2003

Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance

Stepan Wood
Allard School of Law at the University of British Columbia, wood@allard.ubc.ca

Citation Details

Stepan Wood, "Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance" (2003) 10:1 Buff Envtl LJ 129-210.

ENVIRONMENTAL MANAGEMENT SYSTEMS AND PUBLIC AUTHORITY IN CANADA: RETHINKING ENVIRONMENTAL GOVERNANCE

Stepan Wood*

Introduction

One of the most intriguing yet obscure developments in corporate environmental stewardship in recent years has been the development and rapid worldwide spread of environmental management systems (EMSs) and EMS standards such as the International Organization for Standardization's ISO 14000 series. These initiatives for corporate "greening" have received very little attention from public interest non-governmental organizations (NGOs) and the popular news media. The bodies that develop them—most prominently, the International Organization for Standardization (ISO)—are influential yet little-known organizations which have gone almost entirely unnoticed in the recent wave of public controversy and grassroots protest regarding globalization and free trade that has engulfed the major intergovernmental trade and financial institutions.

---

* Assistant Professor, Osgoode Hall Law School of York University, Toronto; swood@yorku.ca; member, Standards Council of Canada's Canadian Advisory Committees on the International Organization for Standardization Technical Committee 207 (ISO TC 207) and TC 207 Subcommittee 1 (ISO TC 207/SC1); member, ISO TC 207/SC1/Working Groups 1 and 2; and Canadian delegate to several meetings of ISO TC 207/SC 1. I am grateful to Michael Fortier (York University LL.B./M.E.S. 2001), Anastasia Lintner, Ph.D. (Osgoode LL.B. 2002) and Michelle Fernando (York University LL.B/M.E.S. 2002) for excellent research assistance and to Tara Sastri (Osgoode LL.B. 2004) for indispensable editorial assistance. I thank participants in the 2001 Legal Dimensions Initiative, "Social Relationships: Refocusing the Public/Private Divide," Laval University, Quebec and the symposium on Environmental Law and Stewardship for a Sustainable Society at University at Buffalo School of Law for valuable feedback on earlier drafts. Any remaining errors remain my own responsibility. The views expressed in this article are my own and do not necessarily reflect those of the Standards Council of Canada or the International Organization for Standardization.

Nonetheless voluntary EMS initiatives and the organizations that develop them have significant implications for environmental quality, health and prevailing conceptions of "public" and "private" in local, national and global law and politics.

Interest in EMSs and EMS standards is growing quickly as more and more governments, business firms, researchers and activists become aware of their potentially broad implications. One of the questions that has sparked the most interest, particularly among lawyers and legal academics, is how these voluntary corporate stewardship initiatives can or should relate to law and public policy. In particular, there is widespread interest in whether and to what extent EMSs might supplement or replace conventional "command-and-control" approaches to government environmental regulation, which are widely perceived as near or already beyond their limits. A growing number of public authorities around the world are experimenting with various ways of integrating EMSs and EMS standards into their environmental policies, programs and laws. Along with this experimentation has come increased attention from business, environmentalists and researchers.

Notwithstanding this growing attention, some of the most intriguing questions about EMSs and EMS standards have been largely ignored. Two features of the existing legal academic literature on EMSs (and, for that matter, other voluntary environmental initiatives) lead to this result. First, the literature tends to ask a limited range of questions about these initiatives and their implications. These questions, while important, deflect attention from other important questions. Second, notwithstanding some attempts to transcend the conceptual categories of "public" and "private," mandatory and voluntary, state and market, and so on, the literature remains by and large transfixed by these received conceptual dichotomies.

These features lead to two important limitations in the existing literature. First, while attention is directed increasingly at the relationship between "private" corporate environmental initiatives and "public" policy, the tendency to assume a dichotomous distinction between these two categories prevents a clearer compre-

hension of the subtle and complex inter-penetration of "public" and "private" actors and regulatory systems in the field of environmental management systems. Public authorities, including legislatures, regulators and courts, are implicated in complicated ways in the establishment, shaping and operation of private authority. I attempt to sketch the extent and complexity of this inter-penetration by proposing a typology of the modes of engagement between public authorities and EMS initiatives, using the case of Canada as an illustration.

I suggest that public authorities' interactions with EMSs and other voluntary environmental initiatives can be described in eight categories: ***steering*** (influencing the development, use or content of voluntary initiatives through official policy pronouncements, participation in standards development or creation of legal "ground rules" or "backstops" for voluntary initiatives), ***self-discipline*** (applying voluntary initiatives to government operations or agreeing to international trade rules that turn voluntary standards into constraints on regulatory authority), ***knowledge production*** (generating and disseminating ideas, information and expertise about the design, use or value of voluntary initiatives), ***reward*** (providing material incentives for adherence to voluntary initiatives through regulatory relief programs, financial incentives or "green" government procurement policies), ***command*** (issuing legally binding requirements to adhere to voluntary initiatives through court orders or legislation), ***benchmarking*** (using voluntary initiatives as benchmarks for determining legal liability), ***challenge*** (challenging firms or other organizations to adhere to voluntary initiatives) and ***borrowing*** (incorporating voluntary initiatives into legal instruments such as statutes and regulations).

Second, the tendency to reinforce received conceptual dichotomies and to ask a limited set of questions about EMS initiatives discourages consideration of EMS initiatives as a form of government in their own right. Rather than asking what the relationship between EMSs and governments ought to be, it might be more interesting to ask how EMSs and EMS standards, in their complex interplay with state actors and apparatuses, operate as a

mode of government with their own normative rationales and mundane technologies of rule. The extensive imbrication of public and private authority revealed by my research suggests the need for an alternative conception of "government" that moves beyond the metaphor of a public-private divide, one that considers government to include the entire array of ideas, goals and techniques by which a diversity of authorities, state and non-state, seek to shape human conduct to desired ends. I suggest that Michel Foucault's idea of "governmentality" is a fruitful starting point for this effort to rethink government. It leads us to pay special attention to the mundane technologies employed by authorities to govern conduct and to acknowledge that these technologies have crucial political implications. I argue in this connection that the techniques of EMSs and standardization deactivate the substantial political stakes of corporate environmental management by treating them as "technical" matters to be resolved by neutral professional expertise and simultaneously as "private" matters of consumer or commercial preference to be resolved by the market. This is true of EMS initiatives whether pursued by the private sector or at the prompting of public authorities. By transforming struggles over environmental harms, jobs, profits, etc. into matters of managerial expertise and market preference, the technologies of environmental management systems disguise their own role in the creation and reproduction of power relations.

Furthermore, considering EMSs as a mode of "government" leads us to explore what Foucault calls political rationalities, the discursive fields within which the forms and goals of government, the appropriate boundaries between state, market and society and the proper roles of public and other authorities are conceptualized and justified. The political rationalities of EMSs and EMS standards consist of a particular set of justifications and story-lines that vest the development and implementation of important environmental standards in global standardization bodies, business firms, consultancies and private certification and accreditation bodies and justify a particular distribution of authority among firms, markets, employees, citizens and public authorities on the basis of good

business sense, managerial rationality, individual employee responsibility, autonomous consumer choice, the limits of the administrative state and the ultimate pursuit of sustainable development.

This analysis of the governmental rationalities and techniques of EMSs and the interpenetration of "public" and "private" authorities in the politics of environmental management casts new light on the debate over what role EMSs should play in public law and policy. I therefore conclude the article with some tentative thoughts on what role law might play in this arena—in particular, how it might be employed to resist the tendency of EMS-based initiatives to "depoliticize" environmental politics.

The article is structured as follows. In Part I, I describe environmental management systems and EMS standards. In Part II, I discuss briefly the existing literature on this subject. In Part III, I present a typology of public authorities' engagements with EMS initiatives, illustrated with reference to the Canadian experience. In Part IV I argue that the interpenetration of public and private authority in the field of EMS suggests an alternative conception of "government," building on Foucault's idea of "governmentality". This analysis has two parts. First, I examine EMSs and organized standardization as governmental technologies, and second, I explore the political rationalities of EMS. Finally, in Part V I make suggestions about the possible roles of law and lawyers in (re)defining the political stakes of environmental management.

Part I: The Development and Standardization of Environmental Management Systems[1]

Environmental management systems emerged as a distinct management tool in the late 1980s in the wake of several prominent environmental disasters including the chemical disaster at Bhopal, India and the Exxon Valdez spill in Alaska. These disasters were accompanied by increasingly negative publicity and pressures for increasingly stringent environmental regulation in a number of leading industries. A growing number of firms, among them many large multinational corporations, expanded and consolidated their existing environmental management tools (*e.g.*, environmental policies, environmental audits, public environmental reports and pollution prevention programs) into systematic programs to manage the environmental impacts of their operations. An EMS is a system of management policies, procedures, structures and practices that enables an organization to anticipate, identify and manage the environmental impacts of its activities. The major elements of an EMS include a

---

[1] Useful accounts of the history and rationales of environmental management systems and EMS standardization include Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1287-1311 (1995); Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479, 489-515 (1995) [hereinafter Roht- Arriaza, *Shifting the Point of Regulation*]; THE ISO 14000 HANDBOOK 4-23 (Joseph Cascio ed., 1996) [hereinafter Cascio, THE ISO 14000 HANDBOOK]; Kerry E. Rodgers, *The ISO Environmental Standards Initiative*, 5 N.Y.U. ENVTL. L.J. 181 (1996); Christopher H. Bell, *The ISO 14001 Environmental Management Systems Standard: A Modest Perspective*, 27 ENVTL. L. REP. 10622 (1997) [hereinafter Bell, *The ISO 14001 EMS Standard: A Modest Perspective*]; ISO 14001 AND BEYOND: ENVIRONMENTAL MANAGEMENT SYSTEMS IN THE REAL WORLD (Christopher Sheldon, ed., 1997); Errol Meidinger, *'Private' Environmental Regulation, Human Rights, and Community*, 7 BUFF. ENVTL. L.J. 123, 183-198 (1999-2000) [hereinafter Meidinger, *'Private' Environmental Regulation*]; REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS? (Cary Coglianese & Jennifer Nash eds., 2001) [hereinafter COGLIANESE & NASH, REGULATING FROM THE INSIDE].

written environmental *policy* setting out the organization's environmental vision and basic commitments; a *planning* process to evaluate the organization's environmental impacts, identify applicable legal requirements and set environmental objectives and targets; *implementation* of the EMS through roles, responsibilities, resources, training, communication, documentation and operational controls; *checking* of the organization's performance through regular monitoring, measurement and audits along with *corrective action* to remedy any problems; and regular *top management review* to make any improvements to the EMS needed to ensure its continuing suitability and effectiveness.

The thinking behind EMS is that poor environmental performance can usually be traced to failure of a firm's management systems, rather than solely to failures of individual managers or employees, and that improved management processes will lead to improved environmental outcomes. The continuous EMS cycle of planning, implementation, checking, corrective action and review (also known as the Deming circle or "Plan-Do-Check-Act" model) is meant to result in continual improvement of the management system and, ultimately, the organization's environmental performance. Implementation of an EMS does not require or guarantee any particular level of environmental performance; rather, it provides a system by which an organization can identify and achieve environmental performance goals set within the organization or elsewhere. Environmental management systems leave it up to each organization to identify its own environmental performance objectives in accordance with its needs and interests.

By the early 1990s many firms based in the advanced industrialized countries supported the development of uniform standards for EMSs to enable comparability and create a level playing field for trade. Standardization bodies in several jurisdictions took up this challenge and began to develop voluntary EMS standards. The first national EMS standard to be published was the British Standards Institution's BS 7750 standard, in 1992. The European Community followed shortly with its own voluntary Eco-Management and Audit Scheme (EMAS) in 1993. EMAS took effect in 1995, whereupon

existing national standards, including BS 7750, were withdrawn by member countries. In 1993, spurred partly by the 1992 Rio Earth Summit's call for global business to contribute to the attainment of sustainable development and partly by the incipient proliferation of EMS standards, ISO established a new Technical Committee, TC 207, to develop voluntary global standards for corporate environmental management. These standards, known as the ISO 14000 series, quickly emerged as the most prominent EMS standardization initiatives. The series, which was published between 1996 and 1999, consists of ISO 14001 (which specifies requirements for an EMS that may be objectively audited and certified), ISO 14004 (a more detailed and flexible EMS guide not intended for certification purposes), and a score of supporting standards and guides relating to environmental auditing, environmental performance evaluation, environmental labeling and product life cycle analysis.[2]

Beyond implementing an EMS for their own internal purposes, many organizations wish to demonstrate to relevant external audiences (*e.g.*, customers, trade associations, consumers or regulators) that their EMS conforms to a recognized standard. This is typically achieved by having the EMS certified as conforming to ISO 14001 or another recognized standard (e.g., EMAS) by an accredited third-party registrar (known as a verifier in EMAS parlance). Independent third-party certification has long been used to verify conformance to technical product safety or performance standards. In recent years it has been extended to a broader range of environmental, labor, social and other initiatives such as product ecolabeling

---

[2] The two EMS standards are ISO 14001:1996, ENVIRONMENTAL MANAGEMENT SYSTEMS: SPECIFICATION WITH GUIDANCE FOR USE (Geneva: ISO, 1996); and ISO 14004:1996, ENVIRONMENTAL MANAGEMENT SYSTEMS—GENERAL GUIDELINES ON PRINCIPLES, SYSTEMS AND SUPPORTING TECHNIQUES (Geneva: ISO, 1996). Both are currently being revised, with publication of second generation standards expected in 2003 or 2004.

programs,[3] sustainable resource management programs[4] and environmental, quality or occupational health and safety management system standards, including ISO 14001.

