The New Universe of Green Finance: From Self-Regulation to Multi-Polar Governance

Oren Perez
Abstract

Green finance represents a wide-ranging challenge to the traditional constructs of financial law. New 'green' instruments threaten to transform conventional investment practices ('ethical investment'), lending standards associated with project finance ('environmental/social impact assessment'), and accounting conventions ('green/social reporting'). To a large extent this process was inspired and motivated by civic forces: environmentally-socially conscious citizens, environmental groups and private financial institutions. International organisations such as the World Bank and UNEP added further impetus to this process. From a legal perspective the phenomenon of 'green finance' reflected a highly patchy social process, constituted by segregated contractual instruments and uncoordinated organisational routines, none of which was subject to meaningful global discipline.

This chaotic picture of detached legal structures evolving in an uncoordinated fashion has started to change over the last years with the emergence of new global centres of governance. While these new normative centres are highly diverse in terms of their institutional structure and mode of operation, they are all dominated by non-state actors. The main goal of this article is to expose the contours of these emerging regulatory orders, highlighting the move from self governance to multi-polar governance. In particular, it explores the question of 'coordinating the regulators': what were the processes that shaped the allocation and redistribution of normative power at the global level. In that respect the article considers two theoretical puzzles. The first puzzle concerns the historical forces that shaped the contemporary governance structure; specifically, it focuses on the dominant role of non-state forces and the relatively minor role of state regulation. This division of normative powers seems to be changing however, with signs of increasing governmental intervention. To a large extent one can view the emergence and transformation of the field of green finance as the product of two conflicting narratives: neo-liberal capitalism with its emphasis on free trade, deregulation and small government and the emergence of globally oriented civic networks that highlighted the adverse social and environmental repercussions of the neo-liberal order. The second puzzle involves a different question: is the current normative structure, with its idiosyncratic distribution of normative powers, the most efficient one, in terms of achieving a more sustainable society? The paper will argue, in this context, that the contemporary governance structure, with its multiple layers, and private and public components, constitutes a regulatory ensemble whose synergistic capacities compensate for some of its evident shortcomings.

In answering these questions the paper takes the following path. First, it describes the various instruments that constitute the new field of 'green finance'. It distinguishes between three fields of financial regulation: project finance, ethical-green investment, and environmental reporting. Project finance represents the supply side of the market, while green investment represents the demand side. Environmental reporting is part of the institutional framework that facilitates the work of the financial market. In each of these domains it explores the evolvement of new global centres of governance. The following section discusses the causal question: to what extent have the new centres been efficient in changing social practices? The last section examines the two puzzles described above.
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1 Perezo@mail.biu.ac.il. I would like to thank Olaf Dilling and Gerd Winter for helpful comments on an earlier version of this article.

2 Green finance is part of a broader phenomenon – the incorporation of various non-financial or ethical concerns onto the financial universe. I will limit my observations, however, to the environmental facet of this phenomenon.
In answering these questions I will take the following path. First, I will describe the various instruments that constitute the new field of ‘green finance’. I will distinguish between three fields of financial regulation: project finance, ethical-green investment, and environmental reporting. Project finance represents the supply side of the market, while green investment represents the demand side. Environmental reporting is part of the institutional framework that facilitates the work of the financial market. In each of these domains I will explore the evolvement of new global centres of governance. In the following section I will discuss the causal question: to what extent have the new centres been efficient in changing social practices? The last section examines the two puzzles described above.

I. Walking the Normative Maze: Mapping the Contemporary Governance Structure of the Field of Green Finance

A. Environmental Assessment and Project Finance

Since the beginning of the 1990s environmental considerations have started to play a bigger role in the field of project finance, influencing and shaping the organisational routines governing lending decisions. The incorporation of environmental risk assessment into the banking sector was led by development banks – prominently the World Bank – with the private sector following suit. This process was triggered by two motivations. First, the recognition that environmental concerns could also reflect financial risks; examining environmental risks alongside conventional risks (economic, political) was seen as a reasonable business practice. Second an ideological commitment not to support ecologically problematic projects. Whereas the first motivation was instrumental, aligned to the banks profit-maximisation ethos, the second was normative.

Underlying the instrumental approach to environmental risks was a three-fold distinction, dividing environmental risks into three categories. First, direct risk, representing the possibility that a bank could incur direct legal liability for cleaning up contaminated land that was owned by one of its borrowers (e.g., if the borrower becomes insolvent); indirect risk, reflecting the risk that a borrower’s environmental liability might affect his ability to repay loans, and reputational risk, reflecting the potential damage to the bank’s image from being associated with environmentally-problematic investments (Thompson 1998).

The Basel Accord is another example for framework regulation: it sets minimum capital requirements for the banking industry. The new Basel Capital Framework (Basel II) will replace the current 1988 Capital Accord (Basel I). All internationally active banks in the G-10 are expected to implement the Framework by the end of 2007. The Framework is based on the following three mutually-reinforcing pillars: 1) Minimum capital requirements, which refine the measurement framework set out in the 1988 Accord; 2) Supervisory review of an institution's capital adequacy and internal assessment process; 3) Market discipline through effective disclosure to encourage safe and sound banking practices. For further details see: http://www.bis.org/publ/bcbsca.htm, visited 22 June 2006.

Financial institutions are faced with environmental risks also in their role as advisors in mergers and acquisitions. In this context financial advisors (e.g., investment banks) are expected also to perform environmental risk due diligence, focusing on potential risks such as contaminated land, sick buildings and out-dated technology. Insurance companies – another key element in the supply segment of the financial market - evaluate environmental risks in terms of their potential influence on the insurer's liability under a

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the direct risk of lenders, has contributed to the incorporation of environmental considerations into the financial decision-making process (UNEP-FI-Secretariat 2002: 54). The American experience has influenced the operations of other financial institutions with worldwide operations. In response to this new understanding banks and other financial institutions, such as insurance companies, have begun to develop risk-management and environmental assessment schemes in order to manage ‘environmental risks’ and identify their financial implications.

Within the public sector – and the World Bank in particular – the instrumental considerations were also accompanied by a newly embraced commitment to environmental values. In response to severe criticism from environmental groups in the late 1980s and early 1990s with respect to its lending practices, the World Bank has made an effort to integrate ecological considerations into the mainstream of its lending activities (Bridgeman 2001: 1037; Nielson and Tierney 2003: 253-71). The introduction of an environmental impact assessment requirement on all of the Bank's loans was a central tenet of this policy. Article I of The Bank's Policy on Environmental Assessment provides that the Bank requires environmental

certain policy – prominently general liability or professional indemnity policies (EPA-Victoria 2003: 6).

5 The Comprehensive Environmental Response, Compensation, and Liability Act (the ‘Superfund Act') 42 U.S.C. paras 9601-75 (1988). The Superfund Act established a comprehensive liability scheme and a federal fund for cleanup of sites where 'hazardous substances' have been disposed. The Act was amended in 1986 by the Superfund Amendment and Reauthorization Act, Public Law No. 9-499 (1986).


7 For a general survey of these schemes, see Jeucken (2001) and UNEP-FI-Secretariat (2002).

8 As Nielson and Tierney note, the historical narrative of this policy change is complex and reflects the intricate relationships between the Bank and its member governments, and the internal dynamics of the Bank. I’m more interested however in the ultimate consequences of this complex process.


10 Part of the OP 4.01, revised August 2004. A complementary text exists for BP 4.01.
assessment (EA) of projects proposed for Bank financing to help ensure that they are environmentally sound and sustainable, and thus to improve decision making. Similar requirements were adopted by other development banks, such as the Asian Development Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank.

