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Towards Sustainable Consumption and Production in North America: Building Legitimacy through Roles and Responsibilities in a beyond Compliance Operating Environment

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TOWARDS SUSTAINABLE CONSUMPTION AND PRODUCTION IN NORTH AMERICA: BUILDING LEGITIMACY THROUGH ROLES AND RESPONSIBILITIES IN A "BEYOND COMPLIANCE" OPERATING ENVIRONMENT

Stefanie Bowles*

And to those nations like ours that enjoy relative plenty, we say we can no longer afford indifference to the suffering outside our borders, nor can we consume the world's resources without regard to effect. For the world has changed, and we must change with it.

- Barack Obama, 2008 Inauguration Speech

1. INTRODUCTION AND OUTLINE

Sitting at the intersection of a number of disciplines, sustainability policy is characterized by learning and debating about what "environmental" problems mean for society.[1] In the flux surrounding mainstream North American policy responses to the de-stabilization of global climate and socio-economic systems, a fledgling discourse coalition is emerging around the concept of a "low-carbon economy."[2] While still in the early stages, it is not the first so-

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[1] MAARTEN A. HAJER, THE POLITICS OF ENVIRONMENTAL DISCOURSE: ECOLOGICAL MODERNIZATION AND THE POLICY PROCESS 12-13 (1995); *see generally* JOHN S. DRYZEK, THE POLITICS OF THE EARTH (1997) (analyzing environmental issues by examining language used to describe such issues, and exploring the main discourses that have dominated environmental politics).

[2] Examples of this emerging low-carbon economy consensus are widespread in both policy and academic circles; *see, e.g.*, LOW CARBON ECONOMY, http://www.lowcarboneconomy.com (last visited Sept. 23, 2011); MCKINSEY & COMPANY, PATHWAYS TO A LOW-CARBON ECONOMY (2009); NATIONAL ROUNDTABLE ON THE ENVIRONMENT AND THE ECONOMY, ACHIEVING 2050 A CARBON PRICING POLICY FOR CANADA (2007); NAT'L COUNCIL ON SCI. AND THE ENV'T, THE CLIMATE SOLUTIONS CONSENSUS: WHAT WE KNOW AND WHAT TO DO ABOUT IT (David E. Blockstein & Leo Wiegman, eds., 2010); *See, e.g.*, DAVID HUGHES ET AL., CARBON SHIFT: HOW THE TWIN CRISES OF OIL DEPLETION AND CLIMATE CHANGE WILL DEFINE THE FUTURE, (Thomas Homer-Dixon, ed., 2009). This emerging low-carbon economy con-

cio-sustainability discourse to eventually be institutionalized at the federal levels in the United States and Canada, as generation after generation attempt to reconcile socio-economic and environmental imperatives. Such institutionalized discourses (e.g., "pollution prevention") represent a moment of consensus within a particular institutional structure, most notably the environment departments at North American federal levels.

This paper begins with a discussion of the some of the key assumptions in the emerging low-carbon economy consensus, which it situates in the context of the existing discourse of pollution prevention as embedded in federal environment departments in North America. It then proceeds to analyze the connection between low-carbon economy tenets and those of the concept of ecological modernization developed primarily in Europe. Historical resistance to the application of ecological modernization approaches in North America is then reviewed, revealing divergent discursive manifestations of the appropriate role of technology, the relationship of humanity to nature, and individual and collective interests.

Transitioning from a review of institutionalized sustainability discourses, a political economy lens is used to identify the emergence of a "beyond compliance" operating environment for all actors, as the parameter setting function of the state declines (see section 3.1). Both driving this decline and characterizing it are new generators of marketplace legitimacy (e.g., visible logos and certifications), the structural deference by regulators to voluntary standards (e.g. the "strategic partnership" between the International Organization for Standardization ("ISO") and state signatories to the World Trade Organization ("WTO") Agreement on Technical Barriers to Trade – see section 3.3), and supply chain imposed environmental and social risk mitigation measures.

This systemic reconfiguration takes us out of federal environment departments, engenders a blurring of roles and responsibilities, and raises a number of key questions for all actors moving forward in a beyond compliance operating environment:

> 1. What does a beyond compliance environment and a decline in parameter setting functions mean for accountability and risk mitigation? Can we actually entrust consumers/procurers with this responsibility?

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sensus is not exclusive to North America. *See, e.g.*, Aidan While, Andrew E.G. Jonas, & David Gibbs, *From Sustainable Development to Carbon Control: Eco-state Restructuring and the Politics of Urban and Regional Development*, 35 TRANSACTIONS OF THE INST. OF BRITISH GEOGRAPHERS 76, 76-93 (2009).

2. Will low-carbon and ecological modernization approaches provide an adequate response to our economic and social sustainability challenges?
3. What does this mean for the United States and Canada's bilateral approach to economic development, as exemplified by the North American Free Trade Agreement?

Finally three potential intervention points are offered: (1) create new democratic North American regional institutions with specific projects related to standardization; (2) establish clear roles and responsibilities between the private sector, government, civil society, business and citizens in a beyond compliance environment; and (3) deliberatively re-vision the good life & the social compact at all levels.

2. A HISTORICAL AND COMPARATIVE DISCOURSE ANALYSIS OF INSTITUTIONALIZED SUSTAINABILITY POLICY CONSENSUSES

Starting points can reveal a lot about an analysis. Language provides concepts and meanings to illuminate the world, and while they can fundamentally unite us, they can also serve to divide along disciplines and worldviews. In the broad field of sustainability, a few disciplines generally predominate (the physical sciences, economics, engineering, business, political science, etc.) and engage in rhetorical[3] dialogue and debate about how sustainability is defined and addressed, in which people bring to the table their own knowledge. Heterogeneous groups engaging in/around sustainability often realize that they need to create a concept map, "green dictionary," or glossary before they can move forward together. Discourse approaches help us understand and trace the consensus that has resulted from different dialogues and debates, and in doing so, we can understand how, where, and when sustainability was defined, institutionalized and acted upon in decision-making through law, economic instruments, policy and programming.

Using discourse to illustrate policy dynamics, I critically analyze key low-carbon economy assumptions, then situate it in the context of the previous discourse consensus of pollution prevention as institutionalized in federal agencies. I then link it to the related concept of ecological modernization, whose reception in North America is revealing of current dynamics and obstacles surrounding perceptions and beliefs of state-industry relations and roles and responsibilities, which are then addressed in the following section.

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[3] I use the word "rhetorical" not as in "imaginary," but as in "through language."

2.1 The low-carbon economy and pollution prevention

The inclusion of a low-carbon economy discourse in mainstream North American federal policy circles does represent a significant sustainability-inspired shift in North America.[4] It is a watershed insofar as it opens up the possibility that human economies do not have to necessarily function in opposition to the environment and that, rather than an exclusive or inherent cost, "green" can represent an opportunity for firms, investors, workers, and communities. Primarily through the climate change and energy lens, inroads have been made at the federal levels.[5] In both the United States and Canada, portions of the fiscal stimulus were devoted to energy efficient buildings and public transportation infrastructure. The United States has led the G-20 to commit to phase out public subsidies for the oil and gas sector.[6] In Canada, shadow national accounts are now produced which include greenhouse gases by sector and energy intensity. Both countries are working together in "The North American Clean Energy Dialogue" with working groups addressing carbon capture and storage ("CCS"), efficient electricity grids, and research and development.[7]

While inroads have been made, a low-carbon discourse tends to understand the sustainability crisis as one primarily of climate change, which is often seen as caused by a pollutant, namely greenhouse gases. In this perspective, climate change is a discrete environmental problem, sometimes

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[4] This paper focuses on the federal levels in North America; North America is considered a region under the U.N. Marrakech process on Sustainable Consumption and Production. *Regions – North America*, THE MARRAKECH PROCESS, http://esa.un.org/marrakechprocess/regionsnamerica.shtml (last visited Sept. 26, 2011). Under this process, Mexico forms part of the Latin American region. *Regions – Latin America & the Caribbean*, THE MARRAKECH PROCESS, http://esa.un.org/marrakechprocess/regionslamericacaribbean.shtml (last visited Sept. 26, 2011). For the purposes of this paper, "North America" will be used in reference to Canada and the United States only.

[5] Of course other sustainability-related programming and cooperation exists outside of the low-carbon discourse, *e.g.* the wildlife conservation Memorandum of Understanding recently signed by the North American Free Trade Agreement countries, which while important and essential, does not necessarily address the demand for raw materials putting pressure on wild places in the first place. Memorandum of Understanding for Cooperation on Wildlife Conservation, Nov. 7, 2009, http://www.wild.org/wp-content/uploads/2010/01/MOU-Wilderness-WILD9-eng.pdf.

[6] THE PITTSBURGH SUMMIT, LEADERS' STATEMENT 3 (2009), *available at* http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.

[7] HONORABLE STEVEN CHU & HONOURABLE JIM PRENTICE, U.S.-CANADA CLEAN ENERGY DIALOGUE: FIRST REPORT TO THE PRIME MINISTER OF CANADA AND THE PRESIDENT OF THE UNITED STATES OF AMERICA (2009), *available at* http://energy.gov/sites/prod/files/CED.Report%20to%20Leaders%20FINAL%209-16-09.pdf.

compared to ozone layer depletion, and is conceived as something that can be solved via technological substitution and increased energy efficiency, engendered by energy price increases and/or research and development supported innovation. In addition to the narrow focus on carbon and a profound implicit technological optimism is the pre-supposition that the economic model itself can continue on much as before (e.g., specialization and trade, consumption as the main driver of economic growth, etc.) as long as it is modified by new sources of energy or end-of-pipe pollution controls (e.g., CCS), geo-engineering solutions,[8] or eco-efficient goods and services.

A low-carbon lens also focuses narrowly on the output of carbon emissions, which isolates carbon from input energy and isolates energy from the materials it displaces—materials which were once intact ecosystems essential for the perpetuation of human and non-human habitats. This narrow carbon focus dramatically reduces the scope of relevant environmental information for decision-making, which in order to be comprehensive would include additional information in addition to the aforementioned material flows, such as water use, toxicity, and social sustainability. At a more abstract level, understanding the problem as one of pollution does not question the intentionality of the input, it keeps the focus on the negative after effects (e.g., the "externality") as opposed to the actual system that produced it. A related vein includes attempts at moving away from thinking of "waste"; rather the point is to conceive of a system where there is no such thing as waste, and no such thing as pollution.[9]

Since the 1990s, a discourse of "pollution prevention" has permeated the policy and programming of both Environment Canada and the Environmental Protection Agency ("EPA"). In Canada, the main piece of federal environmental legislation is an "Act respecting pollution prevention,"[10] and we have a database of Pollution Prevention programs, as well as the Canadian Roundtable for Pollution Prevention where we give awards to companies for preventing pollution. In the United States, pollution prevention has been similarly engrained. The Pollution Prevention Act was passed by Congress in 1990 in which "Congress declared it to be the national policy of the Unit-

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[8] *See* NAT'L COUNCIL ON SCI. AND THE ENV'T, THE CLIMATE SOLUTIONS CONSENSUS (David E. Blockstein & Leo Wiegman eds., 2010) (putting Geoengineering solutions on the table).