EMSs have spread rapidly through the private sector in recent years, particularly among multinational corporations and corporations operating in international markets. The number of ISO 14001 certificates worldwide has grown rapidly in the last few years, reaching around 36,000 by January 2002.[5] The total number of organizations with EMSs that have either not pursued certification or are certified to another EMS standard is likely to be much higher. A growing number of multinational corporations, including, notably, the major auto manufacturers, require their suppliers to have ISO 14001 EMSs in place, although they do not necessarily require third party certification. EMS implementation or certification is slowly becoming a *de facto* requirement for doing business in a handful of industry sectors and international markets.

Part II: The State of EMS Scholarship

While they have received relatively little scholarly attention compared to some other corporate greening initiatives, EMSs and EMS standards are the subject of a quickly growing academic literature concentrated mainly in management studies, economics and policy studies. They have not attracted much attention from the legal academy, although there is a small and growing body of legal scholarship on the subject. Academic interest in EMSs began to arise

---

[3] Ecolabeling programs may apply across a range of products, like the US EPA's Energy Star program or Environment Canada's Environmental Choice program, or they may product-specific, like ecolabels for bananas, coffee or forest products.

[4] The most prominent such programs are the Forest Stewardship Council's program for certifying sustainable forest management operations and the Marine Stewardship Council's program for certifying sustainable fisheries management operations.

[5] *See* Gergely Tóth, *The ISO 14001 Speedometer*, *at* http://inem.org/htdocs/iso/speedometer/speedo-01_2002.html (last visited Oct. 9, 2002) (presenting data on ISO 14001 registrations for January 2002 and various dates back to 1999).

almost as soon as EMSs emerged as a distinct management tool in the late 1980s. There was a flurry of academic interest in EMSs in the mid-1990s with the development of the ISO 14000 standards and EMAS, followed by a lull as EMSs spread quietly but rapidly through the corporate community. Since the late 1990s there has been a sustained surge of scholarly interest in EMSs, likely reflecting a number of developments: the establishment of a substantial record of experience with EMSs capable of supporting serious empirical research into their drivers, effects, credibility, etc.; the remarkably rapid growth of interest in EMSs among industry, reflected in the number of EMAS- and ISO 14001-registered organizations world-wide; the increasing interest in EMSs on the part of governments and intergovernmental organizations, manifested in the rapid proliferation of legal and policy initiatives aiming to incorporate EMSs into governmental regulatory strategies;[6] the recently completed revision of EMAS and the ongoing revision of ISO 14001 and ISO 14004; and a slowly increasing awareness among policy makers of the potential significance of international standards and standardization bodies under international trade agreements.[7]

The existing academic literature on EMSs, and, for that matter, other corporate greening initiatives, has two features which limit its usefulness for exploring the full range of implications of these experiments in corporate environmental responsibility.[8] The first feature is a tendency to ask a limited range of questions about these initiatives and their implications. The second is a tendency to reproduce received conceptual dichotomies between public and private, state and non-state, mandatory and voluntary, and so on. While the existing literature has made substantial contributions to our knowledge of important aspects of environmental management

---

6 *See infra*, Part III.

7 *See infra*, notes 106-109 and accompanying text.

8 The following account focuses mainly on the legal literature on EMSs and EMS standards, but also includes some of the literature on EMSs and EMS standards that has emerged in other fields such as economics, environmental studies, management and policy studies.

systems and corporate greening, these two features prevent a fuller appreciation of the subtle and complex interpenetration of "public" and "private" actors and regulatory systems. They also discourage more imaginative inquiry into how we govern and are governed in the field of environmental management.

The Limited Range of Questions Asked

My purpose in this article is not to stake out a position in the existing debates about EMSs and EMS standards, at least not directly. I do not seek to evaluate the literature in terms of the merits of methods employed, findings reached, arguments advanced and positions taken. Rather, what intrigues me most about the existing literature on EMSs and EMS standards is how it defines the relevant questions to ask. One of the most salient features of the existing literature, and one of its most important limitations, is found in the questions it asks about EMSs and EMS standards, not so much in the answers reached nor in the methods used to reach them.

In short, the existing literature poses a limited range of questions about EMSs and EMS standards. To a first approximation, the existing literature poses five types of questions about EMSs and EMS standards: questions of ***success and failure***, ***power***, ***legitimacy***, ***motivations and drivers***, and ***design***.[9] Within this constellation of questions, the legal literature lays particular emphasis on questions of ***design***, in particular the question of what should be the relationship between EMSs, on one hand, and law and public policy, on the other.

---

[9] A number of caveats are in order. First, this characterization is not, of course, exhaustive, although I maintain that it adequately describes the large majority of the legal EMS literature. Second, the sample questions I present below are not always posed explicitly in the sources cited, but where they are not, they can be fairly implied from the context. Finally, the five types of questions are not mutually exclusive, but overlap considerably. Thus, for example, questions of the success or failure of EMS standards are very closely related to questions about their legitimacy and design. In some cases, therefore, the different types of questions I identify may be different ways of asking the same questions.

1. Success and Failure

First, much of the existing literature is concerned with questions of the success and failure of EMSs and EMS initiatives, such as:

Questions of how to define success and failure, e.g. how should success or failure of an EMS or EMS standard be measured?[10]

Questions of efficiency, e.g. do the benefits of an EMS outweigh its costs? Does implementation of an EMS lead to cost savings, more efficient operations or increased productivity? Will implementation of EMSs by industry reduce governments' policy development and enforcement costs? Will EMSs and EMS standards avoid or promote policy capture, externalization of social costs, free-riding and other market distortions and collective action problems?[11] Are EMS standards anti-competitive? Will they raise non-tariff

---

[10] *See, e.g.*, EUROPEAN PARTNERS FOR THE ENVIRONMENT & SUSTAINABILITY LTD., FROM EMAS TO SMAS: CHARTING THE COURSE FROM ENVIRONMENTAL MANAGEMENT AND AUDITING TO SUSTAINABILITY MANAGEMENT (1996) [hereinafter EPE/Sustainability]; Andrea Spencer-Cooke, *From EMAS to SMAS: Charting the Course from Environmental Management to Sustainability, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 243.

[11] On this and the preceding questions in this paragraph, *see, e.g.*, Bell, *The ISO 14001 EMS Standard: A Modest Perspective, supra* note 2; Anthony Reiley, *The New Paradigm: ISO 14000 and its Place in Regulatory Reform*, 22 J. CORP. L 535, (1997); Tim J. Sunderland, *Environmental Management Standards and Certification: Do They Add Value?, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 127; Amy Pesapane Lally, *ISO 14000 and Environmental Cost Accounting: the Gateway to the Global Market*, 29 LAW AND POL'Y INT'L BUS. 501 (1998); Richard Starkey, *The Standardization of Environmental Management Systems: ISO 14001, ISO 14004 and EMAS, in* 1 CORPORATE ENVIRONMENTAL MANAGEMENT: SYSTEMS AND STRATEGIES 61 (Richard Welford ed., 2d ed. 1998); Jason Morrison et al., *Managing a Better Environment: Opportunities and Obstacles for ISO 14001 in Public Policy and Commerce* (2000), *available at* http://www.pacinst.org (last visited Nov. 25, 2002).

barriers to international trade?[12]

Questions of consequential effectiveness, e.g. do EMSs or EMS standards result in improved environmental performance and pollution prevention?[13] Do they promote sustainable development?[14]

---

[12] On the questions of anti-competitiveness and trade barriers, *see, e.g.*, Rodgers, *supra* note 2, at 186; EPE/SustainAbility, *supra* note 11; Spencer-Cooke, *supra* note 11; Roht-Arriaza, *Shifting the Point of Regulation, supra* note 2; Naomi Roht-Arriaza, *Developing Countries, Regional Organizations, and the ISO 14001 Environmental Management Standard*, 9 GEO. INT'L ENVTL. L. REV. 583 (1997) [hereinafter Roht-Arriaza, *Developing Countries, Regional Organizations*]; Aidan Davy, *Environmental Management Systems: ISO 14001 Issues for Developing Countries, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 169; Kerstin Pfliegner, *International Voluntary Standards—The Potential for Trade Barriers, in* ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION 37 (Ruth Hillary, ed., 1997); Harris Gleckman & Riva Krut, *Neither International Nor Standard: The Limits of ISO 14001 as an instrument of Global Corporate Environmental Management, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 45; RIVA KRUT & HARRIS GLECKMAN, ISO 14001: A MISSED OPPORTUNITY FOR SUSTAINABLE GLOBAL INDUSTRIAL DEVELOPMENT (1998); Lally, *supra* note 12; WORLD WILDLIFE FUND, ISO INSIDE OUT: ISO AND ENVIRONMENTAL MANAGEMENT (1996); Morrison et al., *supra* note 12.

[13] *See, e.g.*, Donna Solen, *ISO 1400 Emerging International Environmental Law*, 10 FLA. J. INT'L L. 275 (1995); WORLD WILDLIFE FUND, *supra* note 13; Roht-Arriaza, *Developing Countries, Regional Organizations, supra* note 13; Bell, *The ISO 14001 EMS Standard: A Modest Perspective, supra* note 2; Christopher Bell, *The ISO 14001 Environmental Management Systems Standard: One American's View, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 61 [hereinafter Bell, *The ISO 14001 EMS Standard: One American's View*]; HILLARY, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13; John Wolfe, *Drivers for International Integrated Environmental Management, in id.*, 15 [hereinafter Wolfe, *Drivers for International Integrated Environmental Management*]; Sunderland, *supra* note 12; Alan Netherwood, *Environmental Management Systems, in* WELFORD, CORPORATE ENVIRONMENTAL MANAGEMENT, *supra* note 12, 37; Gleckman & Krut, *supra* note 13; KRUT & GLECKMAN, *supra* note 13; Lally, *supra* note 12; Meidinger, *'Private' Environmental Regulation, supra* note 2; Morrison et al. *supra* note 12. One of the most ambitious efforts to study the effects of EMS implementation on firms' environmental, economic and legal performance is the National Database on Environmental Management Systems (NDEMS) developed by the University of North Carolina

Do they improve or assure compliance with applicable laws?[15] Do they promote the implementation of existing international environmental agreements?[16] Do they improve a corporation's public image?[17] Do they improve an organization's competitiveness?[18] Do they contribute to the protection of human rights?[19] Do they promote

---

at Chapel Hill and the Environmental Law Institute with support from the US Environmental Protection Agency (EPA) and the Multi-State Working Group on EMS (MSWG), a nationwide consortium of government, business, academic and NGO representatives. The NDEMS project gathers and analyzes data on EMS implementation in more than 50 participating industry, institutional and government facilities. Information on the project is available online at http://www.eli.org/isopilots.htm (last visited Nov. 25, 2002). *See* Richard N.L. Andrews et al., *Environmental Management Systems: History, Theory and Implementation Research, in* COGLIANESE & NASH, REGULATING FROM THE INSIDE, *supra* note 2, 31.

[14] *See, e.g.,* EPE/SustainAbility, *supra* note 11; Rodgers, *supra* note 2; SHELDON, ISO 14001 AND BEYOND, *supra* note 2; Netherwood, *supra* note 14; KRUT & GLECKMAN, *supra* note 13; Douglas Taylor, *Is ISO 14001 Standardization in Tune with Sustainable Development?,* 13 J. ENVTL. L & LITIG. 509 (1998) [hereinafter Taylor, *Standardization in Tune*]; Meidinger, *'Private' Environmental Regulation, supra* note 2; Morrison et al., *supra* note 12.

[15] *See, e.g.,* Sunderland, *supra* note 12; Starkey, *supra* note 12; Meidinger, *'Private' Environmental Regulation, supra* note 2; Bell, *The ISO 14001 EMS Standard: A Modest Perspective, supra* note 2; Bell, *The ISO 14001 EMS Standard: One American's View, supra* note 14; Lally, *supra* note 12; Morrison et al., *supra* note 12; Dianne Saxe, ISO 14001/14004 and Compliance in Canada (Dec. 2000) (unpublished manuscript prepared for Canadian Standards Association, on file with author).