Following the lead of developing banks, private banks - especially big banks with international operations - have introduced risk assessment procedures into their internal 'rule-book' (UNEP-FI-Secretariat 2002: 54-55). This codification process was driven mainly by instrumental considerations, recognizing the business logic of taking environmental risks seriously. It evolved in a highly fragmented fashion, reflecting the accumulated experience of each institution. Nonetheless, it marked an important change in the operational practice of international banks, by subjecting lending decisions to some form of environmental regulation – even though this remained a completely internal process. The approach of private banks to ecological risks was critical given the increasing role of private capital in the financing of big infrastructure and industrial projects across the globe since the mid-1990s.

The foregoing processes reflected uncoordinated normative phenomena, which took place simultaneously at separate locations. This fragmented picture seems to be changing, however. Several important initiatives, representing public-private cooperation, seek to provide a global normative framework for the incorporation of environmental considerations into the business practices of financial institutions. The first initiative is the United Nations Environmental Program Finance Initiative (‘UNEP-FI’). UNEP-FI was established in the early 1990s as a global partnership between the


13 Some banks have relied on the World Bank guidelines in designing their internal risk assessment procedures, ibid.

14 There was a substantial increase in the 1990s in the amount of private capital flows going to developing countries with a similar increase in the level of private financing of infrastructure projects (although since the late 90s there was a steady decline in annual investment flows to private infrastructure projects in developing countries). See: Botchwey (2000: 3) and Dailami and Leipziger (1998: 1284-5). It is important to note, however, that these capital flows were not equally dispersed. Low income countries in Africa and South Asia had, relatively, very low levels of private capital inflows (Botchwey 2000: 5-8).
UNEP and the private financial sector. UNEP's Initiative seeks to strengthen the commitment of private financial institutions to environmental values. As part of its work programme UNEP initiated two statements, translating its general vision into pragmatic principles. The first statement - 'Statement by Financial Institutions on the Environment and Sustainable Development' covers the banking sector; the second, 'Statement of Environmental Commitment by the Insurance Industry' targets the insurance market.

Both statements emphasise the need to incorporate environmental considerations into standard risk assessment processes at banking and insurance firms. Thus, article 2.3 of the Banking Statement provides that:

We recognise that identifying and quantifying environmental risks should be part of the normal process of risk assessment and management, both in domestic and international operations. With regard to our customers, we regard compliance with applicable environmental regulations and the use of sound environmental practices as important factors in demonstrating effective corporate management.

Article 2.1 of the Insurance Statement provides similarly that:

We will reinforce the attention given to environmental risks in our core activities. These activities include risk management, loss prevention, product design, claims handling and asset management.

Another important initiative, led by the International Finance Corporation ('IFC') of the World Bank Group, is the Equator Principles. The principles provide a framework for addressing environmental and social risks in project financing. Similar to

15 UNEP-FI focuses on three topics. First, it explores questions of carbon finance, and renewable energy investment through its Climate Change Working Group. Second it explores how social, environmental and governance considerations can be incorporated into investment practice. Finally, it emphasises the issue of sustainability reporting, and has developed with the Global Reporting Initiative Unique Reporting Guidelines for financial institutions (Financial Services Sector Supplement (Environmental Performance)). See, UNEP-FI core activities at http://www.unepfi.org/work_programme/index.html (visited 16 February 2006). This supplement is part of the GRI disclosure protocol; I will therefore review it more closely in section C below.

16 The banking statement was originally launched in 1992 under a slightly different name. The current, revised statement was launched in May 1997. See: www.unepfi.org/signatories/statements/index.html (visited 16 February 2006).


18 The first version of the Equator Principles ('EP') was released in 2003; a second version was released in July 2006. See: http://www.equator-principles.com. The new text has expanded the class of projects to which the Principles apply by lowering the 'project threshold' to projects which cost $10 million or more (instead of the $50 million threshold of the 2003 version). As of 6 February 2007 the EP have been adopted by 45 banks representing about 80% of project finance funds worldwide; Paul Watchman and Charles July. "A new environment", Legal week, 2 February 2006, 24 (available at http://www.legalweek.com). The list of institutions, which have adopted the EP, is available on the EP web-site.
UNEP Financial Initiative the Equator Principles are a public-private initiative, and many of the financial institutions which have adopted the principles are also signatories to the UNEP Banking Statement. Unlike UNEP statements the Equator Principles provide a detailed environmental-social impact assessment manual, adopting the practices of the IFC and the World Bank. The Principles include risk categories for different types of projects, list of issues which should be addressed by the environmental assessment process, and monitoring and follow-up guidelines.

The following schema depicts the normative evolution which took place in this domain.

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**Figure 1**

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**B. The Maze of 'Green' Investment**

An increasing number of institutional investors across the globe, but especially in the U.S., Europe (particularly in the UK) and Canada, are now managing their investment portfolios according to 'socially responsible' principles. This trend reflects a widening demand for investment vehicles that will be guided, not just by the criterion of financial

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19 The EP are based on the International Finance Corporation ‘Safeguard Policies’. The introduction of the 2006 version was triggered by a change in the IFC ‘Safeguard Policies’ (February 2006) (BankTrack 2006: 3).

performance, but also by moral and social concerns. Ethical investment was thus defined by one of the leading 'ethical' research groups as 'an investment process that considers the social and environmental consequences of investments, both positive and negative, within the context of rigorous financial analysis. It is a process of identifying and investing in companies that meet certain baseline standards or criteria of Corporate Social Responsibility…' (Social-Investment-Forum 2006: iv).

The market for socially responsible investment ('SRI') has been growing steadily over the last years. In the U.S. assets in socially screened mutual funds increased from $12 billion in 1995 to $179 billion in 2005. Nearly 10 percent of the total assets under professional management in the United States ($24.4 trillion) in 2005 are involved in socially responsible investing (Social-Investment-Forum 2006: iv). This trend was also evident in other markets. Thus, for example, by 2001 total assets under ethical management in the United Kingdom reached the £3.3 billion mark (Friedman and Miles 2001: 543). In Canada SRI had grown to CAN$ 65.46 billion as of June 30, 2004 – a 27 percent increase in two years (part of this growth was due to strong support from public pension plans). Europe, Australia, and Japan have all experienced a similar growth in their SRI industry (UNEP, World-Bank, and Institute 2003: 126; Social-Investment-Forum 2006: 36-37).

Commonly ethical investment schemes include two types of investment criteria ('norms'). First, negative or screening criteria, which exclude inappropriate ('brown') securities from the portfolio (e.g., mineral extraction industries). Second, positive investment criteria, which channel the investment to firms or sectors with a positive ecological 'signature'. Positive investment criteria can be based either on considerations associated with the ecological qualities of the firm core activity (e.g., renewable energy) or on best-practice bench-marking (choosing the best environmental performers from a certain sector) (Brink and Woerd 2004: 187-203). From a legal perspective ethical investment represents a form of private rule-making, in which investors contract with financial institutions to invest on their behalf, subject to certain investment rules, designed by the financial institution, and (passively) accepted by the investors. It is a process, then, of both self regulation and standard contracting. This process - much like the incorporation of environmental considerations into the realm of project finance - evolved in a highly fragmented environment: each financial institution devising its own set of investment criteria (sometimes relying on external consultancies).

I will not consider in this chapter other forms of responsible investment such as shareholder advocacy and community investing, see, eg, Social Investment Forum (2006: 16-36).

