authoritarianism, corporate social responsibility (CSR), environmental certification, environmental regulation, environment/social/governance (ESG), populism, private regulation

## Abstract

Rapid global trade expansion beginning in the 1990s spawned a parallel expansion in non-state ('private') environmental regulatory (PER) programs. They issue regulatory standards, monitor and judge performance, sanction poor performance, and sometimes regulate state activities. PER programs constitute extensive and complex transnational governance agglomerations encompassing environmental certification, corporate social responsibility, and environment-society-governance programs, typically intertwined with governmental and intergovernmental regulatory programs.

Using forestry and climate change examples, this article analyzes key features of PER programs, how they may be growing empirically more binding despite their formally voluntary status, and their changing relationships with governments. It finds that PER's pull on behavior appears to be growing but is subject to new political headwinds. The EU is moving to conscript PER to its ambitious regulatory purposes while the US remains ambivalent, and China manages it in a controlled way. Most other countries either passively accept or affirmatively deploy PER programs for their policy goals.

[Note: This paper is under preparation for the forthcoming *Research Handbook on Environmental Regulation*, edited by David Williamson, Gary Lynch-Wood and Agne Prochorskaite. Length constraints and citation format, along with the expansive topic, preclude citing a full complement of the excellent literature available on this subject. This article is a foundational step for ongoing work on the implications of rising authoritarianism and populism for transnational private environmental regulation.]

## 1. Introduction

Starting in the early 1990s multiple environmental advocacy and commercial organizations built up an extensive web of loosely connected non-state ('private') environmental regulatory (PER) programs. Consisting of environmental certification (Cert), corporate social responsibility (CSR) and environment-society-governance (ESG) programs, PER generally focuses on areas where nation-state regulatory programs are palpably inadequate, often due to the transnational nature of modern supply chains, but also due to coverage gaps, inadaptability, insufficient stringency, or chronic nonenforcement of standards promulgated by governments. Though drawing upon existing policy discourse and experience, PER programs typically set their own standards and establish their own mechanisms for monitoring performance, sanctioning shortcomings, and adapting to new problems. Over

time these programs have become institutionalized and *de facto* mandatory in some instances (e.g., Meidinger 2008).

Cert programs, as exemplified by the Forest Stewardship Council in this article, typically set behavioral standards for operations in specific industries, audit their performance, 'certify' operations that meet the standards, and allow resulting products to carry labels indicating that compliance. They also usually have processes to ensure that labeled products derive from certified operations.

CSR typically involves a much broader range of corporate activities, regardless of whether they are covered by Cert programs. CSR relies on corporate reporting, wherein firms are expected to assess their environmental and social impacts, make plans to address them, and report on their performance. Corporations thus have great latitude in choosing the subjects addressed and data presented, as well as how far up and down their supply chains to report. Because they have incentives to make themselves look as good as possible, there have been numerous problems with the quality and reliability of corporate reporting, resulting in several high profile 'greenwashing' scandals noted below. In recent years many large corporations have employed external auditing companies to review their CSR reports, as ESG reporting has come to the fore.

Corporate governance became a central concern for investors following the Enron scandal in the early 2000s, and contributed the 'G' to ESG, which displaced CSR as a dominant label for corporate reporting in the 2010s. ESG reports conventionally include three 'pillars:' environmental (e.g., climate change, pollution, deforestation), social (e.g., labor rights, community protection, child labor), and governance (e.g., board composition, management diversity, CSR implementation, stakeholder responsiveness). The rapid expansion of ESG reporting has also given rise to numerous private standard setting and rating agencies, seeking to provide legibility and comparability in the field. In recent years, numerous major investors, most famously BlackRock, have made ESG practices central to their investment criteria (Fink 2020).<sup>1</sup>

Government regulatory agencies in both developed and developing countries have largely accommodated PER programs, sometimes after initially resisting or attacking them. They often coordinate with or incorporate PER programs into state regulatory policies and sometimes subject their own operations to them (Renckens 2020). Recently, however, ESG has come under attack in some Republican dominated 'red states' of the US, possibly portending challenges in the future.

The remainder of this article describes the rise of PER, its primary characteristics and variations, especially those that qualify it as 'regulation,' and its interactions with state-based regulation. It asks to what degree states may be moving to retake the regulatory terrain occupied by PER, and if so how this may be inflected by current populist and authoritarian movements.

The next section, Part 2, provides a framework for the PER discussion by proposing a conception of 'environmental regulation,' based on two criteria. The first is that it be aimed at internalizing externalities that would likely not be internalized through market transactions. The second is that it be binding in practice, and thus comparable to government regulation without being a command of government. The section proposes

viewing regulation on a compound continuum of five variables: obligation, precision, institutionalization, normative support, and social uptake.

Part 3 offers an overview of the institutional and discursive structures of PER today, using forestry and climate change as analytical arenas. It includes subsections on Cert, CSR and ESG. Together they seem to show a movement from detailed substantive requirements to a combination of general principles with increasingly detailed reporting and analytical requirements. At present, the detailed requirements are being generated largely by private actors.

Part 4 summarizes research thus far on current governmental treatment of PER. It describes recent efforts by the EU to actively mobilize PER for its larger regulatory purposes, narrower initiatives by the US and several other large trading countries, and the current complacency toward PER of many other countries.

Part 5 offers some tentative conclusions. While some governments are growing more involved in PER, their reasons for doing so vary. The EU is working to use PER to achieve more effective transnational regulation; the US is trying simply to bring ESG considerations, especially climate change, into corporate risk analysis and reporting processes; and China appears to be using it in a controlled way to pursue its environmental and trade goals but keep it in check at the same time. Rising populist and authoritarian movements pose potential challenges to the future of PER in liberal democratic regimes.

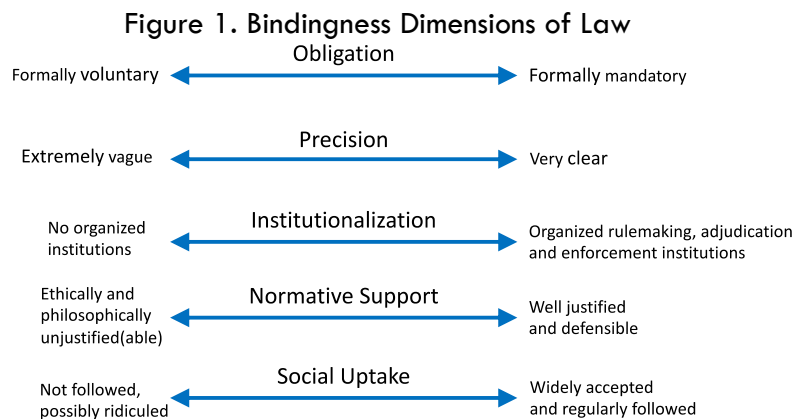
## **2. Environmental Regulation**

‘Regulation’ is often presumed to be an exclusive function of government. In the conventional legal positivist model, only a nation state, its agencies and subunits can issue binding commands. Non-state actors can encourage or incentivize or perhaps even pressure, but only states can regulate. Consequently, some of what this article analyzes as private regulation is elsewhere sometimes misleadingly labeled as ‘voluntary standard setting’ (e.g., Wijen and Chiroleu-Assouline 2019) or ‘self-regulation’ (e.g., Héritier and Eckert S. 2009). Much private regulation is not truly voluntary. Instead, it is adopted in response to pressure from actors whose interests are not included in the firm’s economic calculations, and who articulate and seek to impose standards to force changed corporate behavior. They typically argue that such standards are morally mandatory. To define such regulation as voluntary because governments are not imposing it obscures its empirical nature. Similarly, because numerous actors outside the industry are involved in setting and enforcing standards, it is not helpfully labeled ‘self-regulation.’

The idea that regulation involves imperatives is important because a core feature involves getting actors to do what they otherwise likely would not. That very often means refraining from activities a significant portion of whose costs fall on others or undertaking activities a significant portion of whose benefits go to others, and thus are not ‘internalized’ in the regulated actor’s economic calculus (e.g., Abbott and Snidal 2009). An actor like a state is often required to regulate such activities because it has the capacity to incorporate interests beyond those included market relationships and to police compliance and possibly impose sanctions for noncompliance.

While private actors have long been involved in environmental regulation to some extent,<sup>2</sup> by the mid- 20<sup>th</sup> century nation-states had claimed a virtual monopoly on the field. That began to change as it became clear in the 1980s that governments were failing to control a plethora of major environmental problems, that the problems were steadily worsening, and that they were tied to unsustainable production and consumption patterns, as widely publicized in the 1987 “Brundtland Report,” among other publications.

This article focuses on the types of non-state actions that show characteristics of binding commands, and therefore are capable of achieving internalization beyond market relationships. This approach invokes a simple and conventional definition of law, such as can be found in places as prosaic as the Merriam-Webster Dictionary: “a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority.” While a state may be a kind of ‘controlling authority,’ it is not necessarily the only kind, as we know from scholarship on legal pluralism (Tamanaha 2008). But the question remains: what makes a rule actually ‘binding?’ While legal theory provides many possible answers that cannot be addressed here, I will work with a simple, empirically oriented approach adapted from Abbott et al. (2000) for purposes of illuminating PER. As portrayed in Figure 1, it places legality on a set of continua, rather than the simple law/not-law dichotomy to which legal scholars often aspire.