[16] *See, e.g.,* Gleckman & Krut, *supra* note 13; KRUT & GLECKMAN, *supra* note 13; Lally, *supra* note 12.

[17] *See, e.g.,* EPE/SustainAbility, *supra* note 11; Spencer-Cooke, *supra* note 11.

[18] *See, e.g.,* WELFORD, CORPORATE ENVIRONMENTAL MANAGEMENT, *supra* note 12; Lally, *supra* note 12; Hillary, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13; Davy, *supra* note 13.

[19] *See, e.g.,* Meidinger, *'Private' Environmental Regulation, supra* note 2.

the transformation of corporate culture?[20] Do they have an impact on consumer or citizen beliefs and behavior?[21]

Questions of the conditions for success or failure, e.g. what internal and external factors limit or enhance the effectiveness of an EMS or EMS standard? In particular, what are the conditions for successful implementation and performance of EMSs in small and medium sized enterprises (SMEs)?[22]

2. Power

Another common set of questions in the EMS literature concerns power, domination and exclusion. These questions are usually raised by critics of EMSs and EMS standards but are also addressed by numerous proponents. Typical questions in this vein include:

- Who has power in the development and implementation of EMSs and EMS standards?
- Which actors and interests are dominant and which are excluded, subordinated or marginalized?
- Do EMS standards development processes or the content of

---

[20] *See, e.g.*, Orts, *supra* note 2; SHELDON, ISO 14001 AND BEYOND, *supra* note 2; Netherwood, *supra* note 14; Paulette Stenzel, *Can the ISO 14000 Series Environmental Standards Provide a Viable Alternative to Governmental Regulation?*, 37 AM. BUS. L.J. 237 (2000).

[21] *See, e.g.*, Judith Petts, *Managing Public Expectations and Information Needs, in* ENVIRONMENTAL MANAGEMENT SYSTEMS 1 (Paul Sharratt ed., 1995); Andrew Blaza & Nicky Chambers, *Environmental Management Standards: Who Cares?, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 197.

[22] *See, e.g.*, EPE/SustainAbility, *supra* note 11; Hillary, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13, 307-346; Ruth Hillary, *Environmental Management Standards: What do SMEs Think, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 333 [hereinafter Hillary, *What do SMEs Think?*]; Spencer-Cooke, *supra* note 11; Netherwood, *supra* note 14; Donal O'Laoire & Richard Welford, *The EMS in the SME, in* WELFORD, CORPORATE ENVIRONMENTAL MANAGEMENT, *supra* note 12, 199.

EMS standards disadvantage particular actors such as developing countries, public interest NGOs, SMEs, governments or the public?[23]

3. Legitimacy

A third set of questions concerns the legitimacy of EMSs, EMS standards and the processes by which they are developed and implemented. I use the term legitimacy to encompass a range of interrelated concerns about trust, credibility, transparency and accountability, such as:

- Are EMSs and EMS standards credible to the business community? Are they credible to relevant external audiences or are they seen as a species of "greenwash"? Are they open to abuse by self-serving firms?[24]
- Do EMS standards set substantive environmental performance requirements? Are environmental performance goals specific

---

[23] *See, e.g.,* WORLD WILDLIFE FUND, *supra* note 13; Rodgers , *supra* note 2; David Bennett, *Beware ISO,* NEW SOLUTIONS, Spring 1997; Hillary, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13; Hillary, *What do SMEs Think?*, *supra* note 23; KRUT & GLECKMAN, *supra* note 13; Roht-Arriaza, *Shifting the Point of Regulation, supra* note 2, at 523 ("who are the drafters?"), Roht-Arriaza, *Developing Countries, Regional Organizations, supra* note 13; Jennifer Clapp, *The Privatization of Global Environmental Governance: ISO 14000 and the Developing World,* 4 GLOBAL GOVERNANCE 295 (1998); Morrison et al., *supra* note 12.

[24] *See, e.g.,* Rodgers, *supra* note 2; WORLD WILDLIFE FUND, *supra* note 13; Bell, *The ISO 14001 EMS Standard: A Modest Perspective, supra* note 2; Bell, *The ISO 14001 EMS Standard: One American's View, supra* note 14; CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY, CSA ENVIRONMENTAL STANDARDS WRITING: BARRIERS TO ENVIRONMENTAL NON-GOVERNMENTAL ORGANIZATIONS INVOLVEMENT (1997) [hereinafter CIELAP]; Christopher Sheldon, *Introduction, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 11 [hereinafter Sheldon, *Introduction*]; Bennett, *supra* note 24; Netherwood, *supra* note 14; Morrison et al., *supra* note 12.

and measurable? How ambitious are they? How is performance monitored and measured?[25]

- Do ISO 1400's treatment of "continual improvement" of the EMS, "commitment to compliance" with legal requirements and "prevention of pollution" enhance or detract from the standard's credibility?[26]
- Does the credibility of an EMS depend on auditing or certification by an independent third party? What or who will ensure the consistency, competence, integrity and impartiality of EMS auditors and certifiers?[27]
- Do EMSs or EMS standards promote or hinder public transparency and accountability of corporate environmental performance? Do they rely on one-way information dissemination or promote genuine public consultation and participation?[28]

---

[25] *See, e.g.*, WORLD WILDLIFE FUND, *supra* note 13; Hillary, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13; KRUT & GLECKMAN, *supra* note 13.

[26] *See, e.g.*, Roht-Arriaza, *Developing Countries, Regional Organizations, supra* note 13; Bell, *The ISO 14001 EMS Standard: A Modest Perspective, supra* note 2; Bell, *The ISO 14001 EMS Standard: One American's View, supra* note 14; Lally, *supra* note 12; Morrison et al., *supra* note 12.

[27] *See, e.g.*, Roht-Arriaza, *Developing Countries, Regional Organizations, supra* note 13, at 600 ("The credibility of ISO 14001...hinges on the credibility of the certification"); EPE/SustainAbility, *supra* note 11; Spencer-Cooke, *supra* note 11; Wolfe, *Drivers for International Integrated Environmental Management, supra* note 14; Jeff Dowson, *Environmental Management System Certification—An Assessor's View, in* HILLARY, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13, 173; Roger Brockway, *Certification and Harmonization of Environmental Management Systems, in id.*, 183; Davy, *supra* note 13; Sunderland, *supra* note 12; Sheldon, *Introduction, supra* note 25, at 15; Lally, *supra* note 12; Meidinger, *'Private' Environmental Regulation, supra* note 2; Stenzel, *supra* note 21; Morrison et al., *supra* note 12.

[28] *See, e.g.*, Petts, *supra* note 22; Rodgers, *supra* note 2; WORLD WILDLIFE FUND, *supra* note 13; Bell, *The ISO 14001 EMS Standard: A Modest Perspective, supra* note 2; Bell, *The ISO 14001 EMS Standard: One American's View, supra* note 14; Roht-Arriaza, *Developing Countries, Regional Organizations, supra* note 13; Neil Gunningham, *Environmental Management Systems and Community*

- Are standards development bodies and processes (especially in ISO) legitimate? Should they have more transparency and accountability and if so, to whom? Does the consensus process common to most standardization bodies lead to "lowest common denominator" standards? Should public interest NGOs participate in EMS standardization?[29]

4. Motivations and Drivers

A fourth set of questions concerns the motivations and drivers for the implementation of EMSs and the development of EMS standards. Such questions include:

- What factors motivate or drive an organization or its leaders to implement or obtain certification of an EMS? What might industry, governments and other actors expect to gain or lose by developing EMS standards? What factors drive or hinder the development of EMS standards?[30]

Participation: Rethinking Chemical Industry Regulation, 16 U.C.L.A. J. ENVTL. L. & POL'Y 319 (1997-98); Meidinger, *'Private' Environmental Regulation, supra* note 2; Morrison et al., *supra* note 12; Stenzel, *supra* note 21; HILLARY, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13; Blaza & Chambers, *supra* note 22; Gleckman & Krut, *supra* note 13.

[29] *See, e.g.*, Roht-Arriaza, *Shifting the Point of Regulation, supra* note 2; Roht-Arriaza, *Developing Countries, Regional Organizations, supra* note 13; Rodgers, *supra* note 2; Davy, *supra* note 13; Gleckman & Krut, *supra* note 13; KRUT & GLECKMAN, *supra* note 13; Meidinger, *'Private' Environmental Regulation, supra* note 2; Stenzel, *supra* note 21; CIELAP, *supra* note 25; WORLD WILDLIFE FUND, *supra* note 13; Bennett, *supra* note 24; Morrison et al., *supra* note 12.

[30] *See, e.g.*, Solen, *supra* note 14; Rodgers, *supra* note 2; Wolfe, *Drivers for International Integrated Environmental Management, supra* note 14; Sunderland, *supra* note 12; Phillip Sutton, *Targeting Sustainability: The Positive Application of ISO 14001, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 211; Davy, *supra* note 13; Stenzel, *supra* note 21; Aseem Prakash, *A New-Institutionalist Perspective on ISO 14000 and Responsible Care*, 8 BUS. STRATEGY & ENV'T. 322 (1999); COGLIANESE & NASH, REGULATING FROM THE INSIDE, *supra* note 2.

Factors typically identified in the literature include anticipated cost savings or increased revenues;[31] the costs of implementing and maintaining and EMS or developing EMS standards;[32] compliance with existing environmental laws, the threat of more stringent laws or the prospect of avoiding new laws or obtaining more favorable regulatory treatment;[33] enhanced competitive advantage or threat of competitive disadvantage;[34] enhanced public image or threat of adverse publicity;[35] the presence or absence of free-rider incentives for firms not to participate in EMS implementation or standardization;[36] pressures from customers, suppliers, trade associations, creditors, insurers, investors, consumers or employees;[37] pressures from environmental or other activists;[38] and adoption of an ethical commitment to improve corporate environmental performance.[39]

---

31 *See, e.g.*, Lally, *supra* note 12; Nicholas A. Ashford, *The Influence of Information-based Initiatives and Negotiated Environmental Agreements on Technological Change, in* VOLUNTARY APPROACHES IN ENVIRONMENTAL POLICY 137, 143 (Carlo Carraro & François Lévêque, eds., 1999); Stenzel, *supra* note 21.

32 *See, e.g.*, Starkey, *supra* note 12; Stenzel, *supra* note 21.

33 *See, e.g.*, Bell, *The ISO 14001 EMS Standard: A Modest Perspective, supra* note 2; Bell, *The ISO 14001 EMS Standard: One American's View, supra* note 14; Ridgway M. Hall Jr. & Kristine A. Tockman, *International Corporate Environmental Compliance and Auditing Programs*, 25 ENVTL L. REP 10395 (1995); Netherwood, *supra* note 14; Starkey, *supra* note 12; Stenzel, *supra* note 21; COGLIANESE & NASH, REGULATING FROM THE INSIDE, *supra* note 2.

34 *See, e.g.*, VIRGINIA HAUFLER, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY (2001), WELFORD, CORPORATE ENVIRONMENTAL MANAGEMENT, *supra* note 12; HILLARY, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13; Lally, *supra* note 12.

35 *See, e.g.*, Haufler, *supra* note 35.

36 *See, e.g.*, Blaza & Chambers, *supra* note 22, at 201.

37 *See, e.g.* WELFORD, CORPORATE ENVIRONMENTAL MANAGEMENT, *supra* note 12; Blaza & Chambers, *supra* note 22; Davy, *supra* note 13; Lally, *supra* note 12; Starkey, *supra* note 12; Stenzel, *supra* note 21.

38 *See, e.g.*, Petts, *supra* note 22; Haufler, *supra* note 35; Stenzel, *supra* note 21.

39 *See, e.g.*, WELFORD, CORPORATE ENVIRONMENTAL MANAGEMENT, *supra* note 12.