While the field of ethical investment evolved, as noted above, in a deeply fragmented fashion, there are similarities between the criteria used by different investment institutions. This convergence evolved spontaneously, however, without central coordination. Thus most ethical funds use the following negative/positive screening criteria: tobacco, alcohol and gambling, defence/weapons, community relations, environment, labour relations, and employment-equality (Social-Investment-Forum 2006: 7-8). The Social Investment Forum report does not provide comprehensive data about sub-fields, but I believe there is much more divergence at this sub-level. A comprehensive mapping of the standards used by 'green' funds is beyond the scope of this article. To get a sense of the criteria used by environmental funds, see the investment statements of two leading British mutual funds, Jupiter Ecology Fund, and Morley Sustainable Future Funds. See, Jupiter Ecology Fund, Interim Report for the six months ended 30th September 2005, pp. 2-3), available at http://www.jupiteronline.co.uk/, visited 22 June 2006 and Morley Sustainable Future Funds, 'How we Select Companies',

intervention was initially limited to providing a very general regulatory framework governing the fiduciary duties of institutional investors (e.g., managers of pension funds, mutual funds, and other types of collectively managed funds). This passive governmental approach has changed somewhat over the last five years (from 2000 onward), with governments seeking a more active role in the regulation of the ethical investment market. I will elaborate on this regulatory shift below.

The evolvement of new centres of governance seems to change this disordered picture. Transnational networks involving different stakeholders, the new Principles for Responsible Investment, sustainable Indexes, and governmental initiatives are the four key sources of governance. Transnational networks reflect an attempt to pool together the expertise of different organisations, and to create international forum for exchanging ideas and coordinating action. There are many examples of such networks – too numerous to cite here. So let me just give few examples. The European Social Investment Forum is a pan-European network which seeks to provide an international forum allowing various stakeholder groups to work together on questions related to Social Responsible Investment and Corporate Governance, and to collect input from members and communicate their ideas to European policy makers. Current members of the European Forum include pension funds, financial service providers, academic institutes, research associations and NGOs. The Enhanced Analytics Initiative is an international collaboration between asset owners and asset managers aimed at encouraging better investment research, in particular research that takes account of the impact of extra-financial issues on long-term investment. The SiRi Network represents another phenomenon – the global alignment of consulting agencies. The SiRi Group was formed in 2000 by eleven research organisations based in Europe, North America and Australia. The global cooperation, which brings together knowledge and expertise from different social domains - allows the network to provide superior consulting and research services in a field which is inherently global.

The Principles for Responsible Investment were introduced in 2006. They were co-sponsored by the United Nations Environment Programme Finance Initiative.

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27 For the full partners list see: http://www.siricompany.com/partners.shtml (visited 6 March 2006).

28 For further details about SiRi, see: http://www.siricompany.com.

29 The full text of the Principles and further details about the development process and signatories is available at: http://www.unpri.org/ (visited 23 May 2006).
the UN Global Compact, and a group of private financial institutions. The Principles provide a menu of possible actions for incorporating environmental, social and corporate governance ('ESG') issues into mainstream investment decision-making and ownership practices. The Principles are voluntary and not prescriptive. They require the signatories, among other things, to address ESG issues in investment policy statements and to support development of ESG-related tools, metrics, and analyses.

Sustainable Indexes constitute another, and increasingly influential, source of governance. The primary players in this field are the Dow Jones Indexes and the FTSE Group (the world leaders in the Stock index market). Dow Jones Indexes launched the 'Dow Jones Sustainability Indexes' in 1999 as an instrument for tracking the financial performance of the leading sustainability-driven companies worldwide. The first index in this 'family' - Dow Jones Sustainability World Index ('DJSI World') - covers the top 10 per cent of the biggest 2,500 companies in the Dow Jones World Index in terms of economic, environmental and social criteria; it was first published on 8 September, 1999. Since 1999 other indexes were added to the group. The FTSE4Good Index Series was launched in July 2001. It was designed to measure the performance of companies that meet globally recognised corporate responsibility standards, and to facilitate investment in those companies. Because of space limits I will focus on the environmental criteria of the Dow Jones indexes. I included a brief discussion of the FTSE environmental criteria in Annex A. The Dow Jones Sustainability Indexes and the FTSE4Good Indexes Series provide order to the ethical investment market in two ways. First, the methodologies used by the two index families to select and rank companies constitute a normative bench-mark for the whole ethical investment market. Second, the ultimate selections of the Dow Jones and FTSE4Good schemes constitute, in themselves, an ordering mechanism.

The Dow Jones Index is constructed according to a highly structured selection process. The core of this process is the Corporate Sustainability Assessment Criteria, which provides a scheme for measuring and comparing corporations. The criteria are divided into three dimensions: Economic, Environment, and Social. Each dimension includes a list of criteria and weighting. Thus, for example, the environmental segment of the criteria consists of the following topics:

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30 Two other noteworthy social-environmental indexes are the KLD Select Social℠ Index and the Canadian the Jantzi Social Index, see: http://www.kld.com/indexes/ssindex/index.html and http://www.jantzisocialindex.com/ (visited 6 February 2007).

31 These include the Dow Jones STOXX Sustainability Index, the Dow Jones EURO STOXX Sustainability Index, the Dow Jones Sustainability North America Index and the Dow Jones Sustainability United States Index, and sub-set indexes using further screens such as Alcohol, Gambling or Tobacco. See http://www.sustainability-indexes.com/html/indexes/overview.html (visited 28 February 2006). In February 2005 SAM Group has launched a sustainable index in Australia - Australian SAM Sustainability Index (AuSSI) - using the same methodology as used by the Dow Jones World Index. See: http://www.aussi.net.au/.


<table>
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<tr>
<th>Dimension</th>
<th>Criteria</th>
<th>Weighting (%)</th>
<th>Sub-Criteria</th>
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<tbody>
<tr>
<td>Environment</td>
<td>Environmental Performance (Eco-Efficiency)</td>
<td>7.0</td>
<td>• Key Performance Indicators (KPI) - Energy</td>
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<td></td>
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<td>• KPI- GHG</td>
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<td>• KPI- Waste</td>
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<td>• KPI- Water Coverage</td>
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<td></td>
<td>Environmental Reporting</td>
<td>3.0</td>
<td>• Content – Environmental Reporting Coverage</td>
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<tr>
<td>Industry Specific</td>
<td>Specific Criteria</td>
<td>Depends on Industry</td>
<td>• Environmental Management Systems,</td>
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<tr>
<td>Criteria</td>
<td></td>
<td></td>
<td>• Climate Strategy, Biodiversity Impacts, Product Stewardship, etc.</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>• Media and Stakeholder Analysis (MSA): Selected Industry Specific Criteria</td>
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In order to select and rank companies in accordance with the Corporate Sustainability Assessment Criteria, Dow Jones uses the services of a consulting agency. The agency analysts use the criteria as a framework for evaluating the sustainability performance of a company, assigning to each company, at the end of the evaluation process, a sustainability score. The sustainability score is used to identify the leading sustainability companies in each sector. The data that is collected by SAM analysts in order to determine the composition of the Index is not disclosed to the public (although the criteria, methodology, and of course the names of the selected firms are made public).

Finally, governments have started to take an increasing interest in the ethical investment market, recognizing the widening popularity of this new investment trend. While so far government intervention has been quite limited there are good prospects, I believe that the scale of intervention will increase as the ethical investment market.