[9] *See* Press Release, U.S. Envtl. Prot. Agency, EPA Announces Reorganization and Name Change for Office of Solid Waste (OSW); OSW Becomes the Office of Res. Conservation and Recovery and Streamlines Its Operations (Jan, 19, 2009), *available at* http://www.epa.gov/osw/reorg-fs1-09.pdf (reflecting the move away from thinking about "waste"); *see also* WILLIAM MCDONOUGH & MICHAEL BRAUNGART, CRADLE TO CRADLE: REMAKING THE WAY WE MAKE THINGS (2002); *see also* DAVID W. ORR, THE NATURE OF DESIGN: ECOLOGY, CULTURE, AND HUMAN INTENTION (2002).

[10] Canadian Environmental Protection Act, S.C. 1999, c. 33 (Can.).

ed States that pollution should be prevented or reduced at the source whenever feasible."[11] In addition to National Pollution Prevention Roundtables, every September the EPA promotes Pollution Prevention week.

The language of "preventing pollution" was intended to move the environmental protection institutions and, by extension, society beyond the end-of-pipe pollution control approaches of the 1970s.[12] However, many of today's most urgent environmental problems have as their fundamental root ever-increasing volumes of production and consumption and the associated use of raw materials (renewable and non-renewable), energy, water, and land.[13] The demand triggers that generate this consumption and production are not criminal in nature; and yet it is the criminal head of power which constitutionally empowers both Canadian and American environmental protection agencies via regulation.

Solving today's environmental and socio-economic crises not only require going beyond the lens of "pollution", it also requires a reconceptualization of criminality. If the core driver of environmental degradation is consumption, then we are all polluters, and it is clear that consumption itself cannot be criminalized in any traditional sense. Even in the area of toxic pollution, sources have moved from being a handful of companies to "non-point" sources, such as in the area of water pollution from run-off or chemicals found in products manufactured outside our territorial jurisdiction.

The difficulty faced by North American environmental agencies in solving today's environmental problems is well articulated in the United States National Advisory Council for Environmental Policy and Technology's re-

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[11] Pollution Prevention Act of 1990, 42 U.S.C. §§ 13101-13109 (2002).

[12] *See Pollution Prevention Week*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/p2week/ (last updated Sept. 20, 2012) (stating "The best way to protect the Earth and its people is to stop creating pollution in the first place – that realization became America's official policy in 1990 with the Federal Pollution Prevention Act's, declaration that, 'Pollution should be prevented or reduced at its source, whenever possible.'"); *Pollution Prevention*, ENV'T CANADA, http://www.ec.gc.ca/p2/ (last modified Aug. 26, 2011) (stating "The federal government believes that pollution prevention is the most effective means of protecting our environment, eliminating costly waste, and promoting sustainable development. P2 focuses on avoiding the creation of pollutants rather than trying to manage them after they have been created."). *See generally Basic Information*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/p2/pubs/basic.htm (last updated June 6, 2011) (providing a basic historic overview).

[13] *See* U.S. ENVTL. PROT. AGENCY, SUSTAINABLE MATERIALS MANAGEMENT: THE ROAD AHEAD (2009), *available at* http://www.epa.gov/smm/pdf/vision2.pdf (arguing that our use of materials is increasing and challenging the Earth's capacity). *See also* STEFAN GILJUM ET AL., SUSTAINABLE EUROPE RESEARCH INST., A COMPREHENSIVE SET OF RESOURCE USE INDICATORS FROM THE MICRO TO THE MACRO LEVEL (2009), *available at* http://seri.at/wp-content/uploads/2010/02/SERI-Working-Paper-9.pdf (stating that the "most urgent environmental problems arise from increasing volumes of worldwide production and consumption and the associated use of natural resources").

port *Everyone's Business: Working Towards Sustainability Through Environmental Stewardship and Collaboration*, which argues that:

> Every day individuals and institutions make a myriad of choices that affect the environment for better or worse. Interest in sustainability and environmental stewardship is surging throughout the country and around the world and now is the time for EPA to re-cast its role to provide the leadership needed for society to reach the next level of environmental quality.[14]

Stewardship is defined in simple terms in this report: taking responsibility for our choices. In Canada, Environment Canada's vision is similar: "to see a Canada where people make responsible decisions about the environment, and where the environment is thereby sustained for the benefit of present and future generations."[15] But what constitutes an environmentally responsible choice? A low-carbon choice? Who is a (accountable) decision-maker in this context? And how do we ensure that these choices will generate the change necessary to solve our most pressing collective action problems?

2.2 The low-carbon economy and ecological modernization

North America's fledgling low-carbon discourse can be understood in relation to its much more established and predominantly European counterpart: ecological modernization. Ecological modernization has its origins in the Netherlands in the early 1980s, in particular with the pioneering work of Maarten Hajer, the current head of the Dutch Environmental Assessment Agency.[16] Like low-carbon discourse, ecological modernization also seeks to work within the confines of the economic growth paradigm, emphasizes competitiveness, and capitalizes on the apparent confluence between the concepts of "innovation" in the economic sense and change for sustainability in the socio-environmental sense.[17] As it evolved earlier, it is broader than

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[14] John L. Howard, Jr., *Introductory Letter* to NAT'L ADVISORY COUNCIL FOR ENVTL. POLICY AND TECH., EVERYONE'S BUSINESS: WORKING TOWARDS SUSTAINABILITY THROUGH ENVIRONMENTAL STEWARDSHIP AND COLLABORATION 1 (2008), *available at* http://www.epa.gov/ocem/nacept/reports/pdf/2008-0328-everyones-business-final.pdf..

[15] *See id.* (*quoting* EPA INNOVATION ACTION COUNCIL, EVERYDAY CHOICES: OPPORTUNITIES FOR ENVIRONMENTAL STEWARDSHIP 2 (2005), *available at* http://www.epa.gov/epainnov/pdf/rpt2admin.pdf.) (explaining that "stewardship is a systemic approach to addressing the challenge of sustainability").

[16] J.P. LACOURSIÈRE INC. FOR ENV'T CAN., RATIONALE FOR THE DEVELOPMENT OF A LIST OF REGULATED SUBSTANCES UNDER CEPA SECTION 200 AND THEIR THRESHOLD QUANTITIES 1 (2002), *available at* http://www.ec.gc.ca/lcpe-cepa/8BA5E950-6016-487C-9AE8-44981D92B3D4/rationale_final_eng.pdf.

[17] *See* Arthur P.J. Mol & David A. Sonnenfeld, *Introduction* to ECOLOGICAL

carbon, yet also encourages flexible strategies predicated on aggressive technological innovation, efficiency, win-win regulatory approaches, and market-based mechanisms. Ecological modernization has formed the basis of many leading European countries' implementation of sustainable development.[18]

Both ecological modernization and low-carbon economy discourses emphasize the link between sustainability, innovation, and competitiveness. Here, a key way for firms to improve market share is to innovate to improve/differentiate one's product, process, or service. An increasingly popular way in which to innovate is to consider modifying your offerings to make them more environmentally friendly—or to at least market them as such. United States research on consumer values shows that between 2005 and 2009 the brand attributes which grew in importance for Americans were: "kindness and empathy" (up 391 percent), "friendly" (up 148 percent), "high quality" (up 124 percent), and "socially responsible" (up 63 percent). Through eco-innovation, you will be providing goods and services that consumers want, that meet the needs/solve the problems of tomorrow's consumers, meet the demands/answer the questions of your supply chain, and thereby improve/maintain your "competitive" position. In this way, your individual competitiveness is now serving social and environmental sustainability.[19]

2.3 Ecological modernization in North America?

Most prominent in leading European states, the wider European Union ("EU"), and Japan, ecological modernization has been controversial since its inception. Prior to the emergence of the low-carbon economy variant, as a discourse ecological modernization never caught on in North America to the extent that it did in Europe.[20] Dryzek and Schlosberg observe that: "the term

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MODERNISATION AROUND THE WORLD: PERSPECTIVES AND CRITICAL DEBATES 1, 4 (Arthur P.J. Mol & David A. Sonnenfeld eds., 2000) (explaining that Maarten Hajer made substantial contributions to the development of the Ecological Modernization Theory and that the first Dutch National Environmental Policy Plan in 1988 is often heralded as the first major example of a concerted program of ecological modernization).

[18] *See* Arthur P.J. Mol, *The Environmental Movement in an Era of Ecological Modernization*, 31 GEOFORUM 45, 45-47 (2000) (viewing changes in the environmental movement through the perspective of ecological modernization theory), *available at* http://journals.ohiolink.edu/ejc/pdf.cgi/Mol_Arthur_P.J.pdf?issn=00167185&issue=v31i0001&article=45_temiaeoem.

[19] *See e.g.*, Colin Fudge & Janet Rowe, *Ecological Modernization as a Framework for Sustainable Development: A Case Study in Sweden*, 33 ENV'T & PLAN. A 1527, 1527 (2001) (highlighting the Swedish government's policy framework of ecological modernization to achieve sustainable development through a study involving three Swedish cities).

[20] *See* STUART L. HART, CAPITALISM AT THE CROSSROADS: ALIGNING BUSINESS, EARTH AND HUMANITY (2d ed. 2007) (explaining the central and expanding role corporations have in global sustainability through commerce).

ecological modernization is not part of [United States] policy discourse, nor is there much in policy practice to suggest pursuit under any other name."[21] As the institutionalizations of the environmental movement at the federal levels in North America, founded in 1970 and 1971 respectively, Environment Canada and the EPA have been the focal points for these debates.

In his 2005 article *Ecological modernization and its discontents: the American environmental movement's resistance to an innovation-driven future*, Maurie Cohen outlines four of the United States environmental movement's critiques of ecological modernization:

> 1. *Ecological modernization as neo-Pinchotism*: Gifford Pinchot was the founding chief of the national forest service under Theodore Roosevelt's administration, and emphasized the efficient exploitation of natural resources. Ecological modernization is thought of as nothing more than an updated version of what Hays described as the "gospel of efficiency" in 1959.[22]
> 2. *The promotion of a de-sacrilized nature*: Those who understand nature as raw and mystical can intuitively judge ecological modernization to be a cold calculating expression of engineering vanity that objectifies nature and reduces it to narrowly anthropocentric terms. Here, it is inconceivable that the same corporations who regularly vilify nature could chart a new direction.
> 3. *Skepticism about technological innovation*: the overall American environmental cast of mind is notably guarded when it comes to declarations of pending technological revolution, as occurs in most expressions of ecological modernization.
> 4. *Anti-pollution as a resistance movement.* Since the appearance of Rachel Carson's landmark book Silent Spring and the first Earth Day in 1970, American environmentalism has assumed the posture of a resistance movement.[23]

These are generally instructive insofar as they illustrate several underlying perspectives commonly held and reveal the profound nature of this par-

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[21] *See generally* William M. Lafferty & James Meadowcroft, *Patterns of Governmental Engagement*, *in* IMPLEMENTING SUSTAINABLE DEVELOPMENT: STRATEGIES AND INITIATIVES IN HIGH CONSUMPTION SOCIETIES 337, 337 (William M. Lafferty & James Meadowcroft eds., 2000) (explaining the relative lack of United States governmental involvement in sustainable development).