5. Design

A fifth category of questions, and one that has attracted perhaps the most attention from lawyers and legal academics, concerns the design of EMSs, EMS standards and standardization institutions, and their relation to other environmental governance systems. These are expressly normative and prescriptive questions. Questions in this category fall roughly into four types:

- *Practical EMS design guidance,* e.g., how should organizations design, implement and maintain an EMS?[40]
- *Questions of reform of EMSs and EMS standards*, e.g. whether and how EMSs or EMS standards should be made more efficient, effective, credible, transparent, accountable, legitimate, etc.; what lies "beyond ISO 14001"?[41]
- *Questions of reform of standards development institutions and processes*, e.g., how should standards development institutions and processes be designed or reformed?[42]

---

[40] Representative sources cover a wide range from practical how-to manuals for business managers to sophisticated scholarly and professional analysis of EMS implementation issues, e.g. BRIAN ROTHERY, BS 7750: IMPLEMENTING THE ENVIRONMENT MANAGEMENT STANDARD AND THE EC ECO-MANAGEMENT SCHEME (1993); ENVIRONMENTAL MANAGEMENT SYSTEMS (Paul Sharratt ed., 1995); Cascio, THE ISO 14000 HANDBOOK, *supra* note 2; JOSEPH CASCIO ET AL., ISO 14000 GUIDE (1996); RICHARD B. CLEMENTS, COMPLETE GUIDE TO ISO 14000 (1996); W.M. VON ZHAREN, ISO 14000: UNDERSTANDING THE ENVIRONMENTAL STANDARDS (1996); PERRY JOHNSON, ISO 14000: THE BUSINESS MANAGER'S COMPLETE GUIDE TO ENVIRONMENTAL MANAGEMENT (1997); SHELDON, ISO 14001 AND BEYOND, *supra* note 2; TOM TIBOR & IRA FELDMAN, ISO 14000: A GUIDE TO THE NEW ENVIRONMENTAL MANAGEMENT STANDARDS (1996); JOHN VOORHEES & ROBERT A. WOELLNER, INTERNATIONAL ENVIRONMENTAL RISK MANAGEMENT: ISO 14000 AND THE SYSTEMS APPROACH (1998), WELFORD, CORPORATE ENVIRONMENTAL MANAGEMENT, *supra* note 12; ISO 14001: CASE STUDIES AND PRACTICAL EXPERIENCE (Ruth Hillary ed., 2001).

[41] Sources in this vein are too numerous to mention. The phrase "beyond ISO 14001" is borrowed from SHELDON, ISO 14001 AND BEYOND, *supra* note 2.

[42] Again, sources in this vein are too numerous to mention.

- *Questions of the appropriate relationship between "private" and "public" regulatory systems*, e.g., how, if at all, should governments and intergovernmental organizations integrate EMSs and EMS standards into their laws, policies and programs? Can EMSs and EMS standards such as ISO 14000 provide a viable alternative or supplement to governmental regulation, particularly "command and control" regulation? Should EMSs be made legally mandatory? Should governments demand that EMSs meet extra requirements (e.g. "ISO 14001 Plus") before granting regulatory flexibility or relief? What role should government actors play in EMS standardization activities?[43] Can EMS standards be used to enlist the

---

[43] On this and the preceding questions in this paragraph, *see, e.g.*, Gunningham, *supra* note 29; NEIL GUNNINGHAM & PETER GRABOSKY, SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY (1998) [hereinafter GUNNINGHAM & GRABOSKY]; Rodgers, *supra* note 2; WORLD WILDLIFE FUND, *supra* note 13; Scott Butner, ISO 14000—Policy and Regulatory Implications for State Agencies, Presentation at National Pollution Prevention Roundtable Annual Meeting (April 10, 1996), *available at* http://www.seattle.battelle.org/p2online/isoregs.htm (last visited June 21, 2001); Henry Balikov & Patrick Cavanaugh, *The Overselling of Government "Reinvention": How Government Expectations of EPA's Project XL and ISO 14000 May Prove Counter-Productive*, 3 ALBANY ENVIRONMENTAL OUTLOOK 23 (Spring-Summer 1997); CIELAP, *supra* note 25; HILLARY, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13; SHELDON, ISO 14001 AND BEYOND, *supra* note 2; Reiley, *supra* note 12; Solen, *supra* note 14; Roht-Arriaza, *Shifting the Point of Regulation*, *supra* note 2; Naomi Roht-Arriaza, *Private Voluntary Standard Setting, the International Organization for Standardization, and International Environmental Lawmaking*, YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 105 (1995) [hereinafter Roht-Arriaza, *Private Voluntary Standard Setting*]; Roht-Arriaza, *Developing Countries, Regional Organizations*, *supra* note 13; Naomi Roht-Arriaza, *Environmental Management Systems and Environmental Protection: Can ISO 14001 be Useful within the Context of APEC?*, 6 J. ENV'T & DEVEL. 292 (1997); KRUT & GLECKMAN, *supra* note 13; Nancy Kubasek et al., *Mandatory Environmental Auditing: A Better Way to Secure Environmental Protection in the United States and Canada*, 18 J. LAND RESOURCES & ENVTL. L. 261 (1998); Meidinger, *'Private' Environmental Regulation*, *supra* note 2; Paula C. Murray, *Inching Toward Regulatory Reform—ISO 14000: Much Ado About Nothing or a*

reflexive and self-regulatory capacities of social systems outside the legal system in pursuit of environmental protection?[44] What role should EMS standards and other forms of transnational private ordering play in global environmental protection?[45]

It is this last subset of questions that has sparked the most interest among lawyers, legal academics and researchers in the field of policy studies: how should these voluntary corporate stewardship initiatives relate to law and public policy? In particular, there is widespread interest in whether and to what extent EMSs might supplement or replace conventional "command-and-control" approaches to government environmental regulation. A common theme in the literature is the proposition that the regulatory state and the interstate system have inherently limited capacities to respond effectively to contemporary economic, social and environmental crises and may have already reached or exceeded those limits in many

---

Reinvention Tool?, 37 AM. BUS. L.J. 35 (1999); Stenzel, *supra* note 21; Morrison et al., *supra* note 12; Keith Pezzoli, *Environmental Management Systems (EMSs) and Regulatory Innovation,* 36 CAL. W.L. REV. 335 (2000); Errol Meidinger, *Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think,* 31 ENVTL L. REP. 10162 (2001) [hereinafter Meidinger, *Closer Than You May Think*]; Saxe, *supra* note 16; Bell, *The ISO 14001 EMS Standard: A Modest Perspective, supra* note 2; Bell, *The ISO 14001 EMS Standard: One American's View, supra* note 14; Roy W. Shin & Yu-Che Chen, *Seizing Global Opportunities for Accomplishing Agencies' Missions: The Case of ISO 14000*, 24 PUB. ADMIN. Q. 69 (2000); POLLUTION PROBE, THE FUTURE ROLE OF ENVIRONMENTAL STANDARDS (2000); COGLIANESE & NASH, REGULATING FROM THE INSIDE, *supra* note 2 (*see* especially Jerry Speir, *EMSs and Tiered Regulation: Getting the Deal Right, in id.*, 198); Haufler, *supra* note 35.

[44] *See, e.g.*, Orts, *supra* note 2.

[45] *See, e.g.*, Roht-Arriaza, *Shifting the Point of Regulation, supra* note 2; Roht-Arriaza, *Private Voluntary Standard Setting, supra* note 44; Clapp, *supra* note 24.

cases.[46] There is a widely shared sense that governmental and intergovernmental regulation, whatever their strengths, have failed to deliver the hoped-for environmental and social improvements or have achieved improvements at excessive cost. It is widely thought that state-based institutions are ultimately incapable, on their own, of responding adequately to global environmental crises and globalized economic forces. It is not uncommon for authors to employ the image of conventional governmental regulation "break[ing] down under its own weight".[47] EMSs are often portrayed as an alternative form of regulation which may supplement or replace conventional governmental or international law and policy.[48]

While these themes of the limits of law and the potential of "private" regulation to achieve social goals usually appear in the context of domestic legal systems, they also appear frequently in relation to the international legal system. The international system of

---

[46] *See, e.g.*, E.D. Elliott, *Environmental TQM: Anatomy of a Pollution Control Program That Works!*, 92 MICH. L. REV. 1847 (1994); Orts, *supra* note 2; Roht-Arriaza, *Shifting the Point of Regulation, supra* note 2; HILLARY, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13; Donal O'Laoire, *Trade, Competitiveness and the Environment, in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 109; Reiley, *supra* note 12; Balikov & Cavanaugh, *supra* note 44; Gunningham, *supra* note 29; Lally, *supra* note 12; Taylor, *Standardization in Tune*, *supra* note 15, Douglas Taylor, *ISO 14000 and Environmental Regulation*, 9 J. ENVTL. L. & PRACTICE 1 (1999) [hereinafter Taylor, *Environmental Regulation*]; Morrison et al., *supra* note 12; Murray, *supra* note 44; Pezzoli, *supra* note 44; Stenzel, *supra* note 21; Kelly Kollman & Aseem Prakash, *Green By Choice? Cross-National Variations in Firms' Responses to EMS-Based Environmental Regimes*, 53 WORLD POL'Y 399 (2001); COGLIANESE & NASH, REGULATING FROM THE INSIDE, *supra* note 2.

[47] Orts, *supra* note 2, at 1241.

[48] *See, e.g.*, Orts, *supra* note 2; Roht-Arriaza, *Shifting the Point of Regulation, supra* note 2; Roht-Arriaza, *Private Voluntary Standard-Setting, supra* note 44; Butner, *supra* note 44; Rodgers, *supra* note 2; Balikov & Cavanaugh, *supra* note 44; Reiley, *supra* note 12; Gunningham, *supra* note 29; Murray, *supra* note 44; Taylor, *Standardization in Tune, supra* note 15; Taylor, *Environmental Regulation, supra* note 47; Morrison et al., *supra* note 12; Pezzoli, *supra* note 44; Stenzel, *supra* note 21; COGLIANESE & NASH, REGULATING FROM THE INSIDE, *supra* note 2.

interstate diplomacy, formal intergovernmental organizations and international law is often portrayed as cumbersome, rigid, bloated, unresponsive and unable to cope with the nimble forces of globalization and the mounting challenges of social inequity and environmental degradation. Roht-Arriaza suggests, for example, that the regulatory system of public international law "may have become anachronistic at best".[49] "Private" regulatory systems such as ISO 14000 are frequently portrayed as potentially heralding a new model of global governance.[50]

All of this is not to suggest, of course, that there is consensus in the EMS literature as to the status and role of the state and the interstate system. On the contrary, there is serious controversy over the role governments and intergovernmental arrangements play or ought to play in achieving desired social and environmental futures. At a minimum, however, there is a widely shared sense that state and intergovernmental interventions cannot, on their own, suffice to meet the current social, economic and ecological crises. Debate rages over the implications of this conclusion, in particular whether conventional state and intergovernmental intervention simply need to be supplemented by EMSs and other "private sector" regulation, or need to be rolled back, replaced or thoroughly transformed by them.[51]

---

[49] Roht-Arriaza, *Shifting the Point of Regulation, supra* note 2, at 485.

[50] *See, e.g., id.* This idea was expressed colorfully by Jonathan Lash, President of the World Resources Institute, in a statement on the recent Johannesburg World Summit on Sustainable Development: "This Summit will be remembered ... for the first stirrings of a new way of governing the global commons, the beginnings of a shift from the stiff formal waltz of traditional diplomacy to the jazzier dance of improvisational solution oriented partnerships that may include non-government organizations, willing governments and other stakeholders." Jonathan Lash, president of the World Resources Institute, E-mail message on the results of the Johannesburg Summit (Sept. 5 2002) (widely distributed via E-mail; copy on file with author).

[51] In this regard, the EMS literature is closely connected with wider debates about regulatory "reinvention" and the role of voluntary initiatives generally in public law and policy. *See, e.g.*, Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990); CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990); DAVID OSBORNE AND TED

6. Questions Not Asked

The existing EMS literature gives priority to questions of the success, failure, legitimacy or illegitimacy, power dynamics, drivers and design of environmental management initiatives. In this way it is typical of much contemporary analysis of law and politics, which tends to ask such questions as "Who governs?" "Who has power?" "What is the source of their power or authority?" "What makes it legitimate or illegitimate?" "What is the relationship between governors and governed?" and "What makes a particular exercise of power or instance of government a success or failure?"[52] These are important questions. Nevertheless I do not intend to pursue them for two reasons. First, they have been and will continue to be well canvassed elsewhere. Second, and more importantly, studies that take these questions as their starting point assume that there is a pre-existing division between those who have power and those who are its targets, between governors and subjects and between subjugation and liberation, and that a central task for analysis is to uncover these divisions. Prevailing approaches to the study of government, law and politics presuppose, in other words, a sort of political *a priori* in the form of the distribution of power and location of rule.[53]

An alternative approach would reject any such political *a priori* by asking instead "how we govern" and "how we are governed".[54] Rather than presupposing an *a priori* distribution of

---

GAEBLER, REINVENTING GOVERNMENT (1992); IAN AYRES AND JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); GUNNINGHAM & GRABOSKY, *supra* note 44; VOLUNTARY INITIATIVES: THE NEW POLITICS OF CORPORATE GREENING (Robert Gibson ed., 1999) [hereinafter Gibson, VOLUNTARY INITIATIVES]; CARRARO & LÉVÊQUE, VOLUNTARY APPROACHES IN ENVIRONMENTAL POLICY, *supra* note 32.