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34 Sustainable Asset Management Group Holding AG.

35 For each company, the input sources of information for the Corporate Sustainability Assessment consist of responses to online questionnaire, submitted documentation, policies and reports, publicly available information and direct engagement between SAM Research analyst’s and the companies. Information provided in the questionnaire is verified. Verification includes crosschecking answers with documentation provided by the company, verifying a company's track record and incidents and crisis management with media and stakeholder reports and, if necessary, direct interaction and clarification with the company.

expands. Governments have intervened so far primarily in the pension market, focusing on issues such as freedom of choice and transparency. Thus, several countries have introduced rules that ensure that individuals can make free choices in choosing their personal retirement plans, as well as rules that require pension funds to disclose their investment policies.37

The U.K. provides an illustrative example of the potential impact of such governmental intervention. According to new rules, which came into force on 1 July 2000, pension fund trustees are required to declare their policy on social, environmental and ethical issues in their Statement of Investment Principles.38 The new disclosure rules have already induced several pension funds to adopt ethical investment criteria. Thus, for example, Friends Provident decided to manage all of its £15 billion assets in equity investment portfolios according to a new strategy of ‘responsible engagement overlay’, which will encourage good practice on human rights, child labour and environmental pollution.39 BT Pension Scheme (£25 billion) and the Universities Superannuation Scheme (£20 billion) have already published their SRI policies, which include special provisions on environmental ‘good practice’.40

The following schema describes the evolution of the ethical investment governing apparatus.

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37 Rules pertaining to freedom of choice were adopted by Australia, Japan, the UK and the United States UNEP-Fi-Secretariat (2002: 18). Disclosure rules were adopted by Australia, Austria, Belgium, France, Germany, Hungary, Spain, Sweden, The Netherlands and the UK (Freshfields-Bruckhaus-Deringer and Group) 2005: 11) and the Compendium on national public policies on CSR in the European Union, available at http://ec.europa.eu/employment_social/emplweb/csr-matrix/csr_matrix_en.cfm (visited 1 June 2006).

38 See, the Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) Amendment Regulations 1999, Art 2(4). The Regulation was made under the Pensions Act 1995.


C. The Emergence of 'Green' Accounting: the Story of the Global Reporting Initiative

The field of Green – or more generally non-financial accounting – has undergone a similar transformation from self-regulation to external, globally oriented, governance. The three vertices of the governance game in this field have been Transnational Corporations ('TNCs'), global institutions, and governments. Firms, especially TNCs, have been publishing non-financial information since the 1980s. However these social-environmental reports\(^{41}\) were highly varied in style and form, disclosing relatively little quantitative data.\(^{42}\) While there was a process of convergence and reciprocal learning between firms (Tile 2001) the lack of central coordination was highly visible.

The disordered landscape of the 1990s is currently being transformed into a much more ordered domain. This process is inspired by three sources of governance. First, *private codes*, setting out clear rules for non-financial reporting and external assurance. Second, increasing and wide-scale *government intervention*. Finally, *indirect pressure* towards more extensive disclosure reflecting the normative changes in the fields of environmental risk assessment and ethical investment, as well as parallel transformations in the field of corporate law. Particularly important in this regard is the

\(^{41}\) Whether as part of the financial report or as separate texts.

influence of global environmental management standards (such as ISO 14001) and corporate codes (such as the Ceres Principles).  

Let me consider these regulatory developments in more detail. The most important code for non-financial reporting is the set of reporting standards produced by the Global Reporting Initiative ('GRI'). The GRI was founded in 1997 by the Coalition for Environmentally Responsible Economies in partnership with the United Nations Environment Programme. Following a wide-ranging consultation process, the GRI published guidelines for sustainability reporting in 2002 which were replaced by a new version in 2006. The driving ethos of the new Guidelines, as their predecessors, is the concept of sustainable development. The new text thus opens with a quote from the famous 1987 Brundtland Report ('Our Common Future') noting that "The goal of sustainable development is to 'meet the needs of the present without compromising the ability of future generations to meet their own needs'." This vision informs the mission of the GRI Guidelines, which is, according to the text, to provide a "trusted and credible framework for sustainability reporting that can be used by organizations of any size, sector, or location" which could facilitate a clear and open communication about sustainability using "globally shared framework of concepts, consistent language, and metrics".

The 2006 Guidelines, as the 2002 scheme they replaced, distinguish between three aspects of the activities of organisations: economic, environmental, and social. This choice is supported by the thesis that 'achieving sustainability requires balancing the complex relationships between current economic, environmental, and social needs in a manner that does not compromise future needs'. A sustainability report issued in accordance with the GRI Guidelines should include information on each of these three aspects of corporate behaviour (although I will focus only on the environmental segment of the Guidelines). It is assumed that the sustainability report will be issued in conjunction with the corporate conventional financial statement.

In contrast to the traditional rules of financial reporting, which are bounded by the ethos of profit maximization – the GRI Guidelines are driven by a distinctive environmental concern. This fundamental distinction influences the nature of the environmental disclosure that is required by each scheme. Whereas the traditional accounting conventions require the disclosure of environmental data only when it is

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44 GRI, Sustainability Reporting Guidelines, (Amsterdam: Global Reporting Initiative, 2002); GRI, RG - Sustainability Reporting Guidelines, (Amsterdam: Global Reporting Initiative, 2006). Both versions can be obtained from the GRI website: http://www.globalreporting.org. In the following I will refer to the 2006 text.


46 Ibid.


48 2002 Guidelines, at 9, my emphasis; see also, 2006 Guidelines, at 8.

49 2006 Guidelines at 37. The two reports might, in some instances, be overlapping; in general, however, they should be complementary, 2002 Guidelines, ibid, at 45.
presumed to have some impact on the firm’s profit, the GRI Guidelines seek to measure the organisation’s “impact on living and non-living natural systems, including ecosystems, land, air and water”. This is achieved by requiring the reporting organisation to provide comprehensive data about the ecological aspects of its behaviour. Thus the Guidelines Environmental Indicators cover “performance related to inputs (e.g., material, energy, water) and outputs (e.g., emissions, effluents, waste). In addition, the indicators cover performance related to biodiversity, environmental compliance, and other relevant information such as environmental expenditure and the impacts of products and services”. The 2006 Guidelines provide a detailed description of each indicator in a separated annex (Indicator Protocols Set: Environment). The indicators include data about total material use, direct and indirect energy consumption, energy conservation measures, total water withdrawal by source, location and size of land owned, leased, or managed in, or adjacent to protected areas and areas of high biodiversity value, significant impacts on bio-diversity, greenhouse gas emissions, emissions of ozone-depleting substances, NOx, SOx and other significant air emissions by type, total amount of waste by type and destination, initiatives to mitigate environmental impacts of products and services, and extent of impact mitigation, and monetary value of significant fines and total number of non-monetary sanctions for non-compliance with environmental laws and regulations.

Although the GRI Guidelines maintain a certain ambiguity with regard to the meaning of sustainability, they take a highly exact approach with regard to the design of ‘green’ behavioural (or performance) indicators. The Guidelines introduce a variety of rigorously defined economic, environmental, and social indicators. The choice of indicators reflects, of course, an embryonic vision of sustainability. It delineates the space controlled by the principle of sustainable development. What is probably the most important aspect of the Guidelines is that they facilitate the cognitive conditions for engaging in an interpretative dialogue about ‘sustainability’ within the corporate universe.