[22] Maurie J. Cohen, *Ecological Modernization and its Discontents: The American Environmental Movement's Resistance To An Innovation-Driven Future*, 38 FUTURES 528, 530 (2006) (quoting David Schlosberg & John S. Dryzek, *Political Strategies of American Environmentalism: Inclusion and Beyond*, 15 SOC'Y & NAT. RESOURCES 787, 800 (2002)).

[23] *Id.* at 538.

ticular set of identity-forming beliefs.[24] As the main receptacles for the brunt of the public debate around sustainability, both departments regularly undergo transitions and re-organizations depending on administrative understandings of the "true" nature of business and technology, and more often than not, retreat into core regulatory functions based on legislation founded in the 1970s, divided by media (air, water), and focused on pollution.

Not only do we have difficulty designing interventions which respond to multiple environmental problems (e.g., energy and toxics in light bulb regulations for example), there is also a persistent internal tension between negotiating a regulatory role with a partnership/ leadership programming role which works with businesses as partners (e.g., EPA's Climate leaders or Performance Track programs).[25] This is despite the institutionalization of the discourse of pollution prevention; here, the institution housing the discourse consensus is the environmental institution, which has no purview over the levers of economic development, infrastructure, agriculture, transportation, etc.

As more businesses are taking steps to reduce their environmental impact of their own volition, certain systemic relationships and roles and responsibilities are being re-configured. As we try to design a system that does not create environmental degradation and inequality in the first place, what is it that we are trying to move beyond? What key barriers are we facing?

3. EMBEDDING MARKETS IN A "BEYOND COMPLIANCE" OPERATING ENVIRONMENT

Even before we consider multi-cultural realities, the previous section made clear that there is a longstanding and significant diversity of views regarding the "true" nature of business and technology, and the appropriate configuration of individual and collective interests here in North America. "Embedded" and "disembedded" economic orders were first distinguished in Karl Polanyi's 1944 book, *The Great Transformation.* In Polanyi's reading of history, economic orders have always reflected the principles and values

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[24] *See, e.g.*, MARY DOUGLAS & AARON B. WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS 150 (1982) (discussing how the area of Cultural Theory has significant explanatory power in the context of U.S environmental movement critiques).

[25] *See* Memorandum from the Environmental Protection Agency to the Performance Track Members & Corporate Leaders, & the State Environmental Commissioners (Mar. 16, 2009) (on file with author), *available at* http://www.epa.gov/performancetrack/downloads/PerformanceTrackNextStepsMemoExternal-text.pdf (explaining that the Obama Administration suspended the National Environmental Performance Track Program to reflect on the Program's achievements and opportunities to encourage environmental stewardship).

of the societies in which they were situated. Only in the middle of the nineteenth century was the idea of an economy that was somehow separate from society, a collection of markets with its own inexorable principles and logic, invented and then cultivated. This idea, which informed classical liberalism, was not only new but revolutionary. Whereas previous economic orders had always been "embedded" in social and political relations, this new liberalism succeeded in "disembedding" national markets, cross-border markets, and ultimately global markets. Several policy practices were essential to this process of disembedding markets, above all the free movement of goods, services, and capital among nations. [26]

As the United States and Canada seek to address persistent environmental and socio-economic problems, it is worth revisiting the assumptions upon which our system(s) address individual and collective interests in the allocation of resources. Moving away from the previous section's review of institutionalized discourses, this section attempts to review some of the structural dynamics which are contributing to the creation of a "beyond compliance" environment in North America. A "beyond compliance" environment is one in which technically being in regulatory compliance no longer provides adequate assurance of the socio-sustainability and legitimacy of a given economic activity, to consumers (citizens), supply chains, investors, employees, or other jurisdictions. Here, consumers and producers must take a more active role in achieving sustainability, in line with the National Advisory Council for Environmental Policy and Technology's ("NACEPT") concept of stewardship ("taking responsibility for our choices") and Environment Canada's mandate ("where people make responsible decisions about the environment"). A three-step sequence will sketch out how the government's parameter-setting function (i.e. parameters around *homo economicus*) is in decline relative to the business development functions of government. Three drivers will then be explored, which both incite and describe the emerging beyond compliance operating environment.

3.1 The decline of the parameter setting function of government

Figure One's steps one and two provide a high level outline of how individual and collective interests have been deemed to function in the allocation of resources in both the United States and Canada, and indeed in many modern market economies. In step one, focusing on the level of the individual, individuals and firms with survival and status needs transact in order to meet those needs in a competitively positional environment. This is based on the

[26] Rawi Abdelal & John G. Ruggie, *Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism, in* NEW PERSPECTIVES ON REGULATION 151, 152 (David Moss & John Cisternino eds., 2009).

tenets of *homo economicus*, which holds that humans are largely rational, self-interested, and self-directed actors; it underpins the profit motive and common understandings about choice, individuality and market function.[27] Here, many needs are met but inequality and environmental degradation are produced. 6

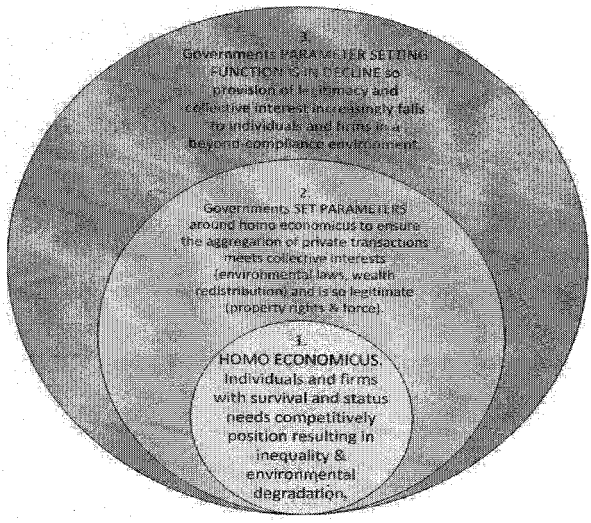

Figure 1. Three Steps to a beyond compliance operating environment

Source: Stefanie Bowles and Alan Painter

In step two, while maintaining *homo economicus* and the profit motive as organizing principles, governments in market economies set parameters around what they know to be self-interested profit-seeking transactions in order to ensure that power is not exploited or concentrated, that no egregious harm is generated, and that inequality and environmental degradation remain within limits acceptable to the majority of the population. In doing so, they ensure that the aggregation of these private transactions is legitimate. Governments use laws and wealth redistribution to "operationalize" these parameters, backed by what remains the only legitimate form of force. This is roughly the way individual and collective interests have been deemed to function in the allocation of resources in both countries.

Different tolerances for inequality and different understandings of environmental risk are longstanding societal characteristics. However, the power of the government was one of *convener*, in which all voices and perspectives would be heard and deliberated. This democratic process would produce a

[27] *See, e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 5-6 (2009) (discussing modern interpretations and applications of *homo economicus*). The author would like to thank Alan Painter for his contribution in this area.

common value, which would then be made real through codified legislation and the state's legitimate monopoly on violence to incarcerate and/or penalize anyone who deviated from that clearly established common value. These collectively established values would determine the parameters inside which we could legitimately transact. Over time, however, there is evidence that the parameter-setting function of government is in decline in both use and utility, especially at the federal levels in North America.

The causes of this macro-level phenomenon are multiple and complex, and while a fully complete analysis is beyond the scope of this paper, the following section will seek to isolate three interrelated structural drivers:

- The emergence of new generators of marketplace legitimacy that do not rely on government regulation, such as direct non-governmental organization ("NGO")/industry certification;
- the deference of regulators to voluntary standards to facilitate international trade; and,
- supply chain imposed environmental and social requirements via procurement.

The rapid pace of private sector innovation and the competitive pressures on jurisdictions to expedite and support time-to-market places enormous pressures on parameter-setting functions. This vacuum is being filled by NGO's, who are emerging as the most trusted institution globally.[28] The decline in the parameter-setting function should be understood relative to the growth in the regional development and trade promotion functions of government.

3.2 New generators of marketplace legitimacy: the first non-state eco-logo and non-state market driven standard setting

The story behind the first non-state administered eco-logo is instructive as it illustrates the formation of a direct relationship between civil society and the private sector.[29] The Forest Stewardship Council emerged in the late 1980s in response to concerns about forest management practices, especially in tropical regions. Coming to head around the time of the 1992 Rio Earth

[28] EDELMAN, 2012 EDELMAN TRUST BAROMETER EXECUTIVE SUMMARY 4 (2012), *available at* http://educar.files.wordpress.com/2012/04/2012-edelman-trust-barometer-executive-summary.pdf.

[29] The first state eco-logo was Germany's Blue Angel which was established in 1978. For a review of the origins and tactics of Forest Ethics and for a discussion on the procurement to advocacy transition you can listen to Tzeporah Berman. *See* LEADERSHIP FOR CHANGE – MAKING CHANGE HAPPEN, http://www.cstudies.ubc.ca/podcasts/index.html.

Summit, consumers, environmental groups, labor unions, industry representations, and First Nations were all frustrated with the failure of governments to negotiate a binding forest convention. They then came together to discuss an alternative that would address their concerns and it was following this meeting that the Forest Stewardship Council ("FSC") was founded in 1993.[30] To avoid private sector domination, which many viewed to be a problem with state-centered processes, the FSC was designed to include environmental, social, and economic decision making chambers, each with equal voting weight, and explicitly excludes governments from formal participation.[31]

The explicit exclusion of government was to be a prominent theme. Operating in sectors that represent one fifth of all products traded globally,[32] non-state market driven standards ("NSMD") like the FSC have proliferated to address collective action problems in areas including: fisheries depletion (Marine Stewardship Council); food production (International Federation of Organic Agriculture Movements); tourism (Sustainable Tourism Stewardship Council); rural and community poverty (FairTrade Labeling Organization); inhumane working conditions (Fair Labor Association); and, the environmental impacts of buildings (Leadership in Energy and Environmental Design).[33] In 2002 four original groups formed an alliance called I-SEAL, which is the global association for social and environmental standards, and is a registered non-profit in the United Kingdom.[34]

Often highly visible through the use of logos, these NSMD standards programs assure individual and institutional purchasers of the socio-sustainability of their transaction, thereby legitimizing it in a way that territorial governments were designed to do. For multinational companies, NSMD certification can be especially efficient and effective, given that it works across jurisdictions. For example, in 2010 Canada's largest company, Loblaw Company, Inc., announced that it would only source Marine Stewardship Council certified wild-caught fish by 2013.[35] All of these labels attempt to transmit environmentally and socially significant information about the

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[30] See FSC HISTORY, http://www.fsccanada.org/history.htm (last visited Nov. 16, 2012).

[31] Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance be Legitimate? An Analytical Framework*, 1 REG. & GOVERNANCE 347, 350 (2007).

[32] Graeme Auld et al., *The Emergence of Non-state Market Driven (NSMD) Governance: A Cross-sectoral Assessment, in* GOVERNANCE FOR THE ENVIRONMENT: NEW PERSPECTIVES (Megali A. Delmas & Oran R. Young eds., 2009). The one fifth figure was derived by the authors by dividing the total amounts of products traded under sectors represented in the Appendix by the total amount of all products traded globally using World Trade Organization 2003 statistics. WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE STATISTICS 2003 187 (2003).

[33] JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000).