52 *Cf.* MITCHELL DEAN, GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY, 9, 23-4 (1999). *See also* Éric Darier, *Environmental Governmentality: The Case of Canada's Green Plan,* 5 ENVTL POLITICS 585, 585 (1996).

53 DEAN, GOVERNMENTALITY, *supra* note 53, at 26, 29.

54 *Id.* at 28-29.

power or division of authority, to ask *how* we govern and are governed involves the assertion that, in Mitchell Dean's words,

> these divisions and distributions are something to be analysed as constructed, assembled, contested and transformed from multiple and heterogeneous elements. The mobile, changing and contingent assemblages of regimes of government and rule have analytic precedence over the resultant distributions of power and divisions between state and civil society and between public and private spheres.[55]

To give priority to the "how" of government is not simply to describe how authority operates in a given situation. Rather, it means, as Dean says, "first of all, to examine all that which is necessary to a particular regime of practices of government, the conditions of governing in the broadest sense of that word".[56] In principle, this includes an unlimited and heterogeneous range of things, such as the structures and interrelations of firms, state agencies and other organizations, the forms of training and expertise of various professionals, the means for collecting, recording and analyzing information, and a mass of other mundane techniques and practices.[57]

Second, the point of listing such conditions of governing is not "merely the description of the empirical routines of government": it is "an attempt to understand, in addition, how all the above has to be *thought*".[58] The practices and techniques of government are formed "in relation to specific forms of knowledge and expertise of a variety

---

55 *Id.* at 26.

56 *Id.* at 28.

57 *Id.* Dean gives the example of the way in which recipients of unemployment insurance are governed, the conditions of which might include the administrative structure and coordination of state and other agencies, organizations and businesses; the forms of training and expertise of public servants and other professionals; means for collecting and managing information about governed populations; the location and design of various offices and facilities; procedures and tests used for receiving, interviewing, evaluating and certifying recipients; and the use of forms, publicity, etc. *Id.* at 28-29.

58 *Id.* at 29.

of authorities"[59] such as lawyers, engineers, public health professionals, environmental scientists and management consultants. Thought about government also takes the form of various programs which seek to unify, rationalize and direct these governmental techniques, practices and knowledge in relation to particular diagnoses, objectives and schemata.[60]

Finally, to ask the "how" of government is also to look at the resultant distributions and locations of power, that is, "to ask what happens when we govern or are governed".[61] This means, crucially, to ask about the formation of subjects or agents, "to ask how we are formed as various types of agents with particular capacities and possibilities of action".[62]

The concern of my study is thus not the success or failure of environmental management systems or EMS standards from the point of view of criteria such as efficiency, effectiveness, legitimacy, transparency, accountability, etc. I am not concerned with "whether and why this or that policy succeeded or failed," as Miller and Rose put it.[63] I am concerned, rather, with identifying the conditions of environmental government, in particular the mundane techniques and practices related to environmental management systems, whether wielded or promoted by the "private" or "public" sector; the characteristic ways of thinking and speaking about environmental management, in particular the various bodies of knowledge and expertise generated around EMSs and EMS standards and on which they rely, as well as the accompanying programs that seek to unify, rationalize and direct environmental management; and the effects of particular techniques and discourses of environmental management, in particular how particular distributions of power and authority are produced, how firms, human populations and individuals are

---

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 Peter Miller & Nikolas Rose, *Governing Economic Life*, 19 ECON. & SOC'Y 1, 4 (1990).

normalized around particular conceptions of identity, interest and conduct and how their capacities and possibilities of action are constituted. To explore these issues involves posing questions of a sort that has not generally been seen to date in the EMS literature.

The Persistence of Received Conceptual Categories

Related to this tendency to neglect the question of "how" we govern and are governed in the field of environmental management is a tendency to assume or reproduce the conventional conceptual categories upon which understandings of law, politics and government are typically based. Notwithstanding some attempts to transcend the categories of "public" and "private," mandatory and voluntary, state and market, and so on,[64] the EMS literature remains by and large wedded to these received conceptual dichotomies.

The conceptual dichotomies of public vs. private, state vs. non-state and mandatory vs. voluntary play prominent parts in the EMS literature. "Private" and "voluntary" are typically identified as the defining features of EMS standards.[65] First, EMSs and EMS standards are understood to be a form and emanation of "private" authority.[66] They are seen as "private" in the sense that they involve actors, forces and institutions that are understood as operating

---

[64] *See, e.g.* Orts, *supra* note 2 (adapting Gunther Teubner's theory of "reflexive law" to the characterization of environmental management systems); and Errol Meidinger, Environmental Law for Global Civil Society: The Forest Certification Prototype, unpublished paper presented to a Conference on Social and Political Dimensions of Forest Certification (2001), *available at* http://www.law.buffalo.edu/eemeid (last visited July 29, 2001) (drawing on theories of legal pluralism and global civil society to characterize environmental certification systems such as EMS standards as a form of law in their own right).

[65] *See, e.g.,* Roht-Arriaza, *Private Voluntary Standard-Setting, supra* note 44.

[66] *See, e.g.,* Roht-Arriaza, *Shifting the Point of Regulation, supra* note 2; Roht-Arriaza, *Private Voluntary Standard-Setting, supra* note 44; Clapp, *supra* note 24; Meidinger, *'Private' Environmental Regulation, supra* note 2; Haufler, *supra* note 35. On the role of "private authority" in international affairs generally, *see* PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (Claire A. Cutler et al. eds., 1999).

primarily in modes and spaces distinct from the "public" sphere of government, law and politics.[67] They do not operate primarily through elected representatives, legislatures, statutes, regulations, state bureaucracies and courts, but through markets, business firms, trade associations, consultancies, consumer choices and non-governmental organizations. Secondly, EMSs and other corporate greening initiatives are typically defined as "voluntary" and given such labels as "voluntary codes",[68] "voluntary initiatives"[69] and "voluntary approaches".[70] They are considered "voluntary" in the sense that they are not *de jure* required; public authorities do not have to order them to be undertaken.[71] Unlike mandatory governmental regulation, participation in the development and implementation of these initiatives is optional, a matter of individual choice rather than official compulsion. The implications of these "private," "voluntary" corporate greening initiatives is, of course, the subject of heated

---

67 See, for example, Webb's definition of "private governance" as "a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken by parties other than the State". Kernaghan Webb, *Introduction to Concepts and Issues, in* VOLUNTARY CODES: PRIVATE GOVERNANCE, THE PUBLIC INTEREST AND INNOVATION 9 (Kernaghan Webb ed., 2002). Cutler et al. draw a definitional contrast between "private authority"—which they identify with transnational cooperation among profit-seeking firms—and the "public" authority of states and formal governmental structures in international affairs. Cutler et al., *supra* note 67. Haufler's study of a "public" role for the "private" sector similarly focuses on self-regulation by the private sector, which she defines in contrast to regulation by "public authorities". Haufler, *supra* note 35, at 8.

68 *See, e.g.*, WEBB, VOLUNTARY CODES, *supra* note 68.

69 *See, e.g.*, Gibson, VOLUNTARY INITIATIVES, *supra* note 52.

70 *See, e.g.*, CARRARO & LÉVÊQUE, VOLUNTARY APPROACHES IN ENVIRONMENTAL POLICY, *supra* note 32; THE VOLUNTARY APPROACH TO ENVIRONMENTAL POLICY (Arthur Mol et al. eds., 2000).

71 Carlo Carraro & François Lévêque, *Introduction: The Rationale and Potential of Voluntary Approaches, in* CARRARO & LÉVÊQUE, VOLUNTARY APPROACHES IN ENVIRONMENTAL POLICY, *supra* note 32, 1 [hereinafter Carraro & Lévêque, *The Rationale and Potential of Voluntary Approaches*]; Robert Gibson, *Questions About a Gift Horse, in* Gibson, VOLUNTARY INITIATIVES, *supra* note 52, 3.

controversy. Some writers herald EMSs as evidence of a revolution in corporate environmental practices and an example of the promise of corporate self-regulation,[72] some see EMSs as an example of corporate "greenwash" and a pretense for governments to retreat from environmental regulation,[73] while the majority of writers exhibit varying degrees of skepticism or enthusiasm between these extremes.

Of course these simple dichotomies between private and public, voluntary and mandatory are often acknowledged to be problematic in the corporate greening literature. "Private" authority is understood to have substantial implications for "public" order, corporate greening initiatives are understood to play a "public" role, the public-private distinction is acknowledged to be blurry and shifting, and "voluntary" and legally mandatory systems of regulation are acknowledged to be highly interdependent.[74] Similarly, the "voluntary" character of EMS standards is frequently problematized.[75] "Voluntary" initiatives are seldom voluntary in the usual sense. As one commentator notes, "virtually all such initiatives are undertaken because the relevant actors have been effectively pressured to act"[76] by such factors as cost savings, competitiveness concerns, the threat of bad publicity, the prospect of governmental regulation and pressures from customers, suppliers, creditors, insurers, investors,

---

[72] *See, e.g.*, Joseph Cascio, *Introduction, in* CASCIO, THE ISO 14000 HANDBOOK, *supra* note 2, 1, at 1 [hereinafter Cascio, *Introduction*] ("the ISO 14000 standards hold out the promise to revolutionize environmental protection as we have known it in the past quarter century"); Lally, *supra* note 12.

[73] *See, e.g.*, KRUT & GLECKMAN, *supra* note 13; Saeed Parto, *Aiming Low, in* Gibson, VOLUNTARY INITIATIVES, *supra* note 52, 182.

[74] *See, e.g.*, Kernaghan Webb, *Voluntary Initiatives and the Law, in* Gibson, VOLUNTARY INITIATIVES, *supra* note 52, 32 [hereinafter Webb, *Voluntary Initiatives and the Law*]; Haufler, *supra* note 35; Meidinger, *Closer Than You May Think, supra* note 44; Kernaghan Webb & Andrew Morrison, *The Law and Voluntary Codes: Examining the "Tangled Web", in* WEBB, VOLUNTARY CODES, *supra* note 68, 32.

[75] *See, e.g.*, Morrison et al., *supra* note 12, at 8-10.

[76] Robert Gibson, Encouraging Voluntary Initiatives for Corporate Greening: Consideration for More Systematic Design of Supporting Frameworks at the National and Global Levels 3 (2002) (unpublished paper on file with author).

competitors, industry associations, consumers, workers, NGOs, local communities and others.

Despite these acknowledged limitations of the conventional categories of political and legal thought, EMSs continue to be conceived primarily in terms of oppositions between public and private, mandatory and voluntary, state and market. Even if these dichotomies are stretched, blurred and questioned no sooner than they are posited, they still provide the basic framework for identifying and understanding the phenomenon of corporate greening. Governmental regulation is the point of departure from which corporate greening is defined and pursued. The relation of corporate greening to public authorities and legal systems is an ever present theme.

This tendency to assume a dichotomous distinction between "private," "voluntary" corporate environmental initiatives and "public" law and policy prevents a clearer comprehension of the subtle and complex interpenetration of "public" and "private" actors and regulatory systems in the field of environmental management systems. By emphasizing the voluntary and private character of these initiatives, the debates over EMSs tend not to acknowledge the full extent of the entanglement of public authorities and voluntary initiatives.[77] In my view public authorities and legal systems are deeply involved in the constitution and exercise of "private" authority to the point that it is not useful to discuss these initiatives in terms of a public-private divide. While the relationship between EMS initiatives and government regulation has received a great deal of attention in the legal literature, there have been almost no attempts to examine their interaction systematically or in a manner that questions seriously

---

[77] *Cf.* LIORA SALTER, MANDATED SCIENCE: SCIENCE AND SCIENTISTS IN THE MAKING OF STANDARDS 31-32 and 178-80 (1988) [hereinafter SALTER, MANDATED SCIENCE] (arguing that the debate over regulation versus deregulation neglects the reality of standards, which are neither fully public nor fully private and always involve some degree of coordination between public and private sectors).

the conventional metaphor of a public-private divide.[78] Distinctions between public and private, state and non-state, mandatory and voluntary, etc., are not particularly helpful in understanding the significance of EMS standards. Rather, EMS standards demonstrate that the practices of government traverse the categories on which our understandings of law and politics are typically based. In the remainder of this article I investigate this issue by exploring the forms of public authorities' engagements with voluntary EMS standards in Canada and examining the "governmental" implications of this experiment in regulation.