The Global Reporting Initiative together with UNEP-FI developed special rules setting out distinctive disclosure requirements for financial institutions. The Financial Services Sector Supplement (Environmental Performance) provides a method for measuring the ecological impacts of financial institutions, which are of different nature than conventional industrial impacts. The performance indicators in the GRI Supplement relate primarily to the systems used by institutions to incorporate environmental considerations into their business processes. The indicators distinguish between three elements – policy, procedures, and practice. Each of these elements is measured by a detailed set of questions, seeking to explicate the content, organisation,
and implementation of the organisation risk assessment system. The GRI financial supplement provides a normative benchmark for financial institutions.\textsuperscript{55}

In parallel to the development of the GRI Guidelines, and in response to concerns regarding the reliability of the reported information, several bodies produced global standards on external assurance. The prominent examples are the International Standard on Assurance Engagements (ISAE 3000)\textsuperscript{56}, the AA1000 Assurance Standard produced by AccountAbility,\textsuperscript{57} and several guidance documents on the assurance of sustainability reports produced by the European Federation of Accountants.\textsuperscript{58} The International Standard on Assurance Engagements is likely to be widely taken up as the International Federation of Accountants, which produces the standard, is the global organisation for the accountancy profession, working with 163 member organisations.\textsuperscript{59}

Alongside these civic-oriented initiatives it is also possible to point out two important developments at the governmental frontier. First, there was increasing recognition from national regulators that securities regulations – although not based on ecological rationale – require more extensive disclosure of environmental data. While the concept of materiality which underlies the disclosure rules of securities law is based on economic logic, requiring environmental disclosure only when the data has an influence on the firm’s future revenues, it seems that stock markets do not provide all the environmental information which should have been disclosed under this framework.\textsuperscript{60} This recognition led, for example, the U.S. Environmental Protection Agency (‘EPA’) in cooperation with the U.S. Securities and Exchange Commission (‘SEC’), to take several steps aimed at improving the level of compliance with SEC disclosure requirements.\textsuperscript{61} The establishment of mandatory reporting schemes, imposing independent reporting obligations is another important development. Mandatory disclosure programmes, such as the U.S. Toxic Release Inventory programme (‘TRI’), the European Pollution Emissions Register (‘EPER’) and the Canadian National Pollutant Release Inventory Scheme (‘NPRI’) require manufacturing establishments, and its potential audience is broad covering a wide range of financial institutions: retail banking, commercial and corporate banking, asset management and insurance, ibid, at 5. It is thus also relevant to the field of ethical investment which will be discussed below, as well as to the operations of insurance companies, which will not be discussed in detail in this chapter.

\textsuperscript{55} See, \url{http://www.ifac.org/Guidance}.

\textsuperscript{56} See, \url{http://www.accountability.org.uk}.

\textsuperscript{57} See, \url{http://www.fee.be}. Also important are several standards produced by ISO on the auditing of environmental managements systems and environmental performance (eg, ISO/AWI 14064, ISO 19011).


\textsuperscript{59} For a more detailed discussion of this issue see Oren Perez (2006).

\textsuperscript{60} On October 2001 EPA’s Office of Enforcement and Compliance Assurance issued an Enforcement Alert urging companies to abide by the requirements of Regulation S-K, which sets out the disclosure requirements under U.S. Securities Regulations; it has also improved its information-sharing with the SEC in order to expand the SEC enforcement capacities. See: EPA Enforcement Alert, volume 4, No. 3 (October 2001), available at: \url{www.epa.gov/compliance/resources/newsletters/civil/enfalert} (visited on 1 April 2005).
which meet certain conditions (usually in terms of size and type of business) to provide estimates of their chemical emissions for a designated set of toxic substances. The GRI scheme goes beyond the requirements of these two state-sponsored projects, both by extending the scope and scale of the ecological data that must be disclosed (moving beyond chemical emissions) and by not basing the disclosure requirement on an economically defined notion of materiality. Nonetheless, the expansion of the disclosure obligations under state law clearly supported the adoption of the more stringent disclosure requirements prescribed by the GRI Guidelines.

The following schema describes the normative evolution of this field.

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62 See Brehm and Hamilton (1996: 445). More details about these three programmes can be found at http://www.epa.gov/tri/, http://eper.eea.eu.int/eper/ and www.ec.gc.ca/pdb/npri, respectively. Other prominent examples include the Swiss Pollutant Emission Register, the Mexican pollution inventory (http://www.ine.gob.mx/?lang=_e), Australia National Pollutant Inventory (http://www.npi.gov.au/index.html), the Swedish Pollutant Release and Transfer Register (http://www.naturvardsverket.se/prtr/), and the British Pollution Inventory (www.environment-agency.gov.uk/pi). Let me expand upon the relatively new European scheme. The European Pollution Emissions Register implements the data dissemination requirements included in Directive 96/61/EC concerning integrated pollution prevention and control (‘IPPC Directive’). The IPPC Directive requires the Member States and the Commission (respectively) to publish the results of monitoring of releases as required under the conditions of IPPC permits and to publish an inventory of the principal emissions and sources responsible (Article 15(2) & (3)). To implement this requirement the Commission has established the European Pollution Emissions Register, which covers 50 substances of environmental significance emitted to the air or water (the EPER became operative on 23 February 2004). Further disclosure requirements are included in Directive 2003/4/EC of the European Parliament and of the Council 2003 on public access to environmental information (repealing Council Directive 90/313/EEC), which requires the Member States to progressively make available to the public (preferably in electronic format) environmental data including ‘data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment’ (Article 7(2)(e)). The Directive was to be implemented by 14 February 2005. For further information about the U.S. scheme and a list of pollution registers in other countries, see UNEP et al (2003: 110-112). A significant advance in the adoption of pollution registers came in May 2003, when a broad coalition of countries signed the Protocol on Pollutant Release and Transfer Registers (‘PRTR’) under the Aarhus Convention. The PRTR Protocol reflects an ambitious effort to expand mandatory disclosure requirements for toxic pollutants. For further discussion of the PRTR Protocol, see UNEP et al., ibid at 114 - 115.
II. The Causal Question: Legal Talk, Greenwash and Ecological Change

As was outlined in the previous section, the field of 'green finance' was transformed from a field governed by multiple, self-standing organisational-contractual instruments, to a field governed by a relatively small number of transnational codes. This transformation has taken place, almost simultaneously, in all of the fields discussed above: project finance, ethical investment and environmental reporting. State intervention remained, in all of the domains, patchy and hesitant. While these processes seem to reflect a notable legal phenomenon, the social impact of these processes on other worlds of meaning (social systems and individuals) and the natural environment – remains unclear. Indeed, one has to deal here with the recurrent accusation that these so-called 'soft' legal instruments are nothing but 'greenwash': a façade of environmental regulation, whose only objective is to enable corporations to continue without disruption with their ecologically destructive practices. Sociologically, Greenwash

63 See, for example, Kenny Bruno, 'Earth Day 2000 Greenwash Sweepstakes: The World Bank', CorpWatch, April 22nd, 2000 (http://www.corpwatch.org/article.php?id=240, visited 4 June 2006). For a more nuanced critique of ethical investment, see Friends of the Earth, Ethical Investment, March 2005 (http://www.foe.co.uk/campaigns/corporates/resource/investors.html, visited 4 June 2006). For a definition of greenwash see, CorpWatch, 'Greenwash Fact Sheet', March
applied to law can be interpreted as a situation in which law is colonised by economic forces, losing the capacity for autonomous self-production. The legal system will be operating in such scenario - to the extent that the notion of law is applicable at all - in a state of corruption maintaining only a dummy of legality. The new legal instruments of green finance constitute, then, a micro-cosmos that mirrors the wider clash between the ethos of neo-liberal capitalism and the defiant world-view of the social-environmental movement.