[34] I-SEAL ALLIANCE, http://www.isealalliance.org/.

[35] LOBLAW CO. LTD., SUSTAINABLE SEAFOOD COMMITMENT (2011), *available at* http://www.loblaw.ca/en/pdf_en/lcl_seafood_policy_initiative.pdf.

impacts of the product or service and/or the ethical practices of the company. However, NSMD certification does not just try to agitate or embarrass companies; it seeks to establish governing mechanisms with sufficient legitimacy to be recognized as authoritative in the sector or policy area in question.[36]

3.3 The "strategic partnership" between the state, the World Trade Organization, and the International Organization for Standardization

The second driver and characteristic of a beyond compliance operating environment is the deference of regulators to voluntary standards to avoid the creation of technical barriers to trade while maintaining inter-jurisdictional operability. The perceived legitimacy of any standard or certification is intimately related to the process for setting the standard, which is in turn related to the ability of the process to be inclusive and legitimate to people in places. States evolved elaborate regulatory systems to ensure this legitimacy of process, for example by ensuring citizens were notified at appropriate times (steps five and six in the American federal regulatory process and via Canada Gazette 1 and 2).[37] An essential component of democracy and the social compact in both the United States and Canada is the regulatory process that links the legislative, judicial, and executive functions.[38]

Yet both Canada and the United States have directives (Canada) or laws (United States) in place that state that voluntary standards should be used *in lieu* of regulation whenever they exist.[39] In Canada, it is the *Cabinet Directive on Streamlining Regulation*. In the United States, *The National Technology Transfer and Advancement Act* (Public Law 104-113) states: "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments."[40]

The preferred voluntary standards to which both regulations refer are the kind developed by standards bodies such as the American National Standards Institute ("ANSI") and the Standards Council of Canada ("SCC"). Loosely

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[36] Bernstein & Cashore, *supra* note 31, at 347-371.

[37] *Canada Gazette*, GOV'T OF CAN., http://www.gazette.gc.ca/index-eng.html. Regulations have to be published not once, but twice via *Canada Gazette*, the official newspaper of the Government of Canada since 1841.

[38] The configurations of the branches vary in each country.

[39] Another way to legitimize standards is to incorporate them by reference into legislation, which occurs in about forty percent of cases in Canada. Not incorporating legislation can also include language which references the most current version of a standard, as in the case of LEED, thus allowing for market dynamism, something traditional regulation does not do well.

[40] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775.

affiliated with states, these bodies, and other similar bodies around the world, work in concert with the ISO. The world's largest developer and publisher of standards, ISO is officially a "non-governmental organization," comprised of the national standards institutes of 159 countries with a central secretariat in Switzerland.[41]

As there is persistent ambiguity between what constitutes a legitimate regulation and what is a technical or non-tariff barrier to trade, ISO has a "strategic partnership" with the WTO in which signatories to the WTO Agreement on Technical Barriers to Trade ("TBT") commit themselves to promoting and using international standards of the type developed by ISO:

> ISO has a strategic partnership with the World Trade Organization (WTO) aiming to promote a free and fair global trading system. Signatories to the WTO Agreement on Technical Barriers to Trade (TBT) commit themselves to promoting and using international standards of the type developed by ISO.[42]

This allows for the free flow of goods across mandatory regulatory regimes, and provides a measure of inter-jurisdictional inter-operability.

The looseness of the affiliation with states of standards bodies varies. In the United States, ANSI oversees the development of voluntary consensus standards for products and services. A private non-profit organization formed in 1918, it is not accredited by government, but governed by a board elected by its members. The National Institute for Science and Technology ("NIST") is a non-regulatory federal agency part of the Department of Commerce whose mission is to "promote United States innovation and industrial competitiveness by advancing measurement science, standards, and technology." In 2000, a Memoranda of Understanding between ANSI and NIST was signed to clarify roles and responsibilities, in recognition of the need for "better communication within and between the private sector (ANSI) and Federal Government (NIST) on voluntary standards and conformity assessment."[43] In this division of labor, ANSI represents the United States in global and regional standards setting bodies, and NIST coordinates affected federal department engagements as stakeholders.

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[41] *About ISO*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/about.htm (last visited Sept. 23, 2011).

[42] INT'L ORG. FOR STANDARDIZATION, ISO IN BRIEF 3 (2008), *available at* http://www.iso.org/iso/isoinbrief_2008.pdf.

[43] Memorandum of Understanding Between the American National Standards Institute (ANSI) and the National Institute of Standards and Technology (NIST), Dec. 27, 2000, http://publicaa.ansi.org/sites/apdl/Documents/About%20ANSI/Memoranda%20of%20Understanding/ansinist_mou.pdf.

In Canada, the task of setting standards for goods and services was delegated by the Canadian federal government to the SCC in 1970. The SCC is a crown corporation which reports to Parliament through the Minister of Industry Canada. The SCC does not actually develop standards but rather accredits standards development organizations.[44] Once standards development organizations receive accreditation, they develop standards privately using volunteers; the standards are not made mandatory unless they are incorporated by reference into legislation (as determined on a case-by-case basis), nor are they available free of charge to the public.

3.4 Real time environmental and social information for individual and institutional purchasers— Life-Cycle Assessment

The third driver and characteristic of a beyond compliance operating environment is the availability of real time environmental and social information to inform economic decision-making.[45] Major private sector initiatives, such as Walmart's supplier information requests, are making waves around the world introducing new information, measurement, and accounting requirements along supply chains, and adding new types of criteria to procurement and contracting decisions.[46] An even larger purchaser than Walmart is the United States federal government, whose 2009 Executive Order 13514 revitalized green procurement commitment at the federal level,[47] as have Canada's 2006 *Policy on Green Procurement* and Canada's *Federal Sustainable Development Act* (2008).[48]

The stakes are becoming increasingly high for firms to be able to make their green case, as proving one's "greenness" can mean the difference between winning or losing a major contract (see Annex A for a review of some key North American private sector initiatives in the area of product sustainability and Annex B for a review of draft legislative approaches). New technologies such as Radio Frequency Identification Technologies, Smart Barcodes, text messaging, and online disclosure websites can all provide the

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[44] The SCC approves National Standards of Canada; not all of the private standards meet those criteria.

[45] This section will focus on consumer goods, however real time information is also manifesting for financial markets, with Reuters and Bloomberg both offering climate news services. *See Carbon Markets*, BLOOMBERG NEW ENERGY FIN., http://bnef.com/ & http://thomsonreuters.com/products_services/financial/communities/carbon/ (last visited Nov. 16, 2012).

[46] WALMART, SUPPLIER SUSTAINABILITY ASSESSMENT: 15 QUESTIONS FOR SUPPLIERS (2009), *available at* http://az204679.vo.msecnd.net/media/documents/r_3863.pdf.

[47] *See* Exec. Order No.13514, 3 C.F.R. 13514 (2009) (setting sustainability goals for Federal agencies and focusing on making improvements in their environmental, energy, and economic performance).

[48] *Id.*

purchaser decision-maker with information about the impact of a product, the practices of a company[49] or the sustainability of a region.[50] As individual and institutional purchasers implement their own green procurement policies in a beyond compliance operating environment, this product and company level information becomes essential. Here, the state's regulatory powers are no longer the only relevant norm drivers, and more onus is being placed on civil society, consumers, and the private sector to determine risk.[51]

As the demand for integrated and comprehensive environmental information grows, more attention is being paid to the emerging practice of "life-cycle assessment." At its most technical, a life-cycle assessment or analysis ("LCA") is a scientific method which allows us to systematically tear apart any manufactured item into its components and their subsidiary industrial processes, and measure with precision their impacts on nature from the beginning of their production through to their final disposal.[52] The life-cycle of a given product is made up of thousands of linked processes (called "unit processes") which all have their own inputs and outputs that impact the environment.

The practice of LCA has evolved considerably since its origins in the late 1960s and early 1970s, when two researchers at the Midwest Research Institute, William Franklin and Robert Hunt, began working on a technique for quantifying energy and resource use as well as the environmental emissions from the manufacture and use of products. Others in Europe were following parallel lines and the result is what we now call LCA.[53] As a scientific area of research, it began in earnest the late 1980s and early 1990s, and its methodology was first standardized by ISO in 1997.[54]

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[49] Greenseal will now certify a whole company. *See* GREEN SEAL, http://www.greenseal.org/ (last visited Nov. 16, 2012).

[50] Jaboury Ghazoul, Claude Garcia & C.G. Kushalappa, *Landscape Labelling: a Concept for Next-generation Payment for Ecosystem Services*, 28 FOREST ECOLOGY & MGMT. 1889 (2009).

[51] What is interesting is when the states' risk determination as expressed through its regulatory posture conflicts with more precautionary expressions of risk manifesting in its operational greening/environmentally preferable purchasing initiatives. *See* STEFANIE BOWLES, GOV'T CAN., WHOSE LOGO? SUSTAINABLE CONSUMPTION AND PRODUCTION IN NORTH AMERICA 23-26 (2011).

[52] DANIEL GOLEMAN, ECOLOGICAL INTELLIGENCE: HOW KNOWING THE HIDDEN IMPACTS OF WHAT WE BUY CAN CHANGE EVERYTHING (2009).

[53] Wayne Trusty & Michael Deru, *The U.S. LCI Database Project and Its Role in Life Cycle Assessment*, *in* PROGRESS REPORT ON LIFE CYCLE ASSESSMENT (2005), *reprinted in* LIFE CYCLE ASSESSMENT AND SUSTAINABILITY (2006), *available at* http://www.caba.org/resources/Documents/2006-08.pdf.

[54] SCIENTIFIC APPLICATIONS INT'L CORP., U.S. ENVTL. PROT. AGENCY, LIFE CYCLE ASSESSMENT: PRINCIPLES AND PRACTICE 4 (2006).

As firms compete in today's marketplace, they find themselves swimming in a sea of eco-labels, with over 395 eco-labels on the market today.[55] ISO classifies eco-labels into three types:

> •Type I (ISO 14024): are multi-attribute labels (i.e. they look at various environmental issues associated with a product) developed by a third party and are based on life-cycle considerations – i.e. not a full life-cycle assessment (e.g. Canada's Eco-Logo). They are often only given to the leaders in a given product category.
>
> •Type II (ISO 14021): are single-attribute labels developed by the producer. While they are self-declared and do not require third-party verification of supporting data, the data must be available and accurate.[56] FSC's international standard references ISO Type II eco-labels; it is unclear if it is categorized as such by ISO.[57]
>
> •Type III (ISO 14025): is a label whose awarding is based on a full LCA, the methodology for which has also been standardized by ISO (14040/44). LCA's form the basis of an Environmental Product Declaration (EPD), which provides "neutral" environmental impact information for the product, but does not compare it to another, or claim that it is more "green" than another, unlike Type I.

It is important to focus on ISO Type III eco-labels, because of the attempted neutrality of the information and because of the pre-existing internationally standardized framework. As environmental (and social) information

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[55] *See* ECOLABEL INDEX, http://www.ecolabelindex.com (last visited Sept. 29, 2011) (stating the current number of eco-labels on the market).