The top three arrows come from the Abbott et al. article, although the third and some of the end points are renamed. Obligation refers to the imperative status of a rule, the familiar shall-should-may continuum. The more mandatory the directive, the more binding the rule is regarding referenced behavior. Note that obligations can address specific environment-affecting behaviors such as pollution emissions or, like the US Community Right to Know Act, simply require reporting on them.

Precision refers to the specificity of a rule. The more precisely it defines what must be done, the more definite the duty; the less precise, the more ambiguity there is about what behavior is required or prohibited, and the more judgment that can be exercised in deciding what is mandated. This dimension can be thought of in terms of the rules-standards-principles discussion in legal scholarship. A good example to clarify its importance can be found in the Convention on Biological Diversity (1992), one of whose key provisions is:

## Article 8. IN-SITU CONSERVATION

Each Contracting Party shall, as far as possible and as appropriate:

- (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; . . .

While the 'shall' makes it formally binding, the provision is sufficiently loose and general as to offer very little clarity on what is required of signatories. This is typical of the other 'binding' provisions of the treaty as well.

Institutionalization refers to the organizational arrangements that are in place to make and apply rules: the legislative, adjudicative, and enforcement functions as they are often categorized in western law. The assumption is that the more it is institutionalized, the more binding a rule will be in practice. A distinctive institutional feature of much present-day regulation is the assignment of regulatory responsibility to expert agencies whose duties are to use their expertise within broad legislative guidelines to assess problems, craft and implement appropriate, typically rule-based solutions, monitor compliance and overall progress, and adjust over time.

Normative support is a more complicated matter and is sometimes rejected as a criterion by legal positivists. However, there is a considerable amount of longstanding empirical evidence for the importance of this criterion (e.g., Ostrom 1990, Scott 1998, Tyler 1990), and the Nuremburg trials indicate how formal law that is inconsistent with fundamental norms may ultimately fail catastrophically. Norm articulation, elaboration, and institutionalization – largely focused on sustainability and sustainable development in the present era – has been a key focus in the formation and enactment of environmental regulation, both public and private. Normative acceptance is also a key element of customary international law, where a duty can be binding on states even if it has not been codified in a treaty.

Finally, social uptake – the degree to which a rule is accepted and followed in the relevant social arena – serves as an important indicator that a rule is effectively binding. This might seem like a circular criterion, since it can be seen as a dependent variable. However, social uptake remains an important indicator. It is recognized in both domestic and international legal systems as a sign of binding, uncodified custom. Importantly, social failure to incorporate a regulation into widespread practice is a clear signal that it has empirically failed to be binding.

Note that this conceptualization aligns with and elaborates on the two major conceptual approaches to understanding legal compliance (March and Olsen 1989). 'Logic of consequences' models focus primarily on material rewards and sanctions, which are mainly addressed by the monitoring, adjudication, and sanctioning elements of institutionalization. 'Logic of appropriateness' models focus primarily on the social acceptance and absorption of norms, and are primarily addressed by the obligation, precision normative support and uptake elements.

### 3. Private Environmental Regulation

#### a. Environmental Certification

Environmental certification is modeled partly on its public counterpart. The first important Cert program of the present era, the Forest Stewardship Council, sprang up to address the role of transnational trade in causing what was labeled a 'global tropical timber crisis' in the 1980s. Consumption of wood products in developed countries was seen as a major driver of forest destruction in many developing countries. Developing country governments were either unable or unwilling to control the accelerating destruction of their forests, often because they were poor and felt they needed income from developed countries (who had after all often over-exploited forests in their own jurisdictions) as a resource for economic development.

Intergovernmental processes in the International Tropical Timber Organization in the 1980s and in the United Nations in the Rio Conference in 1992 failed to generate a binding forest treaty to curb the destruction. This failure of the state-centered system led reformers to turn to other possible ways of curbing trade-driven forest destruction. An initial boycott of tropical timber by developed-country environmental activists quickly came to be seen as counterproductive because it encouraged developing countries to convert 'unproductive' forest land to other, income-producing uses and deprived forest communities of income they could otherwise have received for sustainable forest management.

In hopes of rechanneling market forces to support sustainable forestry, a loosely connected group of activists gelled around the idea of turning timber buyers toward preferring and buying sustainably produced timber. Influenced in considerable part by the models of the organic food certification program of the International Organization for Organic Agriculture and the technical product certification programs of the International Organization for Standardization (ISO), they settled on the idea of creating a global program for the certification and labelling of sustainably produced timber, which would allow buyers to distinguish sustainably grown timber from that of unclear origins (Cashore et al. 2006).

Officially founded in 1993 "to promote environmentally responsible, socially beneficial and economically viable management of the world's forests, by establishing a worldwide standard of recognized and respected principles of forest management," the Forest Stewardship Council (FSC) had a rich institutional structure from the outset. A General Assembly consisting of equally powerful environmental, social, and economic chambers, subdivided into developed and developing sub-chambers, also with equal voting power, performs the legislative functions of making and revising standards and setting general policy. Standards and policy are made with prior public notice, allowance for comment by members and nonmembers, and generally accompanied by public explanations. Membership is open to any individual or organization that professes commitment to the FSC, its principles and criteria, completes an application and is willing to pay the modest membership fee (currently approximately \$100 for individuals).

The principles and criteria are wide ranging, echoing the sustainable development principles articulated at the Rio Conference. Like the biblical commandments, they come in a group of ten, and mandate compliance with applicable laws and treaties, clear and

adequate property rights, protection of indigenous, community, and worker rights, full and efficient use of forest resources, environmental protection, management planning, monitoring and assessment among other things. They were never solely 'environmental' standards. These standards have been revised in limited ways over time and are given further place-appropriate content in national and stakeholder based regional standard setting processes.

Cert standards are typically phrased in legal form. The primary FSC environmental principle, for example, reads:

Forest management shall conserve biological diversity and its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and, by so doing, maintain the ecological functions and integrity of the forest. (FSC-US 2003-2016)

It is made more specific in a series of ten criteria, which, while formally mandatory, still allow for considerable interpretive discretion. For example, criterion 6.2 states:

Safeguards shall exist which protect rare, threatened and endangered species and their habitats (e.g., nesting and feeding areas). Conservation zones and protection areas shall be established, appropriate to the scale and intensity of forest management and the uniqueness of the affected resources. Inappropriate hunting, fishing, trapping and collecting shall be controlled. (Ibid)

Although such principles and criteria are fairly specific, they still need to be translated into applied practices by firms, certifiers, involved civil society organizations, and community members, who thus play roles in their definition. The formally independent certifiers (who are themselves accredited by a separate agency) evaluate conformance through a notice and comment processes. Certification teams typically consist of several members with interdisciplinary expertise. They conduct intensive site visits, consult with local stakeholders, prepare a draft report that is subjected to expert peer review, and consult with the applicant before deciding on certification and possible corrective action requirements, and provide public summaries of their decisions. They conduct annual follow-up audits and full reviews every five years.

Certifiers thus combine the traditional public law functions of inspection and adjudication and do so in relatively open procedures. However, they are compensated by the applicants, who are generally able to select the certification organizations with whom they work, thus creating corruption pressures. For the most part, the FSC handles these risks with a complaint system and occasional audits of certifiers' work. However, they seem to pose an ongoing structural risk for the process which, while also present in government administrative systems, is exacerbated in private ones where defective inspections are unlikely to be detected in defective products.

Wood products from certified forest management organizations are entitled to carry the FSC logo. Because it is easy to forge, the FSC also developed a Chain of Custody



Certification system to verify the origins of certified products, which will not be detailed here.

The FSC system enjoyed relatively rapid and broad uptake, given that its only formal sanction was withdrawal or suspension of the certification. While the FSC also expected to create benefits of Cert through hoped-for price premiums, those largely did not materialize.

Why then was FSC Cert adopted, given that it was likely to raise costs for many forest enterprises? The primary impetus was activists threatening brand damage to major retailers in developed countries. A major campaign against Home Depot, for example, involving nearly 200 attention-grabbing demonstrations in and near its stores and accusing the company of helping destroy the world's rain forests and endangered species, turned the corporation from disinterest to a major customer for certified products. The threat of similar actions against other major retailers resulted in their rapid conversions as well (Conroy 2007). These actions in turn created a large and growing market for certified wood as the retailers used their market power to require suppliers to achieve certification.

The surprising success of the FSC prompted the establishment of several industry-based Cert programs. They often stressed process, rather than product certification. They were effectively in competition with the FSC for public credibility, however, and over time were forced to adopt more substantive standards. This dynamic of mutual observation, competition, and adaptation became the central forum for debate and experimentation in forestry regulation (e.g., Meidinger 2006).