In exploring the integrity of these new legal regimes I would like to focus on two causal issues. First, what is the impact of the normative clustering depicted above on the structure and behaviour of financial institutions? Examples of structural changes include the creation of new organisational units, routines, and hierarchies. Behavioural changes include, for example, shifts in the composition of loans or stocks portfolios (in banks and investment institutions, respectively). Second, what is the ecological impact of the new normative framework? In considering this question one can either try and observe nature directly, or, alternatively, focus on close proxies, such as the behaviour of (polluting) industries. These two issues do not exhaust the causal puzzle. Other questions such as the general influence on the economic system (in terms of fluctuations in stock market), the influence on individuals in their dual role as investors and citizens, and the reciprocal relationship between these new global regimes and national normative processes, are also important; however I will not be able to fully consider them in this article (although I will return to the last issue in the next section). Nonetheless, the two causal paths highlighted above provide a rich enough picture of the external impact of the new regimes.

Before commenting on these two questions it is important to explicate the limitations of this kind of causal exploration. The causal paths underlying the problem of pollution control are highly complex. The normative processes depicted above are taking place along side multiple legal and non-legal processes with their own causal force. It is not possible to create a laboratory experiment, in which our chosen variables of environmental risk-assessment, investment criteria and disclosure rules are manipulated, while everything else is held constant. Thus, the following observations will be necessarily contingent and tentative, especially given the fact that the normative phenomena explored here are very recent.

Consider, first the field of project finance. One needs to distinguish in this context between private banks and development banks. There are some indications that private banks have been influenced by the new regimes. First, UNEP Banking and Insurance statements and the Equator-Principles have already attracted a significant number of signatories, many of which are global leaders. UNEP statements had 168 signatories as of 1 February 2007, among them key players such as Barclays Group plc, Citigroup, Credit Suisse Group, and Deutsche Bank AG. The Equator Principles had

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65 Experimental economics explores economic dilemmas with such laboratory experiments, but it usually deals with much more structured and simpler causal situations. See, for example Kahneman et al (1990).
66 For a discussion of these limitations, following Luhmann, see also King (2006).
45 signatories. Many leading institutions such as ABN AMRO Holding N.V., Citigroup, HSBC Holdings plc, JPMorgan Chase and the Royal Bank of Scotland Group take part in both initiatives. The lack of transparency, which characterises the operations of private financial institutions makes it difficult, however, to assess to what extent these institutions have actually implemented their commitments under these regimes. Whereas public financial institutions, such as the World Bank, operate in a relatively transparent manner, the practices of private financial institutions remain, in general, highly secretive. Nonetheless at least one recent report argues that the Equator Principles had a substantial impact on the financial market, describing them as a "shining beacon for responsible banking" (Freshfields-Bruckhaus-Deringer and Group) 2005: 1).

There are also some indications that the practice of environmental risk assessment spread beyond the circle of UNEP/Equator signatories (McKenzie and Wolfe 2004).

With respect to development banks the data is somewhat richer, allowing more detailed empirical research. Particularly noteworthy is an ambitious research project funded by the U.S. National Science Foundation - Project-Level Aid (PLAID) – which has compiled data on development finance for the years 1970-2001, covering 430,000 development projects. The project evaluates each of the projects for its projected impact

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69 Whereas the World Bank, for example, provides extensive information about its decision-making rules (e.g. lending criteria) and its loans portfolio, this information is usually not available with respect to private banks. See, Paul Watchman and Charles July, “A new environment”, Legal week, 2 February 2006, 24 (available at http://www.legalweek.com), WWF, Shaping the Future of Sustainable Finance: Moving from Paper Promises to Performance' (2005) at 3, and BankTrack (2006: 9-10). The lack of transparency is reflected also by the fact that as of 8 June 2006 only 25 financial institutions (out of 163 organisations) have committed to publishing annual reports in accordance with the GRI Guidelines. See: http://www.globalreporting.org/ guidelines/reporters_IA.asp. It is interesting to note in that regard that only five of the 25 financial institutions that have published in accordance reports have also subscribed to the Equator Principles (ABN AMRO Bank, Caja Navarra, Rabobank Groep, WestLB AG, Westpac Banking Corporation). Principle 10 of the 2006 Equator Principles ('EP') requires each of the subscribing institutions to publish annual report about the way it has implemented the EP. It may thus reduce some of the information asymmetry that currently characterizes the financial realm.

70 The Freshfields study was based on detailed questionnaires, which were sent to Equator and non-Equator banks, project sponsors, consulting agencies, and NGOs, ibid at 45.

71 A UNEP study found that 56% of the banks which participated in the survey (which included banks from the EU, North America and Oceania) conduct environmental risk assessment in their financing decisions (UNEP-FI-Secretariat 2002: 54-55). Other studies report similar findings. See, for example: McKenzie and Wolfe (2004), McDermott and Stainer (McDermott, Stainer, and Stainer 2005: 8-9), Hoijtink (2005: 50), Gee-Janssens (2004: 42-66). While the foregoing studies seem to indicate that the world of private banking has undergone significant institutional change, their results are somewhat limited because they rely either on questionnaire-based surveys, in-depth interviews, or on examination of data in financial and social-environmental reports. None of these studies examined closely the banks’ loan portfolio or the financed projects themselves. While this methodological deficiency may be understandable given the secretive nature of the banking business, it nonetheless casts doubts on the conclusions of these studies.
on the environment (using a novel coding system). Studies using the PLAI D data base focused, so far, mainly on the World Bank. The studies show that the World Bank has significantly changed its lending practices, and that these changes triggered statistically significant changes to its loan portfolio, reflecting a shift toward categories whose environmental impact is negligible, nonexistent, or even positive.

Consider next the area of ethical investment. The normative transformation of the field of ethical investment has triggered significant institutional changes, reflecting the fact that the new 'ethical' investment vehicles have attracted substantial, and increasing, amount of money (causing substantial changes in the investment portfolios of pension funds and investment houses). What is less clear is whether this normative-institutional phenomenon, and the associated shift of investment money from 'regular' to 'green' funds, had any effect on the behaviour of firms themselves.

The research into the possible and actual effects of ethical funds is still in an embryonic stage. Several studies offer theoretical models that show that the existence of green or ethical investors may induce firms to change their behaviour (e.g., adopt green technologies), by changing the cost of capital of firms in view of their compliance profile. However, the force of this 'green' stimulus depends on the proportion of green/ethical 'money' in the total universe of investment capital (Heinkel, Kraus, and Zechner 2001; Aslaksen and Synnestvedt 2003). Economic theory also predicts that ethical/green investment funds are likely to underperform neutral investment vehicles because 'by restricting the universe from which stocks can be picked, a fund manager cannot improve his performance and may worsen it' (Heal 2004: 22). Empirical studies of these two predictions are still quite limited and leave many open issues. There has not been much work exploring the efficacy of ethical/green funds in changing corporate behaviour. A recent study exploring the FTSE4Good index examined this question indirectly, by conducting a questionnaire survey of companies listed on the FTSE4Good UK and Europe indices (as of September 2003). The questionnaires were sent to public/investor relations departments. The results suggest that the FTSE4Good initiative had some impact on the internal dynamics of listed companies, especially with respect to reporting, policy decisions and management systems (Cobb et al. 2004: 26). This study suffers however from various methodological shortcomings, and thus its results require further corroboration (Cobb et al. 2004: 25-26). There are also conflicting findings with respect to the performance of ethical funds (Heal 2004: 22).