[56] *See* CANADA, COMPETITION BUREAU, ENVIRONMENTAL CLAIMS: A GUIDE FOR INDUSTRY AND ADVERTISERS, ENFORCEMENT GUIDELINES (2008), *available at* http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/eng/02701.html (stating the Canadian Competition Bureau's published guidelines). *See generally* Guides for the Use of Environmental Marketing Claims, 16 C.F.R. §260 (1998), *available at* http://www.ftc.gov/bcp/grnrule/guides980427.htm (stating the United States' Federal Trade Commission's published guidelines).

[57] *See* FOREST STEWARDSHIP COUNCIL, GUIDANCE ON THE IMPLEMENTATION OF FSC-STD-40-201 FSC ON-PRODUCT LABELING REQUIREMENTS (2004) (stating the Forest Stewardship Council's guidelines new labeling guidelines).

is inherently value-based and competitively important, their communication is rarely neutral, and many eco-labels on the market focus on different ethical elements (animal testing, energy use, etc.) and draw particular boundaries of inclusion and exclusion.

Recognizing that many unit processes are common among the supply chains and life-cycles of a wide range of products, many countries have had publicly available life-cycle inventory databases, starting in Europe as early as the 1980s.[58] In North America, a United States federally funded database was introduced in 2003, after a meeting of interests hosted by the Ford Motor Company, at which an eventual North American database was envisioned.[59] In May 2010, the province of Quebec's Minister of Sustainable Development announced the development of a life-cycle inventory database for the province.[60]

4. ROLES AND RESPONSIBILITIES TENSIONS UNDER "BEYOND COMPLIANCE" SYSTEMIC RECONFIGURATION

As regulators structurally defer to voluntary standards that interface with the ISO-WTO strategic partnership, and with the rapid evolution of direct civil society-business relationships and the growing availability of market-relevant environmental information (LCAs), a new set of systemic arrangements is emerging. This new set of arrangements is not by any means clearly defined or generally accepted; however, its early configuration does present some key tensions as roles and responsibilities shift in a beyond compliance environment.

The decline in the market parameter-setting function of governments changes the operating environment for individuals, firms, and organizations in profound ways. Where once all consumer goods on the market were implicitly understood to be in compliance with all relevant environmental and social laws, today visible environmental and social standards are now commonplace on the market. Rather than waiting for regulation or wealth redistribution, some consumers and supply chains are imposing their own environmental and social criteria, legitimating transactions in real time. Direct relationships between businesses and civil society proliferate. We also see environmental and social considerations inspire new business models/legal

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[58] MARY ANN CURRAN, ET AL., SUMMARY OF GLOBAL LIFE CYCLE INVENTORY DATA RESOURCES 4 (2006).

[59] *See* NAT'L RENEWABLE ENERGY LAB., REPORT ON LCI DATABASE PROJECT MEETING OF INTERESTS (2003); NAT'L RENEWABLE ENERGY LAB., U.S. LCI DATABASE PROJECT—PHASE 1 FINAL REPORT 4 (2003) (stating the background of the meeting of interest).

[60] *See* Press Release, Minister Beauchamp, Que. Ministry of Sustainable Dev. Env't and Parks (May 4, 2010), *available at* http://www.mddep.gouv.qc.ca/infuseur/communique.asp?no=1671 (stating that Quebec will develop a life-cycle inventory database).

statuses (e.g., social enterprise, B-corps), new criteria for investment, and new kinds of value propositions that include claims of reduced social and environmental risk. A few key questions emerge:

1. What does a beyond compliance environment and a decline in the parameter setting functions mean for government accountability and risk mitigation? Can we actually entrust consumers/procurers with this responsibility?
2. Will low-carbon and ecological modernization approaches provide an adequate response to our socio-ecological challenges?
3. Finally, what does this mean for the United States and Canada's bi-lateral approach to economic development, as exemplified by the North American Free Trade Agreement?

4.1 In Consumers We Trust?

A consistent tension with respect to the provision of environmental and social information to consumers or decision-makers is the assumption that it is even possible to communicate any complex environmental and social impact information to consumers, and whether consumers:

a) notice this information;
b) care about this information at the point of purchase;
c) are willing to pay more for products bearing this information;
d) care about the same types of information; or,
e) have the power to do anything about it.

Consider all the factors an individual takes into account when making a purchase: price, availability, performance, fashion, culture, health, and time. Do consumers actually pay a premium at the point of purchase for social and environmental sustainability, as opposed to assuming the government is taking care of it? Or, in theoretical terms, paying after the fact via pollution remediation and wealth redistribution, as in the traditional model of state-industry relations?

A recent systematic review of thirty years of research in this area found a lack of any conclusive empirical data that consumers will pay more for socially responsible products.[61] Indeed, recent research seems to indicate that

[61] JUNE COTE & REMI TRUDEL, SOCIALLY CONSCIOUS CONSUMERISM: A SYSTEMATIC REVIEW OF THE BODY OF KNOWLEDGE (2009), *available at* http://nbs.net/fr/files/2011/08/NBS_Consumerism_SystRev.pdf.

they will not: consumers will buy responsible products only if "quality, performance and price are equal." Yet research also suggests that the group of consumers most interested in socially responsible products is growing across the world and that, as we know, firms continue to work hard at reducing the impact of their operations on society and the environment and sell green or otherwise ethical products.[62] This finding makes sinister "greenwashing" claims less convincing because the companies are not even necessarily making money from these efforts.[63]

If governments are not making harm-avoiding standards mandatory in all cases, and if pollution cannot necessarily be remedied after the fact, and wealth redistribution is not happening to the extent that a middle class is being maintained,[64] does the social and environmental good then depend on consumers supporting "ethical" businesses? Do we expect consumers to act like citizens when making purchases?[65]

Despite being whole embodied people—who are simultaneously consumers, workers, citizens, parents, and children—as consumers in a marketplace we are not necessarily rational, but we do have cost-saving motivations as well as strong cultural desires for social inclusion, which generally lead us to seek relative status through material acquisition.[66] Some evidence even suggests that consumers will even demand a discount for "unsustainability."[67]

At worst, rather than moving the market, a green niche can exacerbate social inequality and status-seeking by making environmentally preferable goods and services luxury goods, and exposing the poor to products with higher social and environmental risk, and even result in more consumption.[68] Concerns surrounding eco-luxury goods are especially relevant for using eco-labeling as a means to communicate a lower toxicity level in a given

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[62] DELOITTE, FINDING THE GREEN IN TODAY'S SHOPPERS (2009), *available at* http://www.ahcgroup.com/mc_images/category/93/deloitte_on_competing_on_green_with_shoppers.pdf (last visited July. 17, 20012).

[63] The more charitable perspective is that companies don't necessarily know how to go green, or who to partner with, etc. Unwillingness to risk brand identity issues has resulted in the phenomenon of green hushing, in which companies do not articulate their greenness for fear of being called out.

[64] OECD, GROWING UNEQUAL?: INCOME DISTRIBUTION AND POVERTY IN OECD COUNTRIES: SUMMARY IN ENGLISH (2008), *available at* http://www.oecd.org/dataoecd/45/42/41527936.pdf.

[65] Many of the same problems with using contingent valuation to ascertain how much someone is willing to pay for some social or environmental good also apply in this eco-labeling context. These include inability to pay (low-income), starting point bias, category mistakes, etc.

[66] THE WORLDWATCH INST., 2010 STATE OF THE WORLD: TRANSFORMING CULTURES FROM CONSUMERISM TO SUSTAINABILITY (2010).

[67] COTE & TRUDEL, *supra* note 61.

[68] Douadia Bougherara et al., *Can Labeling Policies Do More Harm Than Good? An Analysis Applied to Environmental Labeling Schemes*, 19 EUR. J. L. & ECON. 5 (2005).

product. Here, those who are not paying a premium are being exposed to substances that may not have been regulated, not necessarily because they do not constitute a risk, but due to systemic issues described in Section Three relating to the decline of the market parameter-setting function of the government.

4.2 The impact on state function of social enterprise and the triple bottom line

Increasingly at the firm level the profit motive itself is changing, as evidenced by the rise in social entrepreneurship, and the blurring of the lines between for-profit, not-for-profit, and charitable organizations.[69] New legal entities are being created such as the B-Corporation (US), the Community Interest Company (UK) and the Community Contribution Company (British Columbia). Michael Porter explains corporate engagement with social and environmental issues as progressing in three phases of awareness.[70] In the first phase, the company donates some profits to a charity; in the second, the company begins to integrate environmental and social considerations into its operations; and, in the third phase, the company brings sustainability into its core *raison d'etre*.[71]

Once sustainability and/or social justice becomes your core *raison d'etre*, however, the contrast between you and a non-profit becomes less clear.[72] Even in for-profit companies, we are witnessing a veritable explosion of "green" products, product lines, and services being offered. While many of these initiatives can be understood as "greenwashing,"[73] it is certain that there are also legitimate and sincere attempts by businesses to provide a socially beneficial contribution that is also profitable while positioning themselves to meet the needs of tomorrow. How assurance is provided one way or the other will be central to system function.

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[69] Julie Battilana et al., *In Search of the Hybrid Ideal*, STANFORD SOC. INNOVATION REV., Summer 2012; J. Gregory Dees & Beth Battle Anderson, *Sector-bending: Blurring lines between nonprofit and for-profit*, 40 SOC'Y 16, 16 (2003).

[70] Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, *HARV. BUS. REV.* Dec. 1, 2006.

[71] *Id.*

[72] Stephanie Strom, *Seeking Profits at a Nonprofit*, N.Y. TIMES, Dec. 5, 2009, http://www.nytimes.com/2009/12/06/us/06zeus.html?ref=us (explaining a nonprofit organization in alternative energy that not only wants to do some social good, but also wants to eventually earn a profit).

[73] TERRACHOICE GROUP INC., THE SEVEN SINS OF GREENWASHING: ENVIRONMENTAL CLAIMS IN CONSUMER MARKETS SUMMARY REPORT: NORTH AMERICA 1 (2009), *available at* http://sinsofgreenwashing.org/findings/greenwashing-report-2009/.

Whether you comply with NSMD driven standards or ISO standards or regulations will depend on how you understand your own role and interest. Businesses, like individuals, come in all shapes and sizes and understand their roles in various ways. Corporate social responsibility ("CSR") is increasing rapidly, with MBA students across North America taking an oath to "create value responsibly and ethically."[74] All of the literature on CSR seeks to gauge the success of a given enterprise, exchange, or policy by its contribution not only to one actor but to a broader range of stakeholders than were previously considered, as well as to the natural environment. This "triple bottom line" mentality is very distinct from traditional *homo economicus* competition, which gauges success primarily on profits.

It is important to note that this implies a significant change in roles and responsibilities. As we have seen under the traditional model of industry-state relations, in which companies are expected to be profit-seeking exclusively, the most egregious forms of harm would be prevented by state regulation (e.g., related to working conditions, human rights, minimum wages, pollution control mechanisms, etc.).[75] Any other residual anti-social effects would be remedied after the fact, again by the state, via prosecution for any pollution offenses (including compensation and remediation) and wealth redistribution via taxation.