Most of the industry-based programs allied with each other in a transnational organization now called the Program for Endorsement of Forest Certification (PEFC). Because it is structured as a federation of formally independent national programs, the PEFC is inherently more complex than the FSC. It also continues to rely more heavily on forest planning processes by forest management firms, although its members have slowly incorporated more substantive requirements. For example, the main U.S. industry affiliate, the Sustainable Forestry Initiative (SFI), now seeks to fulfil its 'Conservation of Biological Diversity' objective with several mandatory performance measures, e.g.: 'Certified Organizations shall protect threatened and endangered species, critically imperiled and imperiled species . . . and natural communities, and old growth forests' (SFI 2022). However, the indicators for compliance still consist primarily of having management programs to pursue these goals. As in the FSC, compliance with the SFI program is certified by third-party auditors and involves stakeholder consultation, public reporting, chain of custody security and a label. It is difficult for meaningless management programs to survive such scrutiny. Over time, the evidence seems to show a growing convergence between the FSC and PEFC programs, and a tendency for standards to rise rather than fall overall, although there have also been adaptations by the FSC to better accommodate practical realities, such as the need to simplify certification processes and reduce costs for small landowners (Overdevest and Zeitlin 2014).

Reviewing the Cert regulatory system in terms of the legal bindingness criteria outlined above, it appears to be growing more legalized and binding overall. Mandatory language is widespread and appears to be increasing. Although still requiring considerable judgment in many cases, standards and criteria seem to be growing more specific. Institutionalization

has advanced not only in the certification programs themselves, but also in the certified companies' supply networks, as discussed further below. Normative fit also seems to be relatively high and growing stronger as the urgency of environmental protection and climate change mitigation become steadily more obvious.

Finally, societal uptake continues to expand, but remains uneven. Forest management certification is widespread in Europe, with certified wood products constituting a majority of its market. Forest management certification and certified wood products are also widespread in the US market but comprise a lower a portion of the total. Forest management certification and certified products comprise a much smaller part of the market in most developing countries. Cert is concentrated in export-oriented companies, primarily those oriented toward Europe and North America. There is some evidence that domestic governmental standards in developing countries may be strengthening or otherwise aligning with Cert standards, partially because of market pressure, but that is hard to gauge at this time.

However, even if Cert and better standards become much more widespread, managing forests well to sell forest products will not necessarily sustain them if there are more profitable uses for the land. In the past two decades, the conversion of forests to beef, cocoa, palm oil, rubber, and soy production came to be recognized as a serious threat. This led to the development of new 'certification risk' programs for those products aimed at ensuring that they were not produced through deforestation, again primarily for the European market (Panwar et al. 2023).

In the interim the Cert model was also applied in numerous other industries, including agri-food systems, apparel, coffee, energy, finance, fisheries, green buildings, mining, and tourism, among others, again frequently generating more than one program in a given sector. The FSC itself also created new forms of certification for activities such as ecosystem services and construction projects. While the various Cert systems are similar in many ways, they also differ, perhaps most often in the inclusivity of their rulemaking systems. These complications and the mutual dependency of the various programs for legitimacy also gave rise to meta-regulatory initiatives like the ISEAL Alliance, which seek to advance good practice for sustainability systems by promoting codes of good practice (ISEAL 2024).

Overall and together in their interactions with each other and other governance players, including states, these proliferating Cert programs help to constitute an increasingly encompassing and complicated governance universe. Major connecting threads through that universe are the countless supply chains that help structure it and have given major corporations powerful roles in leveraging PER into place through supply chain management. The next section discusses the role of CSR in extending PER.

## **b. Corporate Social Responsibility (CSR)**

While the idea of corporate social responsibility is ancient, it took on new prominence in the mid-20<sup>th</sup> century. Vehemently resisted by economic conservatives like Milton Friedman, who insisted that "the social responsibility of a business is to increase its profits" (within the law and "embedded custom") (1970), CSR was widely demanded by the turn of the 21<sup>st</sup> (Moura-Leite and Padgett 2011). Much of the impetus came from the broader civil rights, anti-war, and environmental movements that spawned a host of environmental, consumer,

worker protection, and equal opportunity laws in the 1970s and 80s. Subsequently the same global environmental and human rights abuses that spawned Cert programs led to pressures for individual corporations to develop CSR programs whereby they would use their management capacity to remedy problems of both their own operations and potentially those of other companies in their supply chains.

Central to the argument was that corporations should not focus on profit to the exclusion of their environmental and social impacts and instead should pursue a 'triple bottom line' in which they protected 'profits, people, and the planet' (Elkington 1997). This challenged the vision of the corporation championed by Friedman (1970) and other conservatives that a corporation's sole duty should be to its shareholders and gave rise to the 'stakeholder theory' of the corporation, whereby it also owes duties to employees, communities, and the environment (Freeman 1984). The shareholder/stakeholder debate festered for decades (Harper Ho 2010), but often did not need to be resolved because corporations responding to brand threats as Home Depot did in the forest certification campaign were also protecting shareholders. It became more important for investors in the ESG context as discussed below.

International organizations also promoted CSR. In 2000, UN Secretary General Kofi Anan convened a variety of businesses, labor organizations, civil society organizations, and national governments to catalyze the UN Global Compact (UNGC), which urged businesses to commit to ten human rights, labor, environmental, and anti-corruption principles and to report on their implementation. Many businesses and other organizations signed on, and today the UNGC counts 24,625 signatories from 167 countries (UN Global Compact 2024). The UNGC program was augmented by additional, often more detailed guidelines from a half-dozen organizations.<sup>3</sup> Whether or not specifically tied to these programs, many corporations, especially large ones, developed and publicized CSR programs. The percentage of S&P 500 companies publishing reports grew from approximately 20% in 2011 to 99 percent in 2022. Even the smallest 500 companies on the Russell 1000 index published reports at a level of 81 percent (Governance Accountability Institute 2023).

However, the guidelines do not claim to be binding, and CSR practices have often been quite variable in issue coverage and reporting rigor. Numerous corporations have been opportunistic in choosing which activities to report and how to measure them, giving rise to frequent attacks for 'greenwashing.' While the term is used to cover a wide range of activities, the basic claim of greenwashing is that corporations structure their CSR reports to make themselves look better than they are. Well known examples include Volkswagen advertising low emissions and other environment-friendly qualities of its vehicles while fitting them with devices that cheated on emissions tests; BP changing its name to 'Beyond Petroleum' and publicly adding solar panels to its service stations while continuing to spend nearly all of its budget on oil and gas; Nestlé declaring an ambition to have its packaging 100% recyclable or reusable by 2025 but not committing to any company targets or helping to set up recycling programs; fast fashion companies like H&M claiming to be green while knowingly contributing to major textile waste problems and making no effort to reduce waste or increase recycling; and major banks publicizing their commitments to combatting climate change while channeling massive investments into companies exacerbating climate change and deforestation (Earth.org 2022).

Regardless of whether corporations can reasonably be described as greenwashing, they retain considerable discretion in designing and implementing their CSR programs. The effort to achieve greater consistency and effectiveness in CSR reporting has concentrated on three strategies: (1) incorporation into standard corporate planning and decision processes, especially due diligence (DD); (2) using supply chain contracting to extend effects to other participants in the businesses supply chains; (3) developing common metrics for CSR reporting. The third has become a central focus of ESG and will be discussed in more detail in the ESG section.

Corporate Due Diligence. The corporate DD process dates to US securities legislation following the stock market crash of 1929. It began as a requirement for securities dealers and brokers to disclose material risks (i.e., risks that a reasonable investor would consider important in making an investment decision) related to securities they sold. The practice soon expanded to include comprehensive reviews of business operations, legal obligations, strategic positioning, and potential liabilities as prerequisites to large transactions like mergers and acquisitions. Having thereby been brought into corporate decision-making processes, it rather quickly became a routine process of assessing corporate liabilities and risks. CSR brought environmental and social risks into the calculus.

A good template for modern CSR was synthesized out of practices developed up to that time in the DD process laid out in the 2011 UN Guiding Principles on Business and Human Rights (UNGPs 2011). All businesses “should” avoid infringing on internationally recognized human rights (defined as including a minimum core drawn from existing international declarations and conventions but also possibly including additional future standards) and address adverse human rights with which they are involved. In general, although they vary from “respecting the freedom of thought, conscience and religion” (UDHR art. 18) to not employing persons under the age of 15 (ILO 138:1.3), most of these duties are not very precise. Businesses have a responsibility to “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”

Operationally, they are to have a formal and public policy commitment to meet these responsibilities, an ongoing due diligence process “to identify, prevent, mitigate and account for how they address their impacts on human rights,” designated officers responsible for implementation and monitoring, and processes “to enable the remediation of any adverse human rights impacts they cause or to which they contribute.” Remediation may be done either by the business or through state-based institutions. In assessing human rights risks businesses are to conduct “meaningful consultation with potentially affected groups and other relevant stakeholders,” as appropriate to the size, nature and context of the operation. All corporate responsibilities are framed with “should” or in terms of “responsibility” rather than mandatory duty, and are acknowledged to vary with size, sector, operational context, ownership and structure. The stated levels of mandate, precision, and delegation are therefore middling at best, although as noted above uptake seems to be relatively high. Evaluating normative fit would require reviewing more data and analyzing it more intensively than can be done here.