Consider next the field of environmental reporting. The emergence of the GRI as a dominant normative source had substantial impact on global disclosure practices. A report published by KPMG in 2005 outlines the scale of this impact (2005). The KPMG survey analyses trends in corporate responsibility reporting of the world's largest corporations, including the top 250 companies of the Fortune 500 ('G250') and top 100 72

74 See the Social-Investment-Forum (2006).
75 It is possible to distinguish in this context between two motivations driving individuals to invest in green funds. Ethical investment can be seen, first, as a reflection of personal integrity. People want to ensure that their deeds conform to their moral principles and beliefs. From this perspective profitability and financial cost are simply irrelevant. But ethical investment can also be seen as an instrument for inducing firms to behave more responsibly - in terms of the environmental and social side-effects of their behaviour. From this perspective ethical investment is seen as an instrument for changing the world.

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companies in 16 countries ('N100'). With its vast coverage of more than 1600 companies the survey provides a truly global picture of reporting trends over the last ten years. The report documents a dramatic change in both the style and scale of environmental reporting. First, the focus of corporate responsibility reporting has changed from purely environmental reporting up until 1999 to sustainability (social, environmental and economic) reporting, reflecting the structure of the 2002 GRI Guidelines. Second, in terms of scale the report notes that sustainability reporting has now become mainstream among G250 companies (68 percent) and fast becoming so among N100 companies (48 percent).\textsuperscript{76} The influence of the GRI Guidelines was also reflected by the fact that 40 per cent of the reporters mentioned that the Guidelines were the tool used by the corporation to decide about the content of the sustainability report.\textsuperscript{77} The increasing influence of the GRI Guidelines on global reporting trends was also noted by SustainAbility 2004 survey of corporate sustainability reporting.\textsuperscript{78}

But did the institutional move from conventional to sustainable reporting made a difference in terms of the environmental performance of the reporting organisations? This is a much more difficult question, mainly because one cannot design a proper experiment which could test this hypothesis, while other measurement techniques, such as econometric methods and elite interviews raise various methodological questions.\textsuperscript{79} The literature has still to tackle this question, so I can only refer to some preliminary hints. Thus, for example, KPMG report explored the question of what drives companies to take on sustainability reporting. Almost half of the companies reported risk management or risk reduction as one of their key drivers.\textsuperscript{80} Since environmental risks are part of the risk universe facing firms, it seems that sustainable reporting is perceived (or more accurately presented) by firms as an important factor in their risk-management apparatus.

To conclude this section it is possible to make two general observations. First, the new global legal apparatus has triggered discernible changes in the practices and organisational routines of financial institutions and transnational corporations. However, to what extent these changes had a meaningful ecological impact is still too early to say. Answering this question involves difficult methodological and empirical problems, reflecting the lack of reliable and coherent data about the behavioural profile of industrial corporations and the state of the environment. The evidence seems, then, to weigh against the 'green-wash' hypothesis although there is not enough data to dismiss it completely.

\textsuperscript{76} KPMG (2005: 4).
\textsuperscript{77} KPMG (2005: 20).
\textsuperscript{79} To mention just two: the problem of building a reliable control set, and the self-selection bias.
\textsuperscript{80} KPMG Report (2005: 18 (table 1)). Other key reasons were economic considerations (74\% of the sample), ethical considerations (53\%), innovation and learning (53\%), and employee motivation (47\%). This data is based on a textual analysis of the reports, \textit{ibid}, at 8.
III. Coordinating the Coordinators: Reflections on the Past and Future of Governance at the Field of Green Finance

In considering the normative apparatus, which governs the field of green finance, one is confronted with two puzzles. The first puzzle concerns the historical forces that led to the contemporary governance configuration, and specifically to the dominant role of non-state forces in it. The second puzzle involves a different question: is the current normative structure, with its idiosyncratic distribution of normative powers, the most efficient one, in terms of achieving a more sustainable society? While the former question takes the position of detached sociological observation, the latter takes the bolder and more problematic perspective of social engineering.

Let me comment, first, on the historical question. The emergence and transformation of the field of green finance should be considered, as noted above, in light of the cultural struggle between neo-liberal capitalism and the new social movements. The trigger to the evolvement of green finance can be traced back to the environmental campaign against the World Bank and the GATT in the 1980s and beginning of 1990s.81 This campaign received some political support from the U.S. Government and other governments (particularly, Japan, West Germany, Netherlands and Denmark) leading to a significant reform at the World Bank, and influencing – although to a less extent – the structure of the newly established WTO.82 This environmental critique brought to light the linkage between the trade-financial world and the environment, acting as a trigger for the emergence of green-financial instruments. This environmental sentiment was supported by certain regulatory changes, in particular the enactment of the Super Fund Act in the United States.83 At another front, financial institutions and industrial corporations began to recognise that ecological risks also represent financial and operational risks.

These confounded processes of broadening environmental sentiments, stricter environmental regulation and increased business interest in ecological risks, led to the evolvement of the first-generation of green financial instruments. As was described above, the ensuing legal map was highly fragmented, reflecting the absence of global coordinating forces. However, state intervention remained limited, reflecting the strong influence of the neo-liberal narrative. The leap to the second-generation of regulatory instruments was facilitated by several processes.84 First, the entry of private institutions, for which the lack of global centres of governance constituted a business opportunity. For private entities such as the FTSE and Dow Jones groups, environmental consulting agencies, and global standardisation bodies such as the International Organisation for Standardisation, the relative chaos that characterised the field of green finance and corporate social responsibility, marked a new business terrain. The evolution of sustainable indexes represents a particularly fascinating example in that context. In providing governance to the ethical investment market groups like FTSE and Dow Jones Indexes were building on their reputation and experience in the parallel business of tracking companies' financial performance. They were using their parallel experience as leverage for gaining normative supremacy at this newly created 'market'.

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81 For a review and discussion see Wade (1997), Esty (1994) and Nielson and Tierney (2003).
82 Nielson and Tierney (2003: 261) and Perez (2004: chapters 1 and 3).
83 Which imposed liability for land contamination on banks lending to environmentally sensitive industries; see Hooley (2001) and Boyer and Porrini (2003).
84 For a discussion of this historical process see also Utting (2000: 2-5).
A second factor was the increasing involvement of international organisations such as the World Bank and UNEP. In most cases these organisations have joined forces with transnational corporations: UNEP Finance Initiative, the Equator Principles project, the 2006 Principles for Responsible Investment, and the Global Reporting Initiative are all examples for such joint projects. Increasing consumer interest - particularly in instruments of ethical investment - provided further impetus to this process, boosting the interest of financial institutions and providing public legitimacy for these initiatives. Finally, new governmental initiatives, such as the imposition of transparency rules in the pension market, and the introduction of mandatory disclosure schemes such as the US Toxics Release Inventory and the European Pollutant Emission Register, also contributed - even if indirectly - to the codification process which was led by private institutions and global organisations. These latter processes reflect, so it seems, a certain retreat from the basic prescriptions of neo-liberal capitalism, and a willingness to accept some of the civic critique against it.