If our collective social and environmental good rests with asking people to think like citizens when consuming in the marketplace, we should be aware that this represents nothing less than a fundamental re-design of roles and responsibilities in the system as we know it, and a significant burden on the individual. New and trusted information requirements on the environmental impact of everyday choices will be needed, as will clear communication regarding the new and expanded role for consumer-citizens. It is not unprecedented at the federal levels, for example Canada's issued a *One Tonne Challenge* as part of previous climate change strategies. However, it is to be expected that contradictions in the positions and objectives of the economic development departments and the environmental departments within the state will become keenly felt by citizen-consumers; for instance, to buy cars to stimulate the economy but do not drive them due to climate change.[76]

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[74] *Welcome*, MBA OATH, http://mbaoath.org (last visited Oct. 3, 2011).

[75] *See UK Environmental Law: Background*, ENVTL. PRACTICE AT WORK PUBLISHING CO. LTD., http://www.epaw.co.uk/ept/law.html (last visited Oct. 3, 2011). *See also* Environmental Protection Act, 1990, c. 43 (Eng.). For example, discussions among regulators would be about Best Available Technology (BAT) or Best Available Technology Not Entailing Excessive Cost (BATNEEC).

[76] Alan Psarski, Randal O'Toole & Peter Van Doren, *The Right Road for America: Top-Down Transportation Planning vs. Customer-Driven Mobility*, CATO INST., Sept. 15, 2009, http://www.cato.org/event.php?eventid=6470. *See* SUSTAINABLE CONSUMPTION ROUNDTABLE,

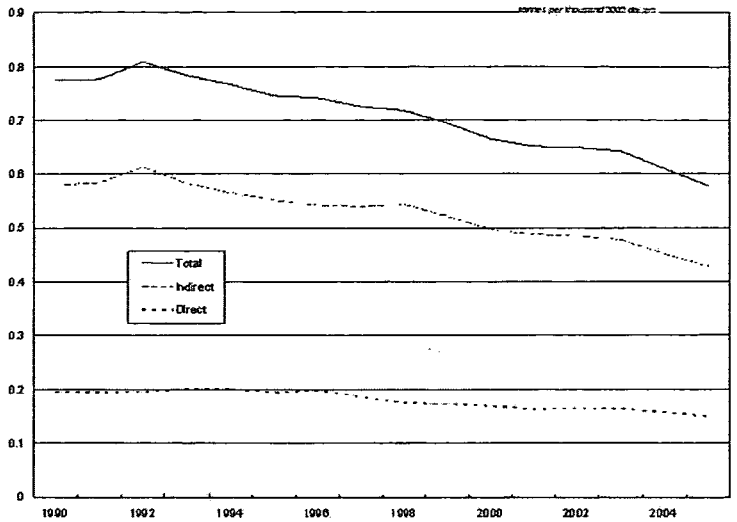

Figure 2: Direct and indirect greenhouse gas emissions per unit of household expenditure (1990-2005)

Source: Statistics Canada

As firms begin to privilege triple bottom line reporting, it is possible that the need for the state to set market parameters will decrease as less harm will be generated. It is also possible or probable that taxation revenues could be affected, thereby limiting the state's ability to engage in wealth redistribution parameter setting. For example, the number of organizations that are deemed charities in the United States has grown more than sixty percent in the United States to 1.1 million in just a decade, costing the Internal Revenue Service more than $50 billion dollars in lost revenue.[77]

4.3 Absolute vs. relative decoupling in low carbon economy and ecological modernization approaches

Morphing roles and responsibilities in a beyond compliance operating environment become particularly significant when we recall our discussion of ecological modernization and the apparent confluence between the concepts

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I WILL IF YOU WILL: TOWARDS SUSTAINABLE CONSUMPTION (2006), *available at* http://www.sd-commission.org.uk/publications/downloads/I_Will_If_You_Will.pdf (discussing the importance of internal government consistency); *see also* John Laumer, *Walmart As Government: Screening Chemical Product Formulations To Protect Public Health*, TREEHUGGER, (Nov. 1, 2009), http://www.treehugger.com/corporate-responsibility/walmart-as-government-screening-chemical-product-formulations-to-protect-public-health.html.

[77] Stephanie Strom, *Charities Rise, Costing U.S. Billions in Tax Breaks*, N.Y. TIMES, Dec. 5, 2009, http://www.nytimes.com/2009/12/06/us/06charity.html?pagewanted=all.

of "innovation" in the economic sense, and change for sustainability in the socio-sustainability sense. Here, we uncover a fundamental tension in low-carbon economy and ecological modernization discourse: absolute versus relative de-coupling of the environment and the economy. As we work to decrease the material and energy intensity of goods and services through technology supported eco-innovation and eco-efficiency, there is evidence that the resource and energy intensity per unit of economic activity does go down.[78] However, the absolute increase of economic activity results in overall increases in material and energy use.[79]

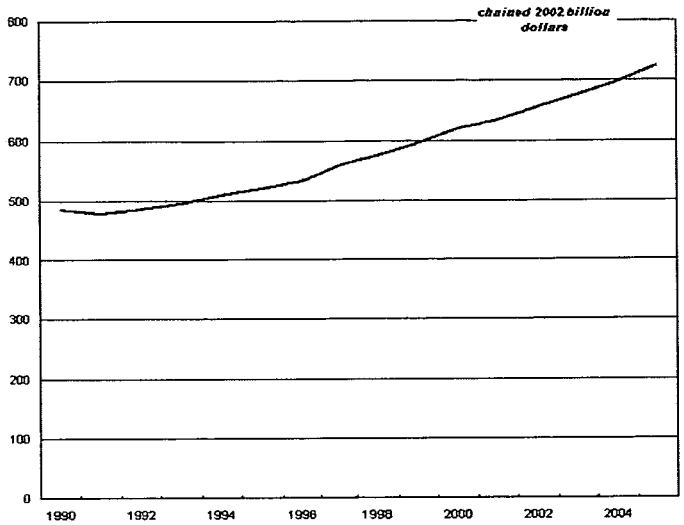

Figure 3: Canadian Household Expenditures on Goods and Services 1990 - 2005
Source: Statistics Canada

Consistent with ecological modernization theories, global resource accounting models demonstrate that resource intensity has been steadily decreasing since 1980. However, those models also demonstrate that resource extraction overall has increased.[80] Using a Canadian energy example, the

[78] NAT'L ENERGY BD., INDUSTRIAL ENERGY USE IN CANADA: EMERGING TRENDS, (2010), *available at* http://www.neb-one.gc.ca/clf-nsi/rnrgynfmtn/nrgyrprt/nrgdmnd/ndstrlnrgscnd2010/ndstrlnrgscnd-eng.pdf.

[79] *See, e.g.,* MOHAN MUNASINGHE, ET AL., CONSUMERS, BUSINESS, AND CLIMATE CHANGE 26, 49 (Gabrielle Walker ed., 2009) (explaining how the rebound effect undermines the energy and resource saved by efficiency investments through consumers' increased consumption). A related dynamic has been observed in the field of energy efficiency, the rebound effect, in which the energy and resources saved by an efficiency investment is taken back by consumers in the form of more consumption.

[80] *See* STEFAN GILJUM ET AL., SUSTAINABLE EUR. RESEARCH INST., GLOBAL DIMENSIONS OF

total direct and indirect greenhouse gas emissions per unit of household expenditure have been decreasing (Figure 2) but total household expenditures on goods and services are increasing (Figure 3), resulting in higher greenhouse gas emissions generated by households overall, despite efficiency gains.[81] For de-coupling to provide a solution to our natural resource problems, resource efficiencies must increase at least as fast as the economy grows if overall burdens are not to increase.

The Canadian example includes direct and indirect emissions. Direct emissions refer to energy use in the home and from private motor vehicles, which is the most obvious form of energy use by households. The indirect emissions are those business sector emissions due to the production of goods and services purchased by households. An estimate of the emissions from foreign companies due to the production of the imported goods purchased by Canadian households is included in that indirect emissions figure; however, it is difficult to capture all the energy embedded in traded goods let alone all the resources, which this information does not do.[82] What is interesting to note is that energy efficient goods and services, such as those demarcated by Energy Star, cover the energy consumed during the use phase of the product, and would be reflected in only the direct emissions line of the graph, which is already significantly lower than the indirect emissions generated by households.

With respect to emissions, statistics are traditionally divided by country according to where the emissions are actually produced. If we consider instead the countries in which goods and services are consumed and allocate

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EUROPEAN NATURAL RESOURCE USE: FIRST RESULTS FROM THE GLOBAL RESOURCE ACCOUNTING MODEL (GRAM) 14-19 (2008) (comparing the domestic extraction and raw material consumption in different world regions illustrating a correlation between economic activity and energy and material use).

[81] *Table 153-0046: Direct and Indirect Household Energy Use and Household Greenhouse Gas Emissions,* STATISTICS CAN., http://www5.statcan.gc.ca/cansim/pickchoisir?lang=eng&searchTypeByValue=1&id=1530046#TFtn (last modified Apr. 11, 2012).

[82] *See, e.g.,* TIM JACKSON, U.K. SUSTAINABLE DEV. COMM'N, PROSPERITY WITHOUT GROWTH? THE TRANSITION TO A SUSTAINABLE ECONOMY 50-51 (2009) ("[The Commission's data, concerning direct material consumption,] does its best to identify traded flows of specific resources but it misses out on the resources and emissions used to manufacture finished and semi-finished products abroad."); *see also* STATISTICS CAN., CONCEPTS, SOURCES, AND METHODS OF THE CANADIAN SYSTEM OF ENVIRONMENT AND RESOURCE ACCOUNTS 8-9 (2006) (explaining Canadian energy policy and the lack in demand for economy-wide material flow date or indicators). The data used by the UK Sustainable Development Commission, direct material consumption, "does its best to identify traded flows of specific resources but it misses out on the resources and emissions used to manufacture finished and semi-finished products abroad. According to Statistics Canada, there is no policy demand for economy-wide material flow data/indicators in Canada.

emissions accordingly, the findings are striking. For example, nearly twenty percent of China's emissions are produced on behalf of other countries. Conversely, emissions from the United States would be eight percent higher when counted by consumption.[83] If we took a per capita look at emissions, we find that only a handful of the countries with the largest total emissions also rank among those with the highest per capita emissions.[84] What neither emissions nor resource extraction data tells us, however is how much land energy and resources we need not only to consume, but also to assimilate our waste, plus the speed at which they replenish themselves. This is where the ecological footprint and biocapacity concepts come into play.[85]

The ecological footprint measures humanity's demand on the biosphere in terms of the area of biologically productive land and sea required to provide the resources we use and to absorb our waste. Biocapacity is defined as the bulk of the world's regenerative capacity.