Part III: Modes of Engagement between Public Authorities and Voluntary EMS Initiatives in Canada

A variety of public authorities in Canada have begun to engage with environmental management systems and voluntary EMS standards in a range of interesting ways. I use the term "public authorities" broadly to denote all parts of the Canadian state apparatus, including government ministers, departments, agencies, bureaucrats, procurement personnel, regulators, committees, legislatures, prosecutors, courts, administrative tribunals, military facilities, local governments and public utilities. Their engagements with EMS initiatives to date have fallen, I suggest, into five rough categories: *steering, self-discipline, knowledge production, reward* and *command.* I also identify three other categories of engagement which have not (yet) been employed by Canadian public authorities in relation to environmental management systems, but can be seen elsewhere: *benchmarking, challenge* and *borrowing.* Together these eight categories give an indication of the range of Canadian public authorities' engagements with "private" governance in the field of

---

[78] A notable exception is Meidinger's work on the interaction between the U.S. legal system and environmental certification systems, including EMS standards. *See, e.g.,* Meidinger, *Closer Than You May Think, supra* note 44.

environmental protection.[79]

Steering

First, Canadian public authorities have sometimes engaged with voluntary initiatives such as EMSs and EMS standards in a mode that can be described as "steering": encouraging voluntary initiatives, inhibiting them or steering their development, content or use in a particular direction. At a certain level, all the modes of engagement I identify could be described in this way. "Steering" might thus be viewed as an umbrella category covering most public authorities' interactions with voluntary initiatives. Nonetheless, Canadian public authorities have exhibited several types of conduct that are distinct enough from the other categories of engagement to be considered separately. The primary driver for these engagements is, as Pollution Probe observes, that "notwithstanding their voluntary nature, standards are properly regarded by policy makers as an instrument of governance."[80]

Although "steering" often involves active, intentional efforts to mold conduct, it can also be passive, or even inadvertent. First, it may include surveillance or intelligence-gathering. Governments officials may participate in standards development, for instance, as much to observe and stay abreast of industry developments as to push standards in any particular direction.[81] In this case "steering" consists

---

[79] Two caveats are in order. First, these eight categories of engagement overlap substantially. A single program or action may involve several modes of engagement simultaneously. Second, the list of categories is tentative and open-ended, subject to variation with changing information and the character and purposes of analysis. Its main purpose is not to set down a definitive typology but to indicate the extent and variety of interactions among public and private authorities in the field of environmental management.

[80] POLLUTION PROBE, *supra* note 44 at 41.

[81] In Salter's view this is also true of industry participants: intelligence-gathering about competitors and informal coordination are often more important to industry participants than the content of particular standards. Liora Salter, *The Housework of Capitalism: Standardization in the Communications and*

in patrolling a particular conception of the appropriate boundary between government and "private" spheres. Second, public authorities may inadvertently send signals that influence voluntary initiatives. For instance, governments may, on one hand, publicly encourage firms to use EMSs and environmental certification initiatives, but on the other, maintain regulatory frameworks such as forest tenure laws or environmental audit disclosure rules that inadvertently inhibit such use.[82]

In any event, public authorities in Canada have engaged in "steering" voluntary EMS initiatives in at least five ways: by pronouncing official policies on environmental management systems, formally constituting and funding standardization bodies, participating in the development of voluntary EMS standards, providing strategic policy leadership for standardization activities and regulating the development, content or use of voluntary initiatives.

1. "Talking the Talk": Official Policy Pronouncements

First, some public authorities in Canada and elsewhere have formulated and pronounced official policies on private sector use of voluntary EMS initiatives. Such pronouncements, which range from off-the-cuff remarks to detailed policy statements, can have important

---

Information Technology Sectors, 23 INT'L J. POL. ECON. 105, 116 (1993-94) [hereinafter Salter, *Housework of Capitalism*].

[82] A recent report by the B.C. government, for example, found that the province's forest tenure system, in which government determines forestry planning requirements, harvest rates and environmental protection standards, made it difficult for forestry companies to demonstrate the long-term commitment to sustainable management planning for a defined geographic forest area required for certification under leading sustainable forestry management programs. BRITISH COLUMBIA MINISTRY OF FORESTS, IMPLEMENTING FOREST CERTIFICATION IN BRITISH COLUMBIA: ISSUES AND OPTIONS: REPORT SUMMARY (March 2001), *at* http://www.for.gov.bc.ca/het/certification/researchproject.htm.

legitimation or delegitimation effects for voluntary initiatives.[83] Their content varies from enthusiastic (but often vague) endorsement, to active promotion, to enunciation of conditions or goals for public authorities' involvement or support, to enumeration of concerns, to active resistance (although this last is very rare in the case of EMS). In Canada official pronouncements have tended toward endorsement and promotion—"talking the talk" of EMS as part of a broader agenda of regulatory flexibility. Very few Canadian government authorities have initiated serious consultations or issued careful policy pronouncements about how, why or in what conditions they will endorse voluntary EMS initiatives; but this may be changing as some federal and provincial authorities have begun earnest policy development efforts regarding EMS.[84]

---

[83] Such legitimation effects depend largely on the credibility of official pronouncements among relevant audiences, with off-hand, vague endorsements typically having much less effect on the use of voluntary initiatives by industry or consumers than deliberate pronouncements by well-informed officials who are capable of distinguishing genuine innovations from mere "business as usual" advances. *See* Carraro & Lévêque, *The Rationale and Potential of Voluntary Approaches*, *supra* note 72, at 9-10.

[84] Some federal government departments (*e.g.*, Environment Canada) and government officials in several provinces (*e.g.*, Alberta, B.C., Nova Scotia and Ontario) have expressly encouraged private sector use of EMSs, often in very general terms in public remarks, web sites or pamphlets. Some have issued discussion papers or establish modest government-industry partnerships around EMS implementation, but most of these efforts have been *ad hoc* and uncoordinated. More recently, Canadian federal officials participated in the development of a joint Canada-Mexico-U.S. policy statement on EMS. *See* North American Commission for Environmental Cooperation (NACEC), *Improving Environmental Performance and Compliance: 10 Elements of Effective Environmental Management Systems* (2000), *available at* http://www.cec.org (cautiously supporting use of EMSs to achieve public policy goals, endorsing structure and approach of leading EMS standards such as ISO 14001 and enunciating ten elements voluntary EMSs should have to satisfy governments' concerns about environmental performance, pollution prevention, public accountability and legal compliance). Alberta and Ontario have begun to elaborate policies on the incorporation of EMS into their regulatory frameworks. *See* "Rewards," below. Still, considering that EMSs have been in wide use for more

2. Constitution and Funding of Standardization Bodies

Second, the federal government is involved in the establishment and operation of voluntary standards-setting bodies in Canada. Although not involving overt direction of standardization activities, this is an interesting but overlooked dimension of interaction between governments and voluntary standardization. Standards-setting bodies in most countries have complicated relationships to the state apparatus. The Standards Council of Canada, Canada's principal voluntary standardization organ and its national ISO member body, is a "quasi-non-governmental organization".[85] It is a federal crown corporation established by statute in 1970, reporting to Parliament through Industry Canada and receiving federal government funding.[86] Its statutory mandate is to promote efficient and effective voluntary standardization in Canada by (*inter alia*) promoting public-private sector cooperation.[87] Thus its constitutive instrument emphasizes the hybrid public-private character of standardization.[88]

---

than a decade, the paucity of considered policy statements is surprising.

[85] Leon Gordenker & Thomas G. Weiss, *Pluralising Global Governance: Analytical Approaches and Dimensions*, 16 THIRD WORLD Q. 357 (1994); *cf.* Salter, *Housework of Capitalism, supra* note 82, at 179.

[86] Standards Council of Canada Act, ch. S-16, R.S.C. (1985) (Can.), *amended by* ch. 1, S.C. 1987 and ch. 24, S.C. 1996 (Can.). The Standards Council of Canada oversees Canada's National Standards System, an informal federation of more than 270 independent organizations. It delegates the actual writing of standards to accredited standards development bodies such as the Canadian Standards Association (CSA), a private not-for-profit corporation. For an excellent overview of voluntary standardization in Canada, *see* CIELAP, *supra* note 25. Like the Standards Council of Canada, the majority of ISO national member bodies are state-owned, but the ISO member bodies in most advanced industrial democracies other than Canada are private not-for-profit organizations formally independent of the state.

[87] Standards Council of Canada Act, ch. S-16, § 4(1), R.S.C. (1985) (Can.).

[88] Salter's work on health, safety and communication standards provides a detailed insight into this public-private hybridization inherent in standardization bodies. *See, e.g.*, SALTER, MANDATED SCIENCE, *supra* note 78; Salter, *Housework*

3. Participation in Standards Development

Third, Canadian government officials have participated directly in the development of EMS standards in Canada and ISO since the beginning of EMS standardization in the early 1990s, by sitting on national standards committees and serving as Canadian delegates to ISO meetings.[89] Indeed, government officials participate in most voluntary standards development in Canada.[90] Canadian standards committees operate on a consensus basis and employ a "balanced matrix" to ensure that their membership reflects a rough balance among standards users (industry), service/professional representatives (including consultants, auditors and registrars), government officials and "general interest" members (a grab-bag for consumer, environmental and labor representatives, academics, etc.).[91] Government officials often cite the balanced membership and consensual process of Canadian standards committees and ISO itself as key reasons to endorse voluntary EMS standards,[92] but the

---

of Capitalism, supra note 82.

[89] Federal government officials have been the most active, a few playing prominent roles in the development of the ISO 14000 standards. Provincial officials have also participated on a limited scale, and municipal officials have begun to participate in Canadian EMS standards committees.

[90] In addition to participating in many non-governmental standards committees, governments have their own standards development organs. For example, one of the four standards development organizations accredited by the Standards Council of Canada, the Canadian General Standards Board (CGSB), is a federal government organization within Public Works and Government Services Canada. Although CGSB does not develop EMS standards, it provides EMS auditing and registration services to public and private sector clients.

[91] *See, e.g.*, CANADIAN STANDARDS ASSOCIATION, GUIDELINE B: PROCEDURES FOR ESTABLISHING AND MAINTAINING STANDARDS STEERING COMMITTEES, (2d ed. 1990), *reprinted in* CIELAP, *supra* note 25, Appendix C.

[92] *See, e.g.*, COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, REPORT OF THE COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT 1999 (1999), *at* http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c9menu_e.html [hereinafter CESD, *1999 Report*].

impression of balanced consensus may be misleading. Industry and consultants usually make up a large majority on committees, the Canadian Standards Association often has difficulty maintaining the "balanced matrix" on its environmental standards committees[93] and ISO has been criticized repeatedly for its dominance by big industry from advanced industrial countries.

4. Strategic Policy Leadership

Fourth, strategic leadership of national and international standardization activities is seen by many governments as a priority to ensure international competitiveness of home industry. It was only in March 2000, however, that the Canadian federal government launched the *Canadian Standards Strategy*, to "provide direction and leadership on how to use standardization to best advance the social and economic well-being of Canadians in a global economy".[94] The *Strategy* promotes the use of standards as complements to regulation, calls for fuller representation of the broadening range of "standardization stakeholders" and acknowledges that fiscal restraint and global trade are driving public authorities' increasing reliance on voluntary standards to achieve public policy goals.[95]

5. Regulation of Voluntary Initiatives

Finally, public authorities may regulate the development, use or content of voluntary environmental initiatives. Canadian public

---

93 *See* CIELAP, *supra* note 25.

94 *See* Standards Council of Canada, *Canadian Standards Strategy and Implementation Proposals* (March 2000), *at* http://www.scc.ca/. The *Strategy* was the product of a stakeholder consultation process led by the Standards Council of Canada and Industry Canada.

95 *Id.* The *Strategy* is expressly based on two assumptions: that (1) standards are becoming a pillar of the new global trade system, and (2) fiscal restraint means that industry and government are struggling to do more with less and standards can offer effective, less costly ways to achieve the objectives of reducing costs, eliminating regulatory burdens and protecting the public interest.

authorities have generally taken a "hands off" approach to the development and use of voluntary initiatives,[96] including EMSs. Nonetheless various forms of state regulation may affect the development and use of EMS initiatives directly or indirectly, including:[97]

- *Competition law,* which addresses the possible anti-competitive effects of competitors coming together to devise rules for themselves;
- *Misleading advertising laws*, which may apply when a firm violates the requirements of a voluntary standard to which it subscribes (*e.g.*, ISO 14001), yet represents itself as conforming;
- *International trade law*, in particular the Agreement on Technical Barriers to Trade (TBT Agreement), which requires member states, including Canada, to do everything reasonable to ensure that voluntary standards-setting bodies in their jurisdiction adhere to the Code of Good Practice for the Preparation, Adoption and Application of Standards, which essentially applies the TBT Agreement's trade disciplines to voluntary standardization: *i.e.*, where international standards exist on a subject, domestic standardization bodies should use them as the basis for their own standards;[98]
- *The presence or absence of clear ground rules* for the development and use of voluntary initiatives, such as requirements of public participation in the development or implementation of voluntary initiatives, or public disclosure

---

96 *See, e.g,* Webb, *Voluntary Initiatives and the Law, supra* note 75.