In 2023 90 percent of the 1000 largest US-based publicly traded corporations published CSR reports (GAI 2023). Though but a small fraction of the total number of corporations, the largest corporations play a large role in determining the practices of smaller ones,

which are often their suppliers or customers. While good statistics on sustainability reporting by smaller corporations do not appear to exist, conventional wisdom has it that they are under growing pressure by their larger business partners to prepare basic sustainability reports. One lawyer who counsels many mid-size corporations on environmental matters quoted Thucydides in explaining this trend: “The strong do what they have to do and the weak accept what they have to accept.”<sup>4</sup>

Vandenbergh and Moore (2022) find environmental supply chain contracting expanding rapidly. Their recent empirical study found that approximately 80 percent of the largest corporations in seven major globalized sectors (discount retail, home improvement, office products, automobiles, personal computers, wood products, aluminum, and industrial machinery) now incorporate environmental requirements in their supply chain contracts, up from approximately 50 percent fifteen years ago. Given the frequent failure of governments to make significant progress in improving environmental practices in many transnational production networks, they argue that these contractual requirements are potentially an important corrective for these governance gaps. Cafaggi (2013) provides a thorough analysis of the multiple ways in which various forms of PER can interact through commercial contracting.

While the expansion of environmental supply chain contracting appears promising, we do not yet have a good sense of how effective it is in practice, nor how effective it ultimately may be. We know that it depends heavily on the management capacity and follow through of the lead firms that dominate production processes, but do not know how effectively they are enforcing the contracts. Moreover, lead firm action to shape the behavior of affiliates is much more complex than just contracting, and often entails maintenance of specific kinds of relationships and efforts to establish responsible management cultures (Meidinger 2019).

Returning to Thucydides, we not only have important remaining questions about what “the weak must accept” but also about what the strong “have to do,” and why. Before further addressing them in the ESG section it is important to recognize two efforts to institutionalize CSR.

B Corps. One approach to gaining credibility as a socially responsible corporation is to be certified as one. In 2006 three individuals with business and investment experience founded a non-profit called ‘B Lab’ in Pennsylvania and commenced creating a program for certifying beneficial corporations. The core idea was to formally and operationally integrate social and environmental goals with profit making. In addition to requiring inclusion of CSR goals in the corporate charter and operational guidance, a major part of the effort was to create a ‘B Impact Assessment tool’ for assessing the social and environmental impacts of corporations. While the questions addressed vary by industry and region, they typically include inquiries about the proportion of management personnel evaluated on their performance regarding corporate, social and environmental targets; percentage of the company owned by full-time workers; percentage of management from underrepresented populations; records of waste production; ways local stakeholders are given voice in corporate policy, and the like.<sup>5</sup>

Receiving certification requires scoring 80 of 200 possible points. Which attributes those points reflect can be ascertained with effort but is not obvious. Certified corporations must publish a public profile on the B Lab website, including their impact score, and re-certify

every 3 years. B Lab currently boasts over 8,000 certified B Corps in 96 countries and 162 industries employing over 750,000 workers (2024). Remarkably, it has retained a monopoly in its field, which though quite unusual does not seem to have been studied in the academic literature.

Benefit Corporations. Since 2010, with the urging and support of B Lab, thirty-six US States have created statutory options for chartering Benefit Corporations, which are for-profit rather than nonprofit and distinct from B Corps. Although requirements vary, they typically include adding consideration of non-financial stakeholders (e.g., employees, local communities, environment) to the articles of incorporation and balancing their interests with financial considerations in corporate decision making. They often require production of an annual report assessing the corporation's social and environmental performance against a third-party standard such as but not limited to B Lab's (Hemphill and Cullari 2014). Very few of these laws provide for loss of the Benefit designation due to poor performance. Several non-US jurisdictions, including Italy, Colombia and British Columbia, have also authorized Benefit corporations, but in most of the world the only comparable status remains the B-Corp certification. In most of the thirty-one US states studied by Vaughan and Arsneault (2018) that allow both, corporations chose the legally chartered Benefit Corporation model, which is less expensive, more flexible and probably less transparent, over the B Corp certification one by a considerable margin.

Very little information is available on the actual performance of chartered Benefit corporations. Their annual reports are remarkably difficult to find (Vaughan and Arsneault 2018). There is little indication of public enforcement of the charter requirements, and little information on any shareholder suits that may have been brought against directors for failure to adequately pursue public benefits. Finally, no serious research seems to exist on the social and environmental performance of Benefit corporations compared to traditional ones. Accordingly, there is reason to wonder whether Benefit corporation status might involve some greenwashing. The simple fact that B Lab requires regular reporting, carries out annual certification assessments and makes information public suggests that it may be the more reliable forum for institutionalizing CSR.

### **c. Environment, Society, Governance (ESG)**

The term ESG was coined for a movement aimed at enlarging and refining the CSR system; it began to supplement and partially displace CSR in the early 2000s. Governance was catapulted to central importance, and thus into the acronym, by the Enron scandal of 2001, in which accounting fraud, misleading financial statements, internal conflicts of interest, inadequate governance by the board of directors, lack of transparency, and audit failures by an outside accounting firm led to the collapse of Enron and major financial losses for stockholders, who were becoming increasingly important actors in PER.

A pivotal moment for the ESG movement was the publication of 'Who Cares Wins' in 2005 by the UN Global Compact. Endorsed by twenty major asset managers, the report both recognized the growing importance of capital providers to advancing sustainability and sought to recruit more of them to the cause. Investment requirements are particularly powerful regulatory tools because the need for capital spreads across the entire range of risk-creating enterprises, and indeed may be greatest for the riskiest. Investment strategies

have long been important regulatory tools, as exemplified by the South African apartheid and tobacco products divestment movements and the increasing use of 'screens' to avoid 'bad' investments, such as firearms and fossil fuels. Central goals of the ESG movement, however, were to funnel capital to socially responsible firms, to use access to capital to incentivize improved behavior in all corporations, and to upgrade the existing CSR system as a major means of doing so.

The prime movers in bringing responsible investment to the fore were institutional investors (pension funds, mutual funds, insurance companies, foundations, universities), who by 2005 owned over half of US equities (OECD 2020). Some had morally based positions on appropriate investments, but nearly all of them, due to their vast and widespread holdings, came to believe that they had a strong interest in the health of the entire economy. Labeled 'universal owners,' they grew increasingly reluctant to have one holding in their portfolio that contributed to declines in the values of other holdings. However, developing a system to channel their investments faced several hurdles.

First, investment firms needed legal latitude to prefer socially responsible firms. This raised the question whether their fiduciary responsibilities to maximize returns to investors allowed them to consider ESG factors, since socially responsible investment had long been viewed by Friedman-style investors as illegitimately reducing shareholder returns. However, arguments were emerging that responsible management did not reduce and possibly improved shareholder returns. The legal question was answered in the strong affirmative by a high-profile report from the international law firm Freshfields Bruckhaus Deringer in 2005. It reviewed eleven important capital holding jurisdictions, including common and civil law countries as well as China, and concluded that "integrating ESG considerations into an investment analysis so as to more reliably predict financial performance is clearly permissible and is arguably required in all jurisdictions" (page 13). The report cited growing evidence that ESG factors are important to long-term financial returns and could thus possibly become compulsory considerations for fiduciaries. It also argued that socially responsible investment would align investor interests with societal goals and that institutional investors might enjoy reputational benefits as a result.<sup>6</sup>

The Freshfields report complemented 'Who Cares Wins,' which also argued that ESG practices are material to corporate performance because they enhance long term returns by (1) identifying and managing risks that might not be evident through conventional financial analysis and thus reduce potential liabilities; (2) enhancing competitive advantage through improved reputation, operational efficiencies and access to new markets; (3) improving market position by meeting growing stakeholder expectations, and (4) positioning a company to more easily meet future regulatory requirements. When made transparent through good quality disclosure, ESG practices can help investors identify companies likely to achieve high long-term value creation and allow them to hold companies accountable for their performance, through shareholding decisions, engaging with company management, and exercising their proxy voting powers.

Investors have increasingly embraced and demanded that capital-seeking companies engage in ESG reporting. It is commonly said to have become a requirement for doing business in developed economies, although I have not found systematic evidence to support this claim. Nonetheless, as noted above, a great and growing number of businesses are in fact preparing ESG reports.

The problem is how to make ESG reporting truly useful for investors. As with the discussion of CSR reporting above (and there is no inherent distinction – reports often are also called by other names such as ‘sustainability’ reports), there is great variation in the content and quality of ESG reports. As also noted above, reporting corporations have incentives to fashion reports favorable to themselves, thus creating a bewildering diversity of reports and often impeding meaningful comparison.