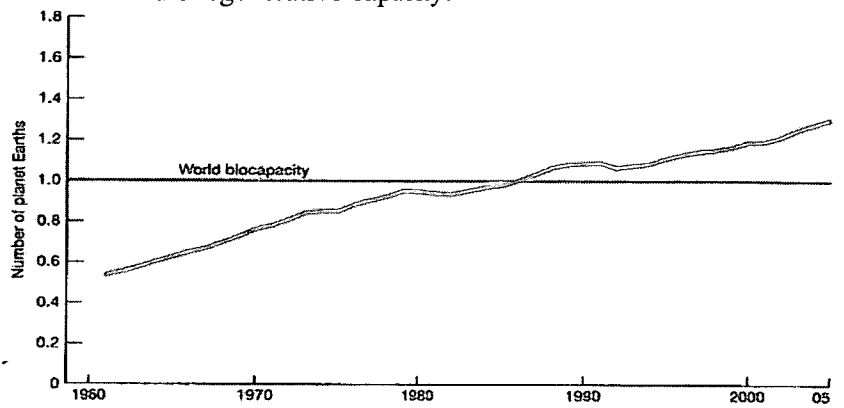

Figure 4: Humanity's Ecological Footprint 1961-2005

Source: WWF, Global Footprint Network and the Zoological Society of London

When footprints and biocapacity are superimposed and broken down by region, you find that many regions are in biological deficit - all in fact, other than non-EU European countries, Latin America and the Caribbean, and Africa. As biocapacities are being reached and food prices increase, countries and wealthy private investors have actually begun purchasing land in other

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[83] MUNASINGHE, *supra* note 79, at 5.

[84] KEVIN A. BAUMERT, TIMOTHY HERZOG & JONATHON PERSHING, WORLD RESOURCE INST., NAVIGATING THE NUMBERS: GREENHOUSE GAS DATA AND INTERNATIONAL CLIMATE POLICY 2 (2005).

[85] *See generally* WORLD WILDLIFE FUND, LIVING PLANET REPORT 2008 (Sarah Humphry, Jonathan Loh, Steven Goldfinger eds., 2008) (providing supplementary date and figures illustrating humanity's ecological footprint and the Earth's biocapacity for 2008).

countries in which to grow food to feed their own domestic populations, and to use for biofuels production.[86]

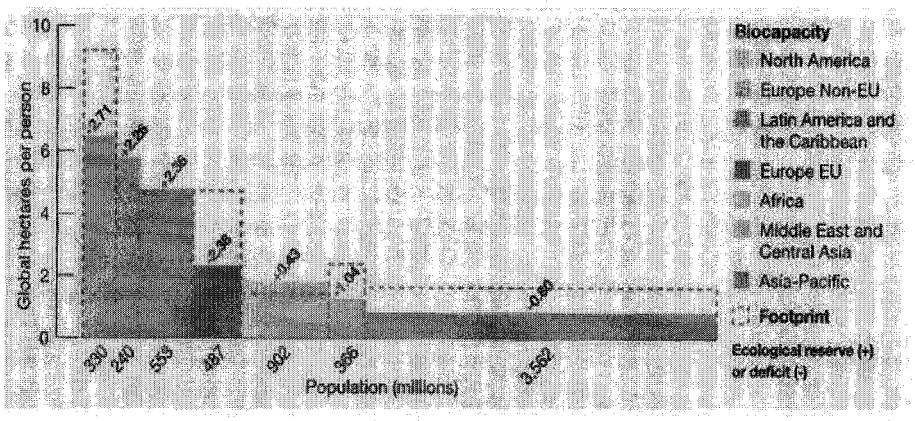

Figure 5: Biocapacity and Ecological Footprint by Region, 2005

Source: WWF, Global Footprint Network, Zoological Society of London

The preceding data demonstrates that a low carbon economy and ecological modernization agenda is not likely to produce the absolute reductions in environmental impact necessary for social or economic sustainability alone. In recognition of this, the pioneers of ecological modernization, the Dutch, recently adopted a distinct new discourse for their 4th national Environmental Policy Plan – the Transitions Approach which seeks to transform systems of production and consumption within a generation.[87] Progress under earlier plans, while positive, was considered insufficient for de-coupling the economy from environmental degradation. Transitions approaches and transitions language is now appearing in countries across the OECD, and there has been interest in the approach at the federal level in Canada.[88]

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[86] *See generally* WOODROW WILSON INT'L CENTER FOR SCHOLARS: ASIA PROGRAM, LAND GRAB: THE RACE FOR THE WORLD'S FARMLAND (Michael Kugelman & Susan L. Levenstein eds., 2009) (discussing States' propensity for purchasing land overseas to accommodate biofuel production needs).

[87] *See* ADRIAN SMITH & FLORIAN KERN, THE TRANSITIONS DISCOURSE IN THE ECOLOGICAL MODERNISATION OF THE NETHERLANDS 2 (2007) (stating Fourth National Environmental Policy Plan (NMP4) commits the government to restructuring by 2030).

[88] *See* JAMES MEADOWCROFT & ANNE MORIN, GOV'T CAN., TRANSITIONS TO A SUSTAINABLE FUTURE: OPPORTUNITIES FOR TRANSFORMATIONAL CHANGE IN CANADA (2009) (stating that the transition approach could make a significant contribution in addressing the sustainability problems in Canada following countries like the Netherlands and the United Kingdom).

5. NAFTA'S DESIGN AND STANDARDS IN NORTH AMERICA

As each other's largest trading partners, the extent of mutual economic interdependence between Canada and United States should not be underestimated. In today's emerging beyond compliance environment, environmental standards have evolved from being seen as an exclusive cost to business towards being an opportunity for competitive advantage and increasingly a requirement for market access at the firm, supply chain and institutional purchasing levels. Somewhat paradoxically, business success requires that they be legitimately socio-ecologically embedded, and are increasingly requesting assistance in this regard from North American governments. Recent years has seen the emergence of lobbying from major business actors like the Ford Motor Company and the Canadian Manufacturers and Exporters Association, who would like to see public sector support for life-cycle inventory databases which their members could then draw from to prove their green case.[89] There have also been public expressions of support for developing an infrastructure to implement ISO Type III Environmental Product Declarations.[90]

When NAFTA was negotiated in 1994, the approach at the time was for each country to determine and enforce its own environmental laws, and in order to ensure that this would happen the Commission on Environmental Cooperation (CEC) was created as a kind of watchdog.[91] When analyzing the integration of environmental considerations in regional trade agreements, the OECD notes that "the obligation for parties to enforce their own environmental laws is included mainly in agreements with the United States and Canada."[92] While other regions such as the EU or MERCOSUR or ASEAN push for a harmonization of standards, Canada and the U.S. continue to maintain the position to each other and to the rest of the world that each individual country is responsible for their own standards, thereby perpetuating

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[89] *See generally* NAT'L RENEWABLE ENERGY LAB., REPORT ON LCI DATABASE PROJECT MEETING OF INTERESTS (2003), *available at* http://www.nrel.gov/docs/fy03osti/34270.pdf (stating the purpose of the project was to explain the project, discuss related issues, and seek the support of relevant organizations).

[90] *See* RITA SCHENCK, INST. FOR ENVTL. RESEARCH & EDUC., THE OUTLOOK AND OPPORTUNITY FOR TYPE III ENVIRONMENTAL PRODUCT DECLARATIONS IN THE UNITED STATES OF AMERICA 5 (2009), *available at* http://www.lcacenter.org/pdf/Outlook-for-Type-III-Ecolabels-in-the-USA.pdf (stating Sweden, Australia, and Japan have implemented Environmental Product Declarations (EPDs)).

[91] *See* Stefanie J. Bowles et al., *Continentalism from Below? Trinational Mobilisation Amoung Labour Unions, Environmental Organisations, and Indigenous Peoples, in* SUSTAINABILITY, CIVIL SOCIETY AND INTERNATIONAL GOVERNANCE 63, 79 (John J. Kirton & Peter I. Hajnal eds., 2006) (stating NAFTA's labor and environmental commissions exercise some watchdog functions).

[92] ORG. FOR ECON. CO-OPERATION AND DEV., ENVIRONMENT AND REGIONAL TRADE AGREEMENTS, 14 (2007).

the idea that markets are separate from societies, relegating regulations to the status of technical barriers to trade, and implicitly promoting private voluntary standard setting. Harmonization was nevertheless pursued, not under the auspices of the CEC or any other such public forum, but under NAFTA's technical working groups with no public involvement, and which resulted in increased pesticide residue levels.[93]

While Canadian and American regulators at the federal levels structurally defer to voluntary standards which interface with the ISO-WTO strategic partnership, and engage in periodic bi- and sometimes tri-lateral harmonization at the North American federal levels (e.g. tailpipe emission standards), it should be recognized that this system is a long way from being generally regarded as adequate for mitigating social and environmental risk or for reducing the imposition of arbitrary standards. While it does provide a measure of inter-jurisdictional inter-operability, its weakness is countered by a rise of NSMD standards, a proliferation of supply chain imposed requirements and hundreds of eco-logos. This results in market place confusion, and rapidly erodes legitimacy as mutual recognition of roles and responsibilities blurs. It also provides little/no institutional infrastructure empowered to address the challenges of and internal tensions in dis-embedded, growth-based, specialization-and-trade development models.

6. CONCLUSION AND THREE SUGGESTED INTERVENTION POINTS

The fledgling low-carbon economy discourse coalition in Canada and the United States can be understood in relation to its predecessor, pollution prevention, which has already been institutionalized in both federal environment agencies. Should the low-carbon discourse ever become institutionalized, it, like pollution prevention, would represent a moment of consensus within a particular institutional structure. As generation after generation attempts to reconcile socio-economic and environmental imperatives, ecological modernization approaches continue to fall on deaf ears and not only fail to deliver

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[93] *See* Kelly Patterson, *Canada Lowers Standards on Pesticide Use on Fruits, Vegetables to Match U.S. Limits; Harmonizing Rules Removes 'trade irritant,' but Won't Put Canadians at Risk, Agency Insists*, OTTAWA CITIZEN, May 8, 2007, at A1 (stating that harmonization may force Canada to raise some of its standards on pesticides to match those of the United States). One area where harmonization was explicitly pursued is in the area of pesticides through the NAFTA Technical Working Group on Pesticides, established in 1996 under the NAFTA provisions on Sanitary and Phytosanitary Measures. Comprised of the regulatory agencies of the three countries the goal of the Technical Working Group on Pesticides is to "serve as a focal point for addressing pesticide issues arising in the context of liberalized trade among the NAFTA countries." The first "NAFTA label", announced on January 31st 2007, can be affixed to pesticides as a way to indicate that the pesticide has met bi-national regulatory requirements and can therefore flow freely across northern NAFTA borders.

in a North American context but also in a Dutch and European context—hence the adoption of a transition management discourse in the Netherlands.

There must come a time in which we begin to wonder if it is less the power of the words and the concepts that are the issue, but rather where the words are being said, by whom, and within what institutional structure and developmental paradigm. As the parameter setting function of government declines *vis a vis* the economic development function (e.g. trade promotion, regional economic development), a new set of systemic conditions is created in which federal environment departments play a smaller and smaller role. Citizens, consumers, firms, organizations, and governments navigate this "beyond compliance" operating environment in different ways; for-profit firms engage in gradations of corporate social responsibility, consumers behave as citizens in the marketplace, and accountable officials willingly defer to private voluntary standards to facilitate trade. Governments themselves are even using NSMD standards as the definition of "green" for public sector green procurement, e.g. LEED for public sector buildings.

Improvements made by previous institutionalized socio-sustainability consensuses have succeeded in reducing environmental impact per unit of economic activity, but they have not managed to absolutely decouple the environment from the economy, nor have they managed to address persistent and growing socio-economic inequality. The three steps to a beyond compliance environment remind us of how individual and collective interests have been addressed in the allocation of resources. Keeping these basic functions in mind, while keeping in mind the diffuse nature of power and the importance of stewardship, three fruitful intervention points can be considered:

(1) Create new democratic North American regional institutions charged with specific projects related to standardization.