97 *See generally id.;* John Moffet & François Bregha, *Non-Regulatory Environmental Measures, in* Gibson, VOLUNTARY INITIATIVES, *supra* note 52, 15.

98 *See* Agreement on Technical Barriers to Trade (1994), *in* The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts, Uruguay Round (1987-1994), arts. 3.1, 4.1, and Annex 3 [hereinafter TBT Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Nov. 25, 2002). *See also* "Self-Discipline," below.

of information on participants' performance (to date, Canadian governments have not enacted such rules); and

- *The presence or absence of a credible "regulatory backstop"* in the form of monitoring and enforcement of existing environmental laws and demonstrable will to step in with regulatory instruments should voluntary initiatives fail to achieve public policy objectives.

Self-Discipline

The second major way Canadian public authorities have engaged with voluntary EMS initiatives can best be described as self-discipline.[99] It is possible to distinguish two forms of self-discipline: public authorities "walking the walk" by implementing EMSs in their own operations; and public authorities ratifying international agreements that turn voluntary standards into potential constraints on their authority.

1. "Walking the Walk": Implementing EMSs in Government Operations

Canadian public authorities at all levels of government have begun to develop and implement their own EMSs, some on their own initiative and others as a result of pressure from central government authorities. At the federal level most major departments and several agencies now have EMSs, although they vary substantially in scope, detail and degree of implementation. The federal Auditor General and the Commissioner of the Environment and Sustainable Development (CESD) began to encourage federal organizations to implement EMSs

---

[99] This category coincides roughly with Doern *et al.*'s "regulatory regime III," the state's regulation of itself. G. Bruce Doern et al., *Canadian Regulatory Institutions: Converging and Colliding Regimes, in* CHANGING THE RULES: CANADIAN REGULATORY REGIMES AND INSTITUTIONS 3 (G. Bruce Doern et al. eds, 1999).

in the mid-1990s. Facing mostly desultory responses they soon turned to prodding and shaming, referring to EMSs as "essential" for government operations and publicly exposing several departments' foot-dragging.[100] The CESD and Environment Canada play central roles in assisting federal government bodies to develop and implement EMSs and appear to consider EMSs mandatory, at least for the 25 major federal departments and agencies that must file Sustainable Development Strategies.[101]

Some provincial and territorial ministries have also begun to implement EMSs and a substantial and growing number of Canadian municipalities have implemented EMSs either for their entire operations

---

100 *See, e.g.*, CESD, *1999 Report*, *supra* note 93.

101 Implementation of formal environmental management systems has been an expectation for departmental sustainable development strategies since they were first introduced in the mid 1990s. A 1995 federal government guide to greening government operations declared that federal departments and agencies "are to develop and implement formal environmental management systems" as part of their sustainable development strategies. Government of Canada, *Directions on Greening Government Operations* (Ottawa: Public Works and Government Services Canada, 1995), *available at* http://www.sdinfo.gc.ca/ Sdinfo/ENG/docs /ggo/default.cfm (last visited December 17, 2001); *see also* Government of Canada, *A Guide to Green Government* (1995), *available at* http://www.ec.gc.ca /grngvt/grngvt_e.htm (last visited December 3, 2001). In 1999 the Commissioner for Environment and Sustainable Development said that he expects to see "accelerated development" of EMSs in the "second generation" of departmental sustainable development strategies. COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, MOVING UP THE LEARNING CURVE: THE SECOND GENERATION OF SUSTAINABLE DEVELOPMENT STRATEGIES (December 1999) [hereinafter CESD, MOVING UP THE LEARNING CURVE], *available at* http://www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/c9dec_e.html (last visited December 3, 2001). Nonetheless EMSs have not expressly been made legally mandatory for federal organizations in Canada, as they have in the U.S. where all federal facilities must implement EMSs by 2005. *See Greening the Government through Leadership in Environmental Management*, Exec. Order No. 13148, 65 Fed. Reg. 24593 (April 21, 2000). The new Canadian Environmental Protection Act authorizes regulations respecting the establishment of environmental management systems for federal government operations, but none have yet been promulgated. Canadian Environmental Protection Act 1999, ch. 33, § 209(1)(a), 1999 S.C. (Can.) [hereinafter *CEPA 1999*].

or for subordinate bodies such as water or waste management units. Central provincial government authorities have generally done little to coordinate, encourage, assist or push these developments.

Several interesting issues arise from these self-applications of EMS to the public sector, including the following. The first issue concerns public authorities' reasons for implementing their own EMSs. Although Canadian public authorities list many reasons for implementing EMSs, one looms large: to set an example for the private sector.[102] In reality, however, the leading edge of EMS design and implementation is found in forward-thinking corporations, consulting firms and standardization bodies, along with innovative public-private consortia outside Canada.[103] Far from leading by example, many Canadian public authorities are simply scrambling to keep up with the private sector.[104]

A second interesting development is the implicit or explicit endorsement of ISO EMS standards as a model for public sector EMSs. Most Canadian public authorities' EMSs are modeled on ISO 14004 or (less often) ISO 14001. The federal government has expressly endorsed ISO 14004 as a guide for public sector EMSs in numerous policy documents.

---

[102] As Agriculture and Agri-Food Canada expresses it, the federal government, as the single largest organization in Canada and the largest employer, purchaser and landlord, can set an excellent example for Canada by implementing EMSs. Agriculture and Agri-Food Canada, *Agriculture in Harmony with Nature II: AAFC's Sustainable Development Strategy 2001-2004*, Publication 2074/E, 43 (2001), *available at* http://www.agr.ca/policy/environment/eb/public_html/pdfs/sds/SDSII_en.pdf (last visited April 24, 2001).

[103] *E.g.*, the Sigma Project in the U.K. (*Sustainability—Integrated Guidelines for Management*), *at* http://www.projectsigma.com (last visited Nov. 25, 2002) and the Multi-State Working Group on Environmental Management Systems in the U.S., *at* http://www.mswg.org (last visited Nov. 25, 2002).

[104] *See, e.g.*, CESD, MOVING UP THE LEARNING CURVE, *supra* note 102; Auditor General of Canada, *Environmental Management Systems: A Principle-based Approach*, *in* REPORT OF THE AUDITOR GENERAL OF CANADA TO THE HOUSE OF COMMONS ch. 11 (October 1995), *available at* http://www.oag-bvg.gc.ca/domino/reports.nsf/html/9511ce.html (last visited May 1, 2001) (observing that federal organizations are far behind the private sector in EMS implementation).

A third issue concerns verification and oversight of public sector EMSs. In short, verification of the implementation and performance of public sector EMSs in Canada is haphazard and incomplete. Most government organizations disclose very basic information about their EMSs and some report publicly on their EMS performance. The Auditor General and CESD monitor the federal government's implementation of EMSs. There is typically no such oversight in the provinces. While some Canadian public authorities have obtained third-party certification for certain individual facilities' EMSs, most have avoided certification largely because of the taxpayer expense involved.

Finally, it is worth noting that Canadian public authorities have implemented EMSs in a wide variety of organizational settings, from entire government departments to individual branches, agencies, operating units, facilities or even single buildings. They have been applied in a range of fields including environmental regulation, food inspection, transportation, electricity generation, water and waste management, military supply, forestry operations and other resource activities.

2. "Lashing to the Mast": Voluntary Standards as Self-Imposed Constraints on Public Regulatory Authority

Canada is a party to international trade agreements that may transform voluntary international standards developed by obscure, often industry-dominated standardization bodies such as ISO into potential constraints on Canadian governments' freedom to set their own legal standards for health, safety and the environment. Under the 1994 Technical Barriers to Trade (TBT) Agreement, member states must base their domestic "technical regulations"—*i.e.*, environmental and other regulations governing products or their related processes or production methods—on existing voluntary standards developed by international standardization bodies such as ISO unless the standards would be "an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological

problems."[105] Under these rules, regulations that are based on existing international standards are presumed not to create an illegal obstacle to trade, but regulations that deviate from international standards may be, and have been, challenged as trade barriers.[106]

Although the full measure of these trade disciplines has yet to be taken, they clearly have potential implications for public authorities' engagements with voluntary environmental initiatives. When public authorities begin to promulgate mandatory regulations on matters covered by voluntary standards, as Nova Scotia and New Brunswick have done by making ISO 14000-based EMSs mandatory in the gas pipeline industry,[107] those standards may become a discipline on governments' authority to design their own regulations.[108] Ironically, therefore, EMS standards, which are almost universally identified with regulatory *flexibility*, may ultimately impose a *constraint* on such flexibility.

---

105 TBT Agreement, *supra* note 99, art. 2.4. Other prominent international trade agreements to which Canada is a party impose similar disciplines, most prominently the WTO's Sanitary and Phytosanitary Measures Agreement and the North American Free Trade Agreement. It is not clear whether regulations relating to EMSs would come within the definition of "technical regulations".

106 Indeed, Canada has been among the most aggressive states in enforcing these disciplines against its trading partners, for instance successfully challenging the European Communities' ban on hormone-fed beef as an unjustified deviation from international food safety standards. *See EC—Measures Affecting Meat and Meat Products (Hormones)*, Report of the Appellate Body, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted 13 Feb. 1998). More recently, however, the WTO Appellate Body rejected Canada's challenge to a French ban on chrysotile asbestos, holding that the ban was a "technical regulation" within the meaning of the TBT Agreement but holding that it was justified under the public health exception of Article XX of the General Agreement on Tariffs and Trade. *See EC—Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WTO Doc. WT/DS135/AB/R (12 Mar. 2001). WTO dispute settlement reports are available online at http://www.wto.org.

107 *See* "Command," below.

108 *See generally* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1407 (1998).

Knowledge Production

The third mode of engagement has as its defining feature the generation and dissemination of knowledge about voluntary initiatives. Canadian public authorities have engaged in such knowledge production by conducting or sponsoring *research* and *education* regarding the design, implementation, verification or effects of environmental management systems.

As for research, numerous federal and provincial government departments have funded or carried out modest pilot projects, case studies and surveys of the design, implementation or performance of EMSs in particular firms or jurisdictions, but none have come close to the research programs on EMS sponsored by various governments and public-private consortia in the U.S. and Europe.[109] Canadian governments have also supported EMS research by sponsoring research conferences on voluntary initiatives, publishing collections of research papers and hosting electronic research discussion fora.[110]

Turning to education, Canadian public authorities have propagated knowledge and expertise regarding EMSs through two principal modalities: training and publicity. Training ranges from basic primer courses for businesspeople to advanced training for experts such as EMS auditors. More commonly, Canadian public authorities have responded to the emergence of voluntary EMS standards by simply publicizing information about EMSs, typically

---

[109] Probably the most ambitious empirical study of EMS implementation and performance is the National Database on Environmental Management Systems project sponsored by the US EPA and conducted by researchers from the Environmental Law Institute and the University of North Carolina. *See supra*, note 14.

[110] As to the latter, Industry Canada hosts the Voluntary Codes Research Forum, a leading arena for informal exchange of information about research into voluntary corporate codes generally with frequent attention to standardization and EMS-related issues. The Forum consists of a web site and listserv facilitated by Dr. Kernaghan Webb, Senior Legal Policy Advisor and Chief of Research, Canadian Office of Consumer Affairs, Industry Canada. The Forum can be found at http://strategis.ic.gc.ca/SSG/ca00973e.html (last visited Nov. 25, 2002).

through passive means such as government web sites. Such publicity is usually aimed at industry but sometimes at consumers as well. It usually encourages the use of EMSs and conveys information about EMS standards and the design, implementation, certification, advantages or sector-specific applications of EMSs. It seldom enunciates public authorities' reservations or concerns; those are typically addressed in other contexts.[111]

These research and educational activities are closely related to official policy development and pronouncement.[112] Research is a crucial input in policy development and education, of course, is an important channel for generating support for preferred policies among relevant constituencies. Governments often sponsor or conduct research and education as elements of carefully orchestrated policy projects and incorporate the fruits of non-state research and creativity into their own policy making, effectively moving some policy development costs off government budgets.[113] In any event these engagements with voluntary initiatives are usually integrated more or less into public authorities' broader political agendas, particularly those springing from platforms of fiscal restraint, government downsizing, regulatory reinvention, free enterprise and global competitiveness.

Reward

One of the most prominent themes in discussions of voluntary initiatives is that voluntary initiatives can be the basis for a new relationship between regulators and industry emphasizing flexibility, efficiency, partnership and market incentives rather than the perceived rigidity and inefficiency of conventional "command and control" regulation. In this vein, public authorities in various countries,

---

[111] *See* the discussion of official policy pronouncements under "Steering," above.