With the claimed goal of countering this problem, nearly a dozen non-governmental organizations have entered the field of ESG standard setting.<sup>7</sup> While five of the most important ones recently announced plans to cooperate to achieve reforms and move toward interoperability, it is not clear how much has been achieved. Importantly, all of them include an emphasis on climate change reporting and address supply chain management to some extent. However, fundamental differences remain. Therefore, large companies needing to meet multiple standards often must gather many kinds of data on similar and different issues and go to great expense and effort in doing so. Users of the reports also face difficulty in understanding and comparing them.

The complexity, variability and extensiveness of ESG reports has spurred the growth of a host of non-governmental ‘rating agencies’ that compile, analyze, summarize, and seek to provide comparative metrics on the ESG performance of different corporations. These rating agencies (approximately five major ones<sup>8</sup> and scores of more specialized ones) offer a variety of metrics and methodologies. They all seek to cover the basic areas of environment, social, and governance practices, and the major ones all address climate change and supply chain management. Yet some rely entirely on data from public disclosures while others add direct engagement with companies or proprietary models to estimate scores. The relative weight of different environmental, social and governance factors varies across rating agencies, as do the specific variables assessed. Some rating agencies offer nominally quantitative ratings while others focus on qualitative scales such as A to F or high to low. And of course, the measures used to assess any given standard in practice help to define that standard. One knowledgeable commentator states that the correlation between leading rating agencies scoring the same company can be as low as .54 (in contrast to the field of credit ratings, where the correlation approaches .99) (Haggebrink 2023). Finally, whatever the standard, there is always the risk that companies may ‘game’ their ratings by focusing on the metrics that are easiest to control or manipulate.

This situation has predictably given rise to many demands for greater standardization and transparency in ESG reporting, often directed at governments. Some standardization and transparency regulation seems to be coming from the EU and US, as discussed in the next section. Japan also recently issued a Code of Conduct for ESG rating and data providers (Haggebrink 2023). However, at this point governments seem unlikely to provide a high level of standardization, since they often have different goals and regulatory styles, as can be seen from the differences between the EU, US, and China discussed below.

Overall, the ESG regulatory system appears to be growing quickly. In terms of the ‘bindingness’ variables described above it appears that ESG reporting is becoming *de facto* mandatory. Almost all major corporations now accept it as a requirement of doing business,



and they in turn appear to be requiring it of their significant suppliers and customers, although there is little data on this question.

The precision of ESG reporting requirements remains limited, since there are multiple standard-setters with different emphases and all of them tend to have fairly general requirements. Moreover, corporations have considerable latitude in choosing among standards, which can be thought of as conceptually similar to allowing them to choose their regulatory jurisdictions. The variability of standards may initially be exacerbated by the host of different rating agencies, but over time their competition to provide accurate and comparable metrics may narrow the variability and sharpen the standards as in the case of credit ratings. At present this process is somewhat hampered by the poor transparency of the rating agencies' methodologies. However, transparency and precision, though not necessarily uniformity, seem likely to increase in response to the growing government regulation discussed in the next section.

ESG is quite institutionalized, with a host of corporate directors, executives, specialized managers, and data compilers complemented by external standard setters, auditors, ratings agencies, and the like. ESG commitments are also often enforceable through shareholder fraud and misrepresentation claims, consumer protection suits, shareholder derivative suits, government administrative enforcement actions, and the like. Although government legal systems provide frameworks for many of these actions, institutionalization appears to remain primarily private.

As usual, normative fit is difficult to assess since it is such a broad concept. The rise of PER has paralleled the rise of sustainable development (now often shortened to sustainability) as a master principle. Indeed, PER has helped to define and operationalize it. At a general level, the idea that humans must protect the environment and society while prospering remains uncontroversial. Corporate adoption of ESG probably reflects, reinforces and somewhat focuses that normative framework. However, political opposition to a strong version of the environmental element of sustainable development remains substantial and may be growing (e.g. Huber 2020, Hoerber et al. 2021, Gibson and Sawyer 2023), potentially reducing its normative strength over time.

Corporate uptake of ESG, as already noted, is strikingly high and growing. The vast majority of major corporations are producing ESG reports. Many include ESG requirements in their supply contracts and otherwise work to recruit their business partners into ESG reporting. ESG related assets under management are predicted to reach US \$53 trillion by 2025, equivalent to approximately one-third of all global investments (Haggebrink 2023). In sum, ESG uptake is so large as to be difficult to explain.

#### **d. PER Theory**

The combination of actors, roles, organizations, and programs involved in PER is vast, complex, and to a considerable extent unanticipated by conventional social and political theory, which assigns most of the regulatory activities exhibited by PER to governments. In this paper I seek (1) to conceptualize how PER programs may come to be binding in ways similar to state law and (2) how states may be responding to what could be seen as incursions on their sovereignty. My efforts on both counts are working hypotheses that will be tested and modified in future work.

The length limits on this article (already stretched greatly) preclude discussion of the many other theoretical questions and perspectives brought into play by PER. However, because this article is intended in part for researchers seeking to familiarize themselves with this research field and its main analytical frameworks, it seems appropriate to provide pointers to some of the main theoretical literature. Colleagues and I published a critical review of that literature in Wood et al. (2015) which I recommend. In addition, a minimal list of valuable theoretical perspectives includes regime-complex theory (Abbott 2012, Green and Auld 2016); Abbott and Faude 2022), experimentalist governance (Overdevest and Zeitlin 2012); transnational legal pluralism (Teubner 1997, Zumbansen 2010, Berman 2012); reflexive law (Orts 1995, Teubner 1983); transnational business governance interactions (Eberlein et al. 2014), and ensemble regulation (Perez 2011). However, this is a theoretically fecund field that has been studied from numerous other illuminating perspectives. Hopefully those listed above and the references they cite will provide a useful introduction.

#### **4. States Striking Back?**

In his chapter, 'The State Strikes Back: Forest Certification in Authoritarian China,' Tim Bartley (2018) argues that although China welcomed the growth of FSC certification, it also controlled the process by carefully limiting the activities of civil society organizations and the flow of information. The likely consequence was that forest management operations that would have been found to have questionable land claims and management practices received FSC certification when they might not have gotten it in more democratic countries. While managing the FSC, the Chinese government simultaneously established its own Cert program, limiting and partly displacing the FSC. Ultimately, these strategies significantly constrained the FSC while still allowing for FSC certification and facilitating ready access by Chinese timber products to the world market. China thus effectively used the FSC as a tool toward its own ends.

The question addressed in this section is how governments generally are reacting to PER. Embedded in this question is how rising populism and authoritarianism may affect their policies. Both questions are relatively subtle and difficult and are the subject of an ongoing research project. The findings reported here are preliminary and should be regarded as working hypotheses.<sup>9</sup> A degree of detail is presented to provide substantive content for generalizations.

Large developed-country governments have taken an increased interest in transnational environmental regulation since the turn of this century. For the US and EU, this initially took the form of seeking to recognize and reinforce environmental regulation by governments in other countries through international trade agreements, and thus to support regulation by sovereigns. The EU, through its 2003 Forest Law Enforcement, Governance, and Trade (FLEGT) Action Plan, sought to negotiate 'Voluntary Partnership Agreements' (VPAs) with developing countries exporting wood products into its territory. Those countries promised to define and police the legality of timber exported from their territories in return for the EU's promise to provide financial and technical support and to facilitate access to its very large

market. This program appears not to have been very successful thus far. To date only Indonesia has fully effectuated its VPA; nine other countries remain in various stages of implementation.

In 2008 the US and in 2010 the EU resorted to regulatory 'sticks' by adopting bans on the sale of illegally produced wood (regardless of source country) in their markets. While the US law is a one-dimensional amendment to the Lacey Act adding a ban on illegally harvested plants to a preexisting one on illegally harvested wildlife, the EU Timber Regulation is more elaborate. 'Operators' (those who place timber products on the EU market) must employ due diligence systems to ensure their legality.

The 2020s have brought a renewed and expanded focus by developed country governments on PER. The EU has issued several directives and regulations<sup>10</sup> on forestry specifically and PER generally. The EU Deforestation Regulation that took effect in mid-2023 requires operators who place a variety of commodities including beef, cocoa, palm oil, rubber, soy, and timber on the EU market to ensure that those products do not originate from land that has been deforested or degraded since December 31, 2020. It also requires them to demonstrate through a due diligence process and written statement that their products have been produced in compliance with the relevant environmental and human rights laws in the production country (Berning and Sotirov 2023).

Regarding ESG generally, the EU has recently promulgated one directive, two regulations, and a framework for its own further work. The Corporate Sustainability Reporting Directive (CSRD) requires all publicly traded companies, private companies with 500 or more employees, and non-EU companies with a turnover of more than 150 million Euros in the EU – an estimated total of 50,000 companies – to disclose their sustainability activities, including how they impact the environment and society. The Sustainable Finance Disclosure Regulation (SFDR) requires financial market participants and financial advisers to disclose how they integrate ESG risks in their investment decisions and advisory processes. The EU Green Taxonomy Regulation (Regulation 2020/852) specifies which economic activities can be considered environmentally sustainable, with the goal of facilitating investment by clarifying which activities have positive effects on the environment and climate.