What would be the next phase? While I think that the normative leadership will remain at the hands of non-state organs: NGOs, Transnational Corporations and International Organisations, and various hybrid combinations of these entities, I believe that governments are likely to extend their intervention, creating a normative ensemble of multilayered regulation. Government intervention is likely take place in the following areas. A first important area is transparency. I think governments are likely to expand their intervention in this area in two directions. First, there will be continued pressure to develop environmental reporting registers, which would operate independently of the emerging practice of sustainability reporting. A second direction will focus on the field of pension law. There will be increasing pressure to ensure that citizens have the freedom to choose among different investment philosophies, and that fund managers provide full information with respect to their ethical, social and/or environmental policies.

Third, while I do not foresee governments intervening directly in the content of the new regimes (e.g., in the investment criteria of ‘green’ mutual funds), there will be more attempts to invoke domestic norms, which govern framework issues such as misrepresentation in securities laws, and laws regarding the fiduciary duties of fund managers. One of the more puzzling questions concerns the response of traditional legal doctrines to the challenges created by the new field of green finance. To mention just two questions. How can one measure damages in case of a misrepresentation or omission regarding ecological information, if this misrepresentation did not cause financial damage to the investor? Is it possible to bring a claim of a breach of fiduciary duty against a pension fund manager, for failing to implement the fund social-

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86 See, above n 63.


88 For a discussion of these doctrinal issues, see, for example Vashista et al (2005) and Freshfields-Bruckhaus-Deringer and UNEP-Finance-Initiative (Asset Management Working Group) (2005). These norms can be invoked both through criminal or administrative actions initiated by state regulators and through private litigation.
environmental policy, if it can be shown that this breach has financially benefited the fund’s beneficiaries? A possible legal response, which was developed by the Israeli Supreme Court, is the creation of a new tortuous remedy, focusing not on the question of financial damage, but on the grievance to the individual’s integrity or autonomy, manifested in the deliberate disregard of his moral beliefs and preferences. Finally, governments are likely to incorporate social-environmental criteria into their public procurement rules. Such clauses can already be found in the public procurement regimes of the Czech Republic, France, Lithuania, and Sweden.

What about the question of regulatory efficiency? One can raise in this context two conflicting arguments. First, the thesis of reflexive law, which highlights the systemic barriers facing the project of social engineering, points to the advantages of bringing together, under a single institutional umbrella, financial expertise and norm-creation capacities. Allowing financial institutions to take an active role in shaping the norms which will regulate the financial market – from risk assessment procedures, to investment criteria and disclosure protocols – sets the ground for more reflexive legal governance. A second important advantage has to do with the shortcomings of global politics – the grave difficulties of reaching transnational agreements. Private entities such as FTSE and Dow Jones, and hybrid structures such as the Global reporting Initiative can circumvent these difficulties.

On the other hand, these hybrid associations – which are very different from the organisational structures that dominate the national realm, in which the legal and economic worlds are embedded in highly separated institutions – are much more prone to the risk of corruption or colonisation. The question, then, is who will guard the regulators? (Utting 2000). Or, in other words, can this new multi-layered regulatory network withstand the inevitable pressures of the global economic system? This is a legitimate concern. I think that the unique structure of the new regulatory apparatus, with its 'ensemble' architecture, makes the prospects of absolute economic domination unlikely. The different regulatory layers which constitute this field create a mutually supportive structure, whose synergistic capacities compensate for some of its shortcomings (like lack of developed compliance mechanisms). Three points are particularly noteworthy in this context. First, the multi-polar structure of the current regulatory framework ensures that an orchestrated attempt to link together the various green-finance initiatives, creating a global greenwash cartel, will face formidable transaction costs. Second, there is a developed network of transnational environmental NGOs, which observes and monitors the developments in this field, thus limiting the

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90 Daaka v. Carmel Hospital - Haifa, Supreme Court Case 2781/93 and Tnuva v. Ravi Tufic, Supreme Court Case 1338/97.

91 See, the public procurement section at http://ec.europa.eu/employment_social/emplweb/csr-matrix/csr_matrix_en.cfm, visited 11 June 2006. Another potential avenue for state intervention is tax law. Thus, for example, the Dutch authorities have introduced tax cut on dividends from green funds (Aslaksen and Synnestvedt 2003: 221).

92 Thus, for example, Environmental groups have criticised the Equator-Principles for their lack of compliance and grievance mechanisms. See BankTrack (2006) and Freshfields-Bruckhaus-Deringer and UNEP-Finance-Initiative (Asset Management Working Group) (2005: 36-44, reviewing and responding to the NGOs critique).
capacity of financial actors to totally undermine the integrity of the new global instruments. Finally, the broadening governmental intervention is also likely to suppress such corrupting pressures.

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Annex A

FTSE4Good Environmental Criteria

To be included in any of the FTSE4Good Indexes companies must meet requirements in five areas: environmental sustainability, relationships with stakeholders, universal human rights, supply chain labour standards and countering bribery. In addition companies having business interests in the following industries are excluded from the FTSE4Good Index Series: Tobacco Producers, companies associated with the nuclear industry or nuclear weapons systems, companies manufacturing whole weapons systems. The FTSE4Good team developed detailed criteria covering each of the foregoing areas. The environmental criteria, which are reproduced below, assign companies with a high, medium or low impact weighting according to their industry sector. The inclusion criteria are more stringent, the higher the environmental impact of the company’s operations. Similarly to the Dow Jones Index, FTSE4Good uses a consultancy group - Eiris - in order to assess companies against the FTSE4Good criteria. The final decision whether to include/delete a company from the index is made by FTSE4Good Policy Committee.


95 See, FTSE4Good Index Series Inclusion Criteria, ibid.

96 Ibid, at 3.

97 Eiris uses the following resources for its evaluation: company questionnaire response and direct contact, company Reports and company Website.

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<th>High Impact Companies</th>
<th>Medium Impact Companies</th>
<th>Low Impact Companies</th>
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<td>- Policy is on all key axes.</td>
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<td>- Accountability to board or department level.</td>
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<td>- Clear strategy of objectives.</td>
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<td>- Commitment to monitoring and audit.</td>
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<td>- Commitment to public reporting.</td>
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<td>Substantial Indicators</td>
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<td>- Carbon footprint management standards.</td>
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<td>- Management of biodiversity.</td>
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<td>- Policy adherence to green procurement.</td>
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<td>- Public commitment to sustainability.</td>
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<td>- The framework must have been published within the last three years.</td>
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<td>- Indicators must cover the whole group, and meet these core indicators.</td>
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<td>- Indicators must cover all high risk activities.</td>
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<td>- Indicators must be communicated to senior management.</td>
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<td>- Indicators must be reviewed at least annually.</td>
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<td>- Indicators must be reviewed at least biennially.</td>
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<td>- Indicators must be reviewed at least triennially.</td>
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<td>- Indicators must be reviewed at least quinquennially.</td>
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<td>- Indicators must be reviewed at least decennially.</td>
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<td>- Indicators must be reviewed at least centennially.</td>
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<td><strong>Reporting</strong></td>
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<td>- Core Indicators</td>
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<td>- Policy environmental policy.</td>
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<td>- Description of strategy.</td>
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<td>- Quantitative data.</td>
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<td>- Performance measured against targets.</td>
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<td>Substantial Indicators</td>
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<td>- Outline of ERM.</td>
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<td>- Risk assessments, processes, flow, incident.</td>
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<td>- Financial accounts.</td>
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<td>- Independent verification.</td>
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<td>- Sustainability criteria.</td>
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<td>- Concepts of sustainability.</td>
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</table>
References


Gee-Janssens, Pai. 2004. The Socially Responsible Investment Fund Market in Belgium and The Netherlands

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