Convene constitutional scholars, elected officials, civil servants and the North American public to creatively re-invent our regional institutions. The North American Agreement on Labor Cooperation is already undergoing a revision.[94] A North American Charter of Rights has already been proposed, as has North American continental climate governance.[95] We can create in-

[94] *See* Press Release, NAALC Council, Statement of the Council on the Secretariat of the Comm'n for Labor Cooperation of the N. Am. Agreement on Labor Cooperation (Aug. 20, 2010), *available at* http://www.naalc.org/index.cfm?page=751&artcat=4&article=56 (stating the office of the Secretariat of the Commission for Labor Cooperation will be closed temporarily as part of broader discussions to improve the implementation of the North American Agreement on Labor Cooperation (NAALC)).

[95] James McHugh, *A Charter of Rights for North America: A Proposal and Analysis*, WILSON CENTER, (July 20, 2010), *available at*

stitutions and roles and responsibilities that will work better than what we have now; our founding fathers (and mothers) would expect no less.

While creating a deliberative structure is important, it is essential that the dialogue be grounded in specific projects. The proliferation of standards promises to continue to be a source of pan-actor frustration, ecological and social damage as well as a missed opportunity to move ourselves up the value chain. Various approaches could be taken at this interface. We could establish high level directives which producers could be required to meet and display a conformity assessment logo, such as the EU's CE mark. We could establish a progressive labeling system which could pull the market towards best practices and use minimum standards (e.g. ISO standards) to push up the bottom. These standards could be the ISO/ANSI/CSA standards, but would require that the standards be brought into the public domain, potentially incorporated by reference into a new North American legal structure. Other specific projects could include:

- transition management pilots modeled after the Dutch approach;
- the elaboration of a "Nudge" agenda;[96]
- an interoperable set of complementary currencies;
- and the selection of the location of a new North American capital city.

If North America were to embed its own regional markets by harmonizing standards and incorporating them by reference into legislation, and encourage other governments with whom we trade to do the same with their own standards (or with global standards), we could see the eventual global re-embedding of markets. This could be connected to whatever graded ecologo/market transformation program is established using LCA data (see intervention point 2).

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http://www.wilsoncenter.org/event/charter-rights-for-north-america-proposal-and-analysis; Henrik Selin & Stacy VanDeveer, Continental Climate Governance Challenges for North America (2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/12_climate_selin_vandeveer/12_climate_selin_vandeveer.pdf.

[96] Stefanie Bowles, Policy Horizons Can., Nudge me Baby One More Time? The US and the UK Move Beyond Carrots and Sticks (2012), *available at* http://www.horizons.gc.ca/doclib/2012-0097-eng.pdf.

(2) Establish clear roles and responsibilities between business, civil society, governments and citizens in a beyond compliance environment.

Fund and support an open source, data quality assured Lifecycle Inventory Database at the North American level. Companies could use this data to produce EPDs, and government would register them in a database, provide technical assistance as well as data quality assurance. This information could also up and downstream social metrics such as wage ratios (e.g. between the highest and the lowest paid employee). While the global interoperability of this data is clearly essential, especially in an international development context,[97] the importance of having a common North American methodology and dataset should not be underestimated. Regional data is needed in LCA in order to determine the environmental information of an input, such as in the area of electricity production. Given the integrated nature of the North American energy grid, biozones, and trade flows, having a common database would avoid disputes in future, especially as the importance of regional trade increases as energy prices rise.[98]

If this database is to form the basis of determining what is "green", it is important that there be significant public involvement and oversight. More technocratic closed door dialogue is not what is needed in North America, as evidenced by NAFTA's technical working group's harmonization of pesticides. If upwardly harmonized North American standards incorporated by reference and certified with one conformity assessment label is too ambitious, a multi-attribute North American government administered eco-logo market transformation program should be possible. This eco-logo should provide comprehensive environmental information, be based on life-cycle assessment data that does not only look at the use phase. The program integration that would be required to support such an initiative (e.g. Energy Star, WaterSense, DFE, Eco-logo, etc.) would be significant, but necessary for making environmental information for consumers and businesses holistically effective and government supported. This logo/certification should be graded (one – three stars for example) tax exempt and possibly even subsidized.[99]

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[97] The UN's network of National Cleaner Production Centers could be leveraged to generate LCA data. *See Cleaner and Sustainable Production Unit*, U.N. INDUS. DEV. ORG., http://www.unido.org/index.php?id=o4460 (last visited Nov. 16, 2012).

[98] JEFF RUBIN, WHY YOUR WORLD IS ABOUT TO GET A WHOLE LOT SMALLER (2009).

[99] Other product policies should also be examined such as recycled content requirements, product-take back, etc.

(3) Deliberatively re-vision the good life & the social compact.

No amount of improved environmental information will affect every day economic decisions unless it is actually utilized. Current limits to consumer willingness to pay a premium for environmentally preferable goods and services and the absolute vs. relative decoupling contradiction inherent in low-carbon and ecological modernization discourses means that we collectively have some serious re-visioning of ourselves and our respective roles to do if we are to manage the transition to a low-carbon/low-impact economy. The UK's national well-being survey conducted by their national statistical agency as part of a beyond-GDP agenda is instructive here as a potential model at the interface between the technocratic measures of societal progress such as GDP and the values of the population.[100]

As it describes a future-oriented state in which we are in relation to each other, no one person can ever have the last word on defining sustainability. It always involves democratic deliberation about the kind of society that is desirable, how that society understands limits, identity and appropriate behaviors. In 1993, President Clinton opened up a national dialogue on sustainable development, asking a representative group of leaders to consult widely and provide him with an action plan for sustainable development. Opening up the geographic scope of this dialogue in line with trade boundaries, we could have a bi- or tri- national public dialogue including Mexico, Canada and the United States akin to that held in the UK (well-being) or one of our own design. Ideally this dialogue, like our civilizations, will continue in perpetuity in the context of the new North American constitutional and institutional framework (identified in intervention point number one) invigorated by effective and inclusive engagement tools and methods.[101]

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[100] *Measuring National Well-Being*, OFFICE FOR NAT'L STATISTICS, http://www.ons.gov.uk/ons/guide-method/user-guidance/well-being/index.html (last visited Nov. 16, 2012); GOV'T CAN., RE-DEFINING PROGRESS: THE WELL-BEING AGENDA (2012), *available at* http://www.horizons.gc.ca/doclib/2011-0095-eng.pdf.

[101] New tools of communication can be mobilized, such as ChangeCamps, U.N. conferences, and Open Conferences. A ChangeCamp event is a creative face-to-face gathering that is citizen-led, non-partisan and social web enabled. ChangeCamps bring together citizen change agents to answer questions like: What does the sustainability challenge mean to you? The results can then be coded using words which can then form the basis for a more structured bi-national dialogue involving experts, covering topics that must be addressed, such as macro-economic configurations and indicators that can help our leaders manage effectively.

ANNEX A - PRIVATE SECTOR RESPONSES TO PROVING "GREEN" IN TODAY'S MARKET

The stakes are becoming increasingly high for firms as environmentally preferable purchasing policies at corporate and public institutional levels mean that proving ones "greenness" can mean the difference between winning or losing a major contract. The private sector has initiated a number of North American initiatives to address product related sustainability issues including the following initiatives:[102]

The Keystone Center's Green Products Roundtable (GPR) is voluntary stakeholder group of representatives from the private, nonprofit, and government sectors working to (a) reduce confusions over the "green" marketplace and (b) improve the production and buying decisions of product manufacturers, institutional purchasers, and consumers. After exploratory dialogue, The Keystone Center formally launched the GPR in October 2009. The Roundtable grew out of increasing concerns among stakeholders from the private sector, government, non-profits, and certifiers that there is a lack of clarity around what constitutes a green product and what the appropriate roles are for the government and private sectors. Participants include 3M, Unilever, Weyerhaeuser, ISEAL, Greenseal, ANSI, Terra Choice, and Five Winds.

The Sustainability Consortium: is a group of scientists and engineers from leading academic research institutions who engage with other leading researchers from the industrial, NGO and governmental sectors to "build a scientific foundation that drives innovation to improve consumer product sustainability." They are trying to provide foundational guidance on how to conduct a product life-cycle assessment. Partners include Walmart, Proctor and Gamble, Unilever, General Mills, Pepsi, Disney, Colgate Palmolive and members include: Harvard, Stanford, Berkeley, Duke, Seventh Generation and the EPA.

The Athena Institute and the Canadian Manufacturers and Exporters is a partnership between a life-cycle assessment database provider and the Canadian Manufacturers and Exporters to raise the profile of the increasing importance of Environmental Product Declarations for market access, and to encourage the development of a government housed and publicly available Life Cycle inventory database. An EPD is a standardized (ISO 14025/TR)

[102] Thanks to EPA's Stephen Sylvan for the majority of the information on the recent private and public sector initiatives related to green products.

and LCA based tool to communicate the environmental performance of a product or system.

Packard Foundation/Walton Foundation/Mars is an 18-month independent scientific collaborative research assessment of the impact and performance of labeling and certification and their effectiveness as sustainability tools. In addition to the foundations mentioned, participants include Duke, Harvard, Yale, the Consumer's Union, WRI, RESOLV, USGBC, Dow Chemical, McKinsey, USBCSD, the EPA and the USDA.

The Inter-University Research Centre for the Life Cycle of Products, Processes and Services (CIRAIG) was founded in 2001 under the leadership of École Polytechnique de Montréal in collaboration with Université de Montréal and HEC Montréal. The CIRAIG was created to meet the demands of industry and governments to develop academic expertise in sustainable development tools by pooling the strengths of Quebec and Canadian universities in the fields of life cycle assessment (LCA) and life cycle management (LCM). CIRAIG is made up of 10 universities and over 20 research professionals and analysts.

ANNEX B - DRAFT LEGISLATIVE RESPONSES TO GREEN PRODUCT ISSUES IN NORTH AMERICA

The private sector, NGO's and universities are not the only one's taking notice: a number of pieces of draft legislation in the U.S. are also relevant to product labeling, including:

Waxman Markey Clean Energy and Security Bill (05/15/09): includes a carbon product labeling component (amendment by Rep. Baldwin – D-WI); single attribute carbon labeling.

Eco-labeling Act (2008): Senator Feinstein to create a multi-attribute, holistic national eco-labeling program run by the EPA. Waiting to move forward until the Keystone Center releases its draft report.

Household Product Labeling (09/23/09) Act: Senator Franken, goal to require all household cleaning products to have a label. Sitting in both House and Senate.

Consumer product labeling amendment (2009) to the *California Global Warming Solution Act (*2006) – another single attribute carbon label, passed full assembly and CA Senate Environmental Quality Committee and is now pending in Senate Appropriations Committee.

In Canada there has been less legislative activity related to product eco-labeling or product carbon labeling, however the Council of the Federation (a group of provincial premiers) has called for the development of a water efficiency logo, much like that of EnergyStar, which we also have in Canada, in addition to our government legitimated, multi-attribute eco-logo. The U.S. EPA's Sustainable Products Network is a cross department group which holds regular meetings to discuss issues associated with green products.