The above summary shows that the EU is highly engaged with PER and sees it as a major vehicle for achieving EU environmental policy objectives, including in non-EU countries. It will be interesting to observe whether the EU encounters significant resistance from its increasingly authoritarian and environmentally ambivalent members, especially Hungary and Poland (as well as candidate for membership, Turkey), or from any of its trading partners. For now, the picture is one of government strongly encouraging and using PER toward shared policy goals.

The posture of the US is less ambitious and more ambiguous than the EU. There is little direct federal regulation of forestry beyond the Lacey Act extension noted above, although some state regulations may be moving toward harmonization with certification standards. ESG reporting was modestly aided at the federal level by the Sarbanes-Oxley Act of 2002, mandating accurate corporate financial reporting and internal controls, with the effect of indirectly supporting ESG disclosures.

In March of 2024 the Securities and Exchange Commission promulgated substantial new regulations to extend and standardize climate disclosures by publicly traded companies. They require disclosure of climate related risks likely to impact their business operations, the roles of directors and managers in assessing and managing those risks, risk mitigation and adaptation plans, and how ESG factors are integrated into investment decisions and strategies, among other things. Although the regulations require reporting of direct emissions from company-owned or controlled sources ('Scope 1') and indirect emissions from generation of purchased electricity, steam, heating and cooling ('Scope 2'), they do not require reporting of emissions that occur in the upstream and downstream value chain of the company ('Scope 3'). In April the agency 'stayed' the regulations pending the outcome of legal challenges. The EU CSRD, by contrast, does require scope 3 reporting and is not subject to legal delays. Member states have until July 6, 2024, to transpose it into their national laws.

While the US federal government has moved slowly but significantly toward supporting ESG, the situation in the states is more dynamic and conflicted. California has been a prime mover in mandating transparency in supply chains and the use of ESG criteria in the allocation of its investment funds. New York, Oregon, Connecticut, and Maine also have played important roles in requiring the application of ESG criteria in their investments. On the other hand, many Republican-dominated states have embarked on a variety of anti-ESG campaigns. In 2023 Republican legislators in thirty-seven states introduced over 160 bills seeking to ban the application of ESG criteria in the use of state funds, contracts, and pensions. While nearly ninety failed, nearly thirty were adopted and over forty were still under consideration at this writing (Gibson and Sawyer 2023).

The third great trading economy, China, also exercises considerable control over PER. In addition to its management of forest certification discussed above, China evidently is working to integrate ESG principles into its broader economic and environmental strategies. It has developed its own ESG standards covering such matters as carbon neutrality, rural revitalization, and poverty alleviation, as well as its own indices and rating methodologies. On the whole Chinese standards appear more focused on environmental than on social and governance factors. China also has recently increased disclosure requirements for large companies, particularly publicly traded ones. There is some speculation that good ESG performance may increase the likelihood of subsidies for non-politically connected companies, thus reflecting incorporation of ESG into the national surveillance system. China also uses ESG as a foreign policy tool by encouraging Chinese companies involved in the Belt and Road Initiative<sup>11</sup> to prepare ESG reports.

The mid-size trading economies examined thus far are also paying more attention to PER. To provide a sense of the similarities and variations among them, several are briefly summarized here.

The UK's posture is similar to that of the EU, although seemingly a bit less aggressive. It encourages and generally supports Cert. It has mandated climate-related financial disclosures for large companies, enhanced its regulatory framework for ESG reporting while generally promoting it, and placed greater emphasis on ESG factors in the annual reports required by its Corporate Governance Code.

Japan has a generally supportive relationship with forest certification and has recently placed a strong focus on sustainable finance. Its Stewardship Code and Corporate Governance Code mainly use the hortatory 'should' and broad language to encourage investors to develop and publicize stewardship policies, promote sustainability and long-term growth in investment, and report on and regularly review their activities. South Korea has adopted policies similar to Japan's, although perhaps a bit more specific with regard to ESG.

Canada has a positive position on forest certification and among the largest area of certified forests in the world. It also promotes ESG reporting and has emphasized aligning its policies with global standards for climate reporting and the sustainable development goals but does not require or intervene much in either forest certification or ESG.

The Mexican government officially encourages PER and uses it to support and promote the Mexican economy. It has long been publicly supportive of forest certification. It provides financial support for Cert processes and many of its community-managed forests are FSC certified. The Mexican Stock Exchange promotes ESG reporting and has issued guidelines for it. The National Banking and Securities Commission is ostensibly in the process of integrating ESG criteria into financial regulations, but has thus far lacked success. The agency that regulates pension funds is requiring them to embed ESG factors into their investment strategies. The situation is complicated, however, in that Mexico has also created a difficult environment for foreign investment in areas such as green power (Gantz 2024). Brazil mostly has similar positions to those of Mexico, although it has not pushed ESG integration to the same degree and has been subject to greater policy volatility in successive governments.

India encourages forest certification as part of its stated commitment to sustainable forest management and uses public-private partnerships with both companies and NGOs to promote it. It is also actively working to increase ESG, primarily by requiring ESG disclosures for the top 1000 publicly traded companies by market capitalization. The Reserve Bank of India has issued guidelines encouraging (but not requiring) banks and financial institutions to integrate ESG factors into their lending and investment decisions. India also has a unique mandatory CSR law that requires their 8000 to 10,000 largest companies to spend two percent of their average net profits on social development projects.

Smaller economies, based on research thus far, seem to be largely recipients rather than managers of PER regulation, and they seem to largely accept that role. Preliminary research on the smaller Latin American countries, for example, indicates that they tend to accept PER and the environmental and trade benefits it may provide, but do not seek to instrumentalize it in a particular direction. This posture does not seem to vary by political orientation, e.g., democratic versus authoritarian, although much research remains to be done on this question.

In sum, the states with the three largest trading economies appear to be 'striking back' but in different ways. The EU is using PER aggressively to pursue its ambitious environmental goals well beyond its borders and is arguably working to make it an adjunct of EU policy (although the direction of causality may not be so simple.) The US is using ESG to require enhanced climate reporting but is also experiencing serious countercurrents at the state

level. Those have the potential to surge and further curb federal support of PER in the future. However, they seem unlikely to change corporate reporting of climate change and other environmental risks, since their materiality has been so widely accepted and their European trading partners will push for it. China has created its own versions of certification and ESG reporting, thereby making them less organizationally 'private', and is using them primarily to further its development goals. However, it has also been stressing the need for 'green growth,' including green finance and green banking guidelines and a pledge of carbon neutrality by 2060. The available information indicates that these environmental policies have become increasingly important to the government in the past several years, likely in part because of the growing recognition of environmental and health damage caused by unrelenting industrialization. Nonetheless, China continues to emphasize the development side of sustainable development.

Mid-sized national economies are mostly encouraging and trying to benefit from PER, but not reshaping or deploying it to reach outside their boundaries. Smaller countries do not appear to be devoting significant attention or resources to it.

## 5. Conclusion

Private environmental regulation appears to be surprisingly binding and may be growing more so. While their variability precludes a single location for the programs discussed above in terms of Figure 1's five dimensions of binding law, general patterns can be seen.

Obligation, seems to be increasing, driven both by environmental activists and investor demands. Research on institutional investors shows a broad commitment to requiring ESG (e.g., McCahery et al. 2022). Recently some governments – mainly the EU – have added formal legal requirements to those pressures.

Precision, too, is growing overall, as behavioral standards in Cert programs are augmented by measurement and decision-making requirements in CSR and ESG. Those standards and metrics are in competition with each other, and it will be important to watch how much more similar and precise they may become over time.

Institutionalization is filling out, as growing numbers of actors define and occupy PER roles in corporate policy making, management supervision, contracting, human resources, measurement, and reporting, while external actors define and occupy roles in standard setting, surveillance, measurement, rating, auditing, investment analysis, investment management, civil society activism, legal advice and advocacy, and state regulatory programs. The corporate roles extend vertically up and down supply chains and are duplicated at various levels of production, thus creating increasingly long and thick regulatory networks.

Normative fit has several dimensions. On one hand, the proliferating roles described above seem likely to solidify sustainability norms alongside profitability ones in businesses over time, although perhaps not on an entirely equal footing. Moreover, sustainability is closely bound with the foundational commitment to societal survival. On the other hand, norms of group solidarity and identity show signs of being used to oppose sustainability initiatives, largely on grounds that they are external impositions not actually necessary to group survival. So, we may have a dynamic normative situation in which a seemingly well-

entrenched sustainability norm is challenged as not justifying the regulatory programs, public and private, being carried out in its name, and is thereby redefined to some extent.

Societal uptake, while centered in developed countries and hardly universal even there, is at the same time highly remarkable. The corporate management systems discussed above appear to be propagating PER very broadly into the global economy. While that does not mean it cannot be backed down or even reversed, doing so would not be easy. If the four factors discussed above continue to strengthen, it will steadily become more difficult. This is not to say that PER will be enough to ensure societal survival in the face of profound environmental threats, but it appears likely to persist for some time to come.

By occupying as much regulatory territory as it has, PER can be seen to have significantly entrenched on the prerogatives of nation-states, which historically have been greedy about maintaining their sovereign turf. After all, they fought hard to get it (Spruyt 1994). Initially, PER rose up to compensate for the failure of nation states to address burgeoning environmental destruction, and states generally did not oppose it (Renckens 2020). Recently, however, there has been significant growth in the involvement of states. Most of that has been on the side of strengthening PER while leaving it intact and perhaps relying on it. In a way this is not surprising, since PER contributes to nation-state goals without relying on the public purse. Moreover, it was created and is largely staffed by well-trained experts with knowledge and values comparable to those in government environmental agencies.

This public/private alignment, however, does not necessarily insulate PER from broader political currents – quite the opposite. In recent years right wing populist movements have begun to target environmental protection programs, particularly in authoritarian tending states. Hungary, for example, has significantly undercut its environmental programs, and particularly the activities of environmental civil society organizations (Krasznai Kovács and Pataki 2021). Similar movements are evident in Poland (Zuk and Zuk 2024). The US Red State attacks on ESG discussed above share an affinity with these developments. Huber's (2020) widely respected research shows significant links between populist attitudes and skepticism about climate change and environmental protection. Could right wing populism therefore destroy the PER system whose construction over the past three decades is described in this paper. Given how large PER has grown, and how interlinked it is with environmental policies that are still persuasively connected to societal survival for much of the world, that seems unlikely. However, it does not seem unlikely that rising populist authoritarianism could impede and weaken it.

## References

Abbott, Kenneth W. (2012) 'The Transnational Regime Complex for Climate Change,' *Environment and Planning C: Government and Policy* 30: 571-590

Abbott, Kenneth W. and Snidal, Duncan (2009) 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State,' in Mattli, Walter

Abbott, Kenneth W. and Faude Benjamin (2022) 'Hybrid Institutional Complexes in Global Governance,' *Review of International Organizations*, 17:263-291

- Agudelo, M.A. L., Jóhannsdóttir, L. and Davídsdóttir, B. (2019) 'A Literature Review of the History and Evolution of Corporate Social Responsibility,' *International Journal of Corporate Social Responsibility* 4(1): 1-23.
- Bartley, Tim (2018) *Rules without Rights: Land, Labor, and Private Authority in the Global Economy*, New York: Oxford University Press
- Berman, H.S. (2012) *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*, Cambridge, UK: Cambridge University Press.
- Berning, Laila and Sotirov, Metodi (2023) 'Hardening Corporate Accountability in Commodity Supply Chains Under the European Union Deforestation Regulation,' *Regulation and Governance* 17, 870-890
- Boyer, Barry and Meidinger, Errol (1985) 'Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws,' *Buffalo Law Review* 34, 834-965.  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2477127](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477127)
- Brundtland, G.H. (1987) 'Our Common Future: Report of the World Commission on Environment and Development. Geneva, UN-Document A/42/427
- Cafaggi, Fabrizio (2013) 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures,' *Fordham International Law Journal* 36(6):1557-1618.
- Carroll, A.B. and Shabana, K.I.M. (2010) 'The Business case for corporate social responsibility: A Review of Concepts, Research and Practice,' *International Journal of Management Reviews*, 12(1):85-104.
- Cashore, Benjamin, et al. (2004) *Governing through Markets: Forest Certification and the Emergence of Non-State Authority*, New Haven: Yale University Press
- Cashore, Benjamin, et al. (2006) *Confronting Sustainability: Forest Certification in Developing and Transitioning Countries*, New Haven: Yale Forestry Press.
- Conroy, Michael (2007) *Branded! How the 'Certification Revolution' is Transforming Global Corporations*, New Society Publishers
- Earth.Org (2022) <https://earth.org/greenwashing-companies-corporations/>
- Eberlein, B., Abbott, K., Black, J., Meidinger, E. and Wood, S. (2014) 'Transnational Governance Interactions: Conceptualization and Framework for Analysis,' *Regulation and Governance* 8:1-21
- Elliott, C., Janzwood, A., Bernstein, S. and Hoffman, M. (2023) 'Rethinking Complementarity: The Co-Evolution of Public and Private Governance in Corporate Comate Disclosure,' *Regulation and Governance*  
<https://doi.org/10.1111/rego.12550>
- Fink, Larry (2020) 'Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance,'  
<https://www.blackrock.com/americas-offshore/en/larry-fink-ceo-letter>.
- Fink, Larry (2024) 'Larry Fink's 2024 Annual Chairman's letter to Investors',  
[https://www.blackrock.com/us/individual/about-us/larry-fink-annual-chairmans-letter?cid=ppc:blk\\_us:chairmansletter2024](https://www.blackrock.com/us/individual/about-us/larry-fink-annual-chairmans-letter?cid=ppc:blk_us:chairmansletter2024)
- Freeman, R.E. (1989) *Strategic Management: A Stakeholder Approach*, Boston, MA: Pitman
- Freshfields Bruckhaus Deringer (2005) 'A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment,' Produced for the Asset Management Working Group of the UNEP Finance Initiative, [https://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf)



Friedman, Milton (1970) 'A Friedman doctrine – The Social Responsibility of Business Is to Increase Its Profits' *New York Times*, Section SM, p. 17, September 13 <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>

FSC (1993-2002) 'Principles and Criteria for Forest Stewardship'  
<https://us.fsc.org/download.principles-and-criteria-for-forest-stewardship.a-106.pdf>

Gantz, David A. (2024) 'What does Mexico's Impending Return to Single Party Government Mean for Attracting FDI?' *International Economic Law and Policy Blog* <https://ielp.worldtradelaw.net> June 18.  
Gibson, Conner and Sawyer, Francis (2023) '2023 Statehouse Report: Right Wing Attacks on the Freedom to Invest Responsibly Falter in Legislatures,'  
<https://drive.google.com/file/d/1VJ82mMNupoFSZPQ98nLcW7AtcyBQWB18/view>

Global Reporting Initiative (2016) <https://www.globalreporting.org/standards/>

Governance Accountability Institute (2023) <https://www.ga-institute.com/research/ga-research-directory/sustainability-reporting-trends/2023-sustainability-reporting-in-focus.html>

Green, Jessica F and Auld, Graeme (2016) 'Unbundling the Regime Complex: The Effects of Private Authority,' *Transnational Environmental Law*, CJO 2016 doi: 10.1017/S2047102516000121

Haggebrink, E., (2023) Upcoming Regulations in ESG Ratings: Three Implications for Business, BSR Blog, January 25 <https://www.bsr.org/en/blog/upcoming-regulations-in-esg-ratings-three-implications-for-business>

Harper Ho, Virginia (2010) "'Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide,' *The Journal of Corporation Law* 36(1): 61-112

Hemphill, T.A. and Cullari, F, 'The Benefit Corporation: Corporate Governance and the For-profit Social Entrepreneur,' *Business and Society Review* 119(4): 519-536

Héritier A. and Eckert S. (2009) 'Self-Regulation by Associations: Collective Action Problems in European Environmental Regulation,' *Business and Politics*. 11(1):1-22. doi:10.2202/1469-3569.1250

Hoerber, Thomas, Kurze Kristina and Kuenzer, Joel (2021) 'Towards Ego-Ecology? Populist Environmental Agendas and the Sustainability Transition in Europe', *The International Spectator* 56(3)41-455.

Huber, R.A. 'The Role of Populist Attitudes in Explaining Climate Change Skepticism and Support for Environmental Protection', *Environmental Politics* 29(6): 959-82.

International Federation of Accountants (2024) 'The State of Play: Sustainability Disclosure and Assurance – 2019-2022 Trends and Analysis. [https://ifacweb.blob.core.windows.net/publicfiles/2024-02/IFAC-State-Play-Sustainability-Disclosure-Assurance-2019-2022\\_0.pdf](https://ifacweb.blob.core.windows.net/publicfiles/2024-02/IFAC-State-Play-Sustainability-Disclosure-Assurance-2019-2022_0.pdf)

International Organization for Standardization (ISO) (2010) ISO 26000. <https://www.iso.org/iso-26000-social-responsibility.html>

ISEAL (2024) <https://www.isealalliance.org/defining-credible-practice/sustainability-systems>

Krasznai Kovács, E., & Pataki, G. (2021). 1. The Dismantling of Environmentalism in Hungary. In E. Krasznai Kovacs (Ed.), *Politics and the Environment in Eastern Europe* (1–). Open Book Publishers. <https://books.openedition.org/obp/22647>

March, James G. and Olsen, Johan P. (1989) *Rediscovering Institutions: The Organizational Basis of Politics*, Free Press.

McCahery, J.S., Pudschedl, P.S. and Steindl, M. (2022) 'Institutional Investors, Alternative Asset Managers, and ESG Preferences', *European Business Law Review* 123:821-868.

- Meidinger, Errol (2006) 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry,' *European Journal of International Law* 17(1), pp 47-87
- Meidinger, E., 2008 'Multi-Interest Self-Governance through Global Product Certification Programs,' in *Responsible Business? Self-Governance in Transnational Economic Transactions.*, edited by Olaf Dilling, Martin Herberg, and Gerd Winter. Oxford: Hart Publishing (pages 259-291)
- Meidinger, Errol (2019) 'Governance Interactions in Sustainable Supply Chain Management,' in Stepan Wood, Rebecca Schmidt, Errol Meidinger, Burkard Eberlein, and Kenneth Abbot, eds., *Transnational Business Governance Interactions: Advancing Marginalized Actors and Enhancing Regulatory Quality*, Cheltenham, UK and Northampton, MA: Edward Elgar (pages 52-76)
- Moura-Leite, R.C. and Padgett, R.C. (2011), 'Historical Background of Corporate Social Responsibility,' *Social Responsibility Journal*, 7(4) 528-539.
- Organization for Economic Cooperation and Development (2010)
- OECD (2020), *OECD Institutional Investors Statistics 2020*, OECD Publishing, Paris, <https://doi.org/10.1787/9a827fb7-en>.
- OECD (2023) *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* <https://www.oecd-ilibrary.org/docserver/81f92357-en.pdf?expires=1714784314&id=id&accname=quest&checksum=6DC20AF4D2DABDE7B9ACA97E01485361>
- Organization for Economic Cooperation and Development 2024
- Ostrom, Elinor (1990) *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press.
- Overdeest, Christine and Zeitlin, Jonathan (2012) 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector,' *Regulation and Governance* 8(1):22-48
- Panwar, Rajat, et al. (2023) 'Why Corporate Sustainability Initiatives Fail to Reduce Deforestation and What to Do About It,' *Business Strategy and the Environment*, 32:5121-5127.
- Perez, Oren 2011) 'Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics,' *Theoretical Inquiries in Law*, 12(2): 543-579.
- Renckens, Stefan (2020) *Private Governance and Public Authority: Regulating Sustainability in a Global Economy*, Cambridge, UK: Cambridge University Press.
- S&P Global (2010) <https://www.spglobal.com/media/documents/esg-industry-report-card-forest-and-paper.pdf>
- Scott, James C. (1998) *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press
- SEC 2024 [climate disclosure regulation]
- SFI 2022 <https://cdn.pefc.org/pefc.org/media/2023-07/418a6d75-fc01-48c6-bcd2-a21659bb0d46/094f6218-55c6-5f10-a910-e6b54102cc77.pdf>
- Snyder, David (2019) 'The New Social Contracts in International Supply Chains' *American University Law Review* 68: 1869-[end page number]
- Spruyt, Henrik (1966) *The Sovereign State and Its Competitors: An Analysis of Systems Change*. Princeton, NJ: Princeton University Press.

- Tamanaha, Brian (2008) 'Understanding Legal Pluralism: Past to Present, Local to Global,' *Sydney Law Review* 30: 375-411.
- Teubner, G. (1983) 'Substantive and Reflexive Elements in Modern Law,' *Law & Society Review* 17(2): 239-285.
- Teubner, G. (1997) 'Global Bukowina: Legal Pluralism in the World Society', in Teubner, G. (Ed.), *Global Law Without a State*, Dartmouth: Aldershot, pp 3-28
- Tyler, Tom (1990) *Why People Obey Law*. Princeton, NJ: Princeton University Press.
- UN Global Compact (2024) <https://unglobalcompact.org>
- UN Principles on Business and Human Rights (2011)
- UN Sustainable Development Goals (2015)
- Vandenbergh, Michael (2008) 'Private Environmental Governance,' *Cornell Law Review*
- Vandenbergh, M. and Moore, P.A. (2022) 'Environmental Governance by Contract: The Growing Role of Supply Chain Contracting,' *Michigan Journal of Environmental and Administrative Law* 12(1) 1-62.
- Vaughan, S.K. and Arseneault, S. (2018) 'The Public Benefit of Benefit Corporations,' *Political Science and Politics* 51(1): 54-60
- Waddock, S. (2008) 'Building a New Institutional Infrastructure for Corporate Responsibility,' *Academy of Management Perspectives* pp 87-108 [volume number if there is one]
- Wijen, Frank and Chiroleu-Assouline, Mirieille (2019) 'Controversy Over Voluntary Environmental Standards: A Socioeconomic Analysis of the Marine Stewardship Council,' *Organization and Environment*, 32(2), pp. 98-124.
- Wood, Stepan, et al. (2015) 'The Interactive Dynamics of Transnational Business Governance: A challenge for Transnational Legal Theory,' *Transnational Legal Theory* 6(2): 333-369.
- Wood, Stepan (2019) 'Interactive Strategies for Advancing Marginalized Actors in Transnational Governance Contests: Labour and the Making of ISO 26000' in Stepan Wood, Rebecca Schmidt, Errol Meidinger, Burkard Eberlein, and Kenneth Abbot, eds., *Transnational Business Governance Interactions: Advancing Marginalized Actors and Enhancing Regulatory Quality*, Cheltenham, UK and Northampton, MA: Edward Elgar (pages 52-76)
- Żuk, Piotr and Żuk Paweł (2024) 'Ecology for the Rich? Class Aspects of the Green Transition and the Threat of Right-wing Populism as a Reaction to its Costs in Poland,' *Sustainability Science, Practice and Policy* 20(1) 2351231, DOI: 10.1080/15487733.2024.2351231
- Zumbansen, P. (2010) 'Transnational Legal Pluralism', *Transnational Legal Theory* 1(2):141-189.

---

## Endnotes

# This title echoes Chapter 4, "The State Strikes Back: Forest Certification in Authoritarian China," of Tim Bartley's excellent book (2018).

\* SUNY Distinguished Professor Emeritus and Margaret W. Wong Professor of Law Emeritus, The State University of New York at Buffalo. Thanks to Todd Agaard, Mekonnen Ayano, Paul Berman, Guyora Binder, Pavlos Eleftheriadis, Robin Kundis Craig, Aravind Ganesh, James Gardner, John Linarelli, Anthony Moffa, Paul Rink, Amber Polk, Ed Richards, Jim Salzman, John Henry Schlegel, Margaret Shannon, and Michael

---

Vandenbergh for comments on earlier drafts; to Dhvani Vrajesh Pandya, Carlos Aguirre Cardenas, and Estefanía Rodríguez for their comments and very helpful research assistance; and to the Baldy Center for Law and Social Policy for very beneficial research funding.

<sup>1</sup> But see Fink's 2024 Statement, advocating transition investing.

<sup>2</sup> Private actors are known to have exercised enforcement power in public environmental law for nearly seven centuries. A 1388 English statute, for example, authorizes anyone "who feel(s) himself aggrieved" to seek a writ from the Chancellor to enforce water pollution control laws. Boyer and Meidinger (1985) See f.n. 279 for more detail.)

<sup>3</sup> These included the Organization for Economic Cooperation and Development (2023, but beginning as early as 1976), the Global Reporting Initiative (2024, originally 1997 and 2006), the International Organization for Standardization (2010), the UN Principles on Business and Human Rights (2011), and the UN Sustainable Development Goals (2015), among others.

<sup>4</sup> Telephone interview with Michael Hecker, Hodgson Russ LLP, April 9, 2024.

<sup>5</sup> These questions are culled from a range of B Lab publications and external literature about B Lab.

<sup>6</sup> While the Freshfields report expressed confidence in the prerogative of institutional investors to consider non-pecuniary factors, there remained some question about the practice under the US ERISA law. It sets minimum standards for most voluntarily established pension and health plans in private industry and has been interpreted by the Supreme Court to require that investment decisions be made for the exclusive purpose of maximizing financial returns on a risk-adjusted basis. Under both Republican and Democratic administrations, the Department of Labor has generally required that ESG investments still meet the financial risk and return analysis required by the traditional corporate law duty of prudence.

<sup>7</sup> These include the Global Reporting Initiative (GRI), the International Sustainability Standards Board (ISSB), the Sustainability Accounting Standards Board (SASB), the International Integrated Reporting Council (IIRC), the Climate Disclosure Standards Board (CDSB), the Carbon Disclosure Project (CDP), the European Financial Reporting Advisory Group (EFRAG), and others.

<sup>8</sup> MSCI, Sustainalytics, FTSE Russell, ISS ESG, and EcoVadis

<sup>9</sup> The information conveyed here is compiled from so many different sources, many of them on relatively small points, that they cannot realistically be cited. The author is responsible for the accuracy of the information and analysis.

<sup>10</sup> Regulations are directly effective throughout the EU. Directives must be transposed by member states into their own laws.

<sup>11</sup> China's Belt and Road Initiative aims to strengthen links to countries along the 'Silk Road Economic Belt' to Europe through central Asia and the '21<sup>st</sup> Century Maritime Silk Road, to southeast Asia, Africa and Europe. Potentially affecting sixty countries, it deploys massive infrastructure investments in hopes of stimulating increased trade, cultural exchanges, economic growth in participating countries, and expanded Chinese economic and political influence.