[112] *Id.*

[113] *See, e.g,* Kal Raustiala, *The 'Participatory Revolution' in International Environmental Law,* 21 HARV. ENVTL. L. REV. 537 (1997).

including Canada, have begun to incorporate voluntary EMS initiatives into their regulatory strategies by offering concrete rewards for voluntary EMS implementation. These rewards typically take three forms: (1) *regulatory relief or forbearance* (*i.e.*, relaxation of existing regulatory requirements or forbearance from introducing new ones), (2) *financial incentives* and (3) *"green procurement" policies.*

1. Regulatory Relief and Forbearance

First, governments in several jurisdictions have begun to establish programs that relax existing regulatory requirements (such as permitting, reporting, inspections or technology requirements) for firms that implement EMSs.[114] In 2001 the province of Alberta became the first Canadian jurisdiction to launch an official program offering regulatory relief to firms that have EMSs in place.[115] Alberta Environment's LEAD (Leaders Environmental Approval Document) program, currently in a pilot phase, requires participating facilities to implement a very rudimentary EMS,[116] maintain a clean compliance

---

[114] These programs also often provide other kinds of incentives including subsidies, technical assistance and reputational benefits (*e.g.* official government recognition, eligibility for awards and the privilege to display logos or other indicia of participation). The most prominent examples are probably the U.S. EPA's National Environmental Performance Track program and the Netherlands' framework licence system. For information on Performance Track see the official program web site *at* http://www.epa.gov/performancetrack (last visited Nov. 25, 2002); on the Dutch framework licences see Netherlands, Ministry of Housing, Spatial Planning and the Environment, *Circular on the Framework Licence and the Customised Licence* (November 1999) (copy on file with author).

[115] *See* Alberta Environment, *LEAD Program Guide—A Guide to Alberta Environment's Leaders Environmental Approval Document (LEAD) Program: Pilot Phase* (April 2001), *available at* http://www.gov.ab.ca/env/protenf/publications/LEADProgramGuideApr01.pdf (last visited July 17, 2001).

[116] In contrast to most EMS-based regulatory relief programs which either require a mature, third-party certified EMS or an EMS that goes significantly beyond the requirements of ISO 14001, the LEAD program requires only a loosely defined "basic" EMS that need not be fully developed, need not have all the elements of an ISO 14001 EMS and need not be verified by an independent third

record, demonstrate past environmental performance that exceeds legal requirements, commit to future environmental performance goals and measures that exceed legal requirements and are based on continuous improvement and pollution prevention, implement meaningful public consultation and report annually on performance. In return, facilities will receive modest regulatory incentives such as preapproval for minor process and equipment changes, facility-wide performance targets ("bubbles"), performance- rather than technology-based requirements and expedited permitting procedures, along with various forms of public recognition.

The province of Ontario launched its own "Cooperative Agreements" program in 2002, under which firms that set "beyond compliance" environmental performance targets for selected priority pollutants, implement public communication and outreach programs, report publicly on their environmental performance and obtain independent third party verification of their performance are offered modest regulatory incentives.[117] Participating firms must have an EMS

---

party. Alberta Environment is, however, considering a "tiered" program in which upper tier participants must have an ISO 14001-equivalent, independently audited EMS. *Id.*

[117] *See* Ontario Ministry of the Environment, *A Framework for Ontario's Cooperative Agreements* (Draft, March 2002), *available at* http://www.ene.gov.on.ca/envision/env_reg/er/documents/2002/PA02E0004_framework.pdf (last visited September 25, 2002) [hereinafter *Draft Framework*]. Background information on the program can be found on Ontario's Environmental Bill of Rights Registry. *See* Ontario Ministry of the Environment, *Framework for Ontario's Cooperative Agreements & Pilot Project with the Automotive Parts Manufacturers' Association*, EBR Registry Number PA02E0004 (posted April 2, 2002), *available at* http://204.40.253.254/envregistry/017397ep.htm (last visited September 25, 2002). The incentives offered include technical assistance, access to site-wide pollution approvals, expedited processing of approvals, "single window" access to the regulatory agency and public recognition. Agreements may be signed directly with participating facilities or with industry associations. The first proposed agreement is a five-year pilot project with the Automotive Parts Manufacturers' Association and a number of its members. Interest in the program does not appear to be widespread in industry, however, possibly due to the modesty of the incentives offered, the stringency of the program requirements (which include, for example, robust public consultation and reporting, as well as

in place which conforms to "generally accepted EMS standards," is acceptable to the Ministry of the Environment and embodies the Plan-Do-Check-Act cycle.[118] The EMS component of the program is considerably more demanding than that of the Alberta LEAD program. Other Canadian governments may be considering such programs as well.[119] In addition to these general programs, some Canadian public authorities have experimented on a modest basis with incorporating EMSs or EMS-related initiatives on an *ad hoc* basis into government-industry agreements, but it is unclear to what extent such agreements involve relaxation of existing regulations or forbearance from introducing new rules.[120]

---

independent third party verification), the fear that adverse publicity and other sanctions for firms that fail to meet the program's requirements might outweigh the benefits of participation, and uncertainty about the reliability and predictability of the provincial government's regulatory and enforcement policies, which have been in flux for some time. This uncertainty is compounded by the fact that the Framework expressly reserves the government's right introduce and enforce new regulatory requirements at any time during the term of a cooperative agreement. *Draft Framework*, para. 3.11.

[118] *Draft Framework, id.*, Schedule 1. While the Draft Framework does not endorse or require any particular EMS standard such as ISO 14001, it requires all the basic elements found in an ISO 14001 EMS, plus some notable extra features, including an environmental policy that commits to "minimising risks to the environment, meeting or exceeding regulatory compliance, and continuous improvement of environmental performance"; a process to identify, document and assess government-identified priority pollutants; communications and outreach processes "appropriate to address internal and external stakeholders"; and regular completion of legal compliance audits. *Id.*

[119] It is possible, for instance, that Environment Canada could couple EMSs with regulatory incentives in pollution prevention plans authorized under the new Canadian Environmental Protection Act. *CEPA 1999, supra* note 102, § 56.

[120] *See, e.g.*, Ontario Ministry of the Environment, Environmental Partnerships Branch, *Progress Report 2001: Ontario Initiatives in Pollution Prevention* (2001), *available at* http://www.ene.gov.on.ca/envision/techdocs/355101e.pdf; Draft Memorandum of Understanding Between the Governments of Canada, Ontario and Alberta and the Canadian Chemical Producers' Association on Environmental Protection Through Action Under CCPA Responsible Care®, *at* http://www.ec.gc.ca/nopp/chemical/ccpa/indexe.htm (last visited October 30, 2001).

In addition, firms that have EMSs may be rewarded with leniency in enforcement after a regulatory violation is discovered. Environmental enforcement policies in some jurisdictions extend some leniency in the exercise of enforcement discretion to firms with EMSs. Not so in Canada: although many environmental policy-makers and permitting authorities in Canada encourage firms to implement EMSs, Canadian environmental enforcement policies appear to give little or no weight to voluntary EMSs.[121] Upon conviction, courts may consider implementation of a voluntary EMS as a mitigating factor in sentencing for environmental regulatory offences, although I am unaware of any instances of this happening.[122]

2. Financial Incentives

While numerous foreign governments have offered grants, tax credits, preferential access to government loans and other financial incentives for private sector EMS implementation or certification, to date Canadian public authorities have not made much use of these tools.[123]

---

[121] Environment Canada's new Compliance and Enforcement Policy, for instance, makes no mention of EMSs at all, although it does recognize the "power and effectiveness of environmental audits as a management tool" and encourages their use. Environment Canada, *Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999* (Ottawa: Environment Canada, 2001), *available at* Environment Canada homepage, http://www.ec.gc.ca /enforce/homepage/cepa/CEPA99_final_eng.pdf.pdf (last visited July 4, 2001).

[122] For example, the new Canadian Environmental Protection Act is the first legislation in Canada to expressly authorize a sentencing court to take the presence of an EMS into account as a mitigating factor in sentencing. *CEPA 1999, supra* note 102, § 287(c).

[123] Between 1994 and 2000 the province of Nova Scotia offered a corporate income tax credit to assist Nova Scotia companies with costs of achieving ISO 9000 or 14001 certification. The credit was 25% of eligible expenditures, which included audits, registrar fees, training and documentation. It appears that few companies claimed this tax credit for ISO 14001 certification expenses, however, possibly because the provincial government failed adequately to bring it to industry's attention.

3. Green Government Procurement

Governments are among the largest purchasers of goods and services in a jurisdiction and their purchasing policies can have a substantial impact on business. Many governments, including the Canadian federal government, have encouraged suppliers to implement EMSs or obtain third-party certification of their EMSs, but only a handful, none of which are Canadian, have made this a formal purchasing preference or requirement.[124] Although green procurement policies may reward firms that adhere to voluntary initiatives, they can also have a coercive aspect: EMSs may ultimately be transformed into a *de facto* requirement for doing business if enough public and private sector buyers make EMS implementation or certification a purchasing requirement.[125]

---

[124] No Canadian government appears to have made EMSs a formal procurement consideration or requirement, although the federal government encourages government buyers to purchase from firms that are ISO 14001 certified. Public Works and Government Services Canada, *ISO 14001—A New Tool for Buying Green*, *at* http://contractscanada.gc.ca/sl/en/iso14-e.htm (last visited March 20, 2001). Some government entities in Japan and Switzerland reportedly give formal preference to suppliers with EMSs. Laura E. Berón, "ISO 14000 and Trade Implications: Facts and Trends," paper presented at Seminar on Trade, Environment and the ISO 14000 Series, Ninth Annual Meeting of ISO/TC 207, Kuala Lumpur, Malaysia (Jul. 4, 2001) (copy on file with author). The US EPA is considering preferential government procurement treatment of products manufactured at facilities participating in the Performance Track program. US EPA, *Summary of EPA's Performance Track Proposal* (9 March 2000) (copy on file with author). The US Departments of Defense and Energy reportedly require first- and second-level suppliers to be ISO 14001 certified. Stenzel, *supra* note 21, at 270. *See generally*, Laurent Hourcle & Frederick J. Lees, *Applicability of ISO 14000 Standards to Government Contracts*, 27 ENVTL. L. REP. 10071 (1997).

[125] Although this situation is still a long way off, the trend toward requiring EMSs can be expected to continue in private sector procurement (*see supra* note 6 and accompanying text) and spread to public sector purchasing as well.

Command

Both industry and government usually resist proposals to make voluntary initiatives mandatory. It is very uncommon for public authorities to issue legally binding commands requiring firms to implement EMSs or demonstrate their conformance to an EMS standard. On the rare occasions this has happened in Canada it has been with the affected firms' or industry's support, either because they found the alternatives even worse, they were planning to implement or obtain certification of an EMS anyway or they stood to benefit directly from the arrangement.

First, in a handful of cases Canadian judges have used creative sentencing powers[126] to order an environmental offender to implement an ISO 14001-based EMS or obtain ISO 14001 certification.[127] In

---

[126] *E.g.*, Environmental Protection and Enhancement Act, ch. E-13.3, § 220(1), 1992 S.A. (Alta.); Environmental Protection Act, R.S.O., ch. E.19, § 190 (1990) (Ont.). The Canadian Environmental Protection Act expressly authorizes a sentencing court to direct an offender to "implement an environmental management system that meets a recognized Canadian or international standard," but no orders appear to have been made under this new provision. *CEPA 1999, supra* note 102, § 291(1). Although Ontario pioneered creative sentencing in Canada, the provincial Progressive Conservative government has reportedly ordered provincial prosecutors not to use it. Saxe, *supra* note 16, at 29. Two pillars of neoliberal politics appear to be in tension here: on one hand, an agenda of flexible regulation in which voluntary initiatives are encouraged and proposed government regulations are subject to cost-benefit analysis; and on the other hand, a "tough on crime" agenda of "zero tolerance" and stiff penalties that seldom seems to be subjected to the same cost-benefit disciplines.

[127] *Regina v. Prospec Chemicals Ltd.*, 19 Can. Envtl. L. Rep. (New Series) 178 (Alta. Prov. Ct. 1996) (ordering chemical company which was already a member of chemical industry's voluntary Responsible Care program to implement third-party certified ISO 14001 EMS); *Regina v. Van Waters & Rogers Ltd.*, 220 A.R. 315 (Alta. Prov. Ct. 1998) (ordering chemical company to undergo independent environmental compliance and ISO 14001 EMS audits, upgrade its EMS manual and operational controls, establish procedures for ongoing evaluation of conformance to ISO 14001 and present an EMS workshop to industry peers, but not ordering ISO 14001 certification); *Regina v. Calgary (City)*, 272 A.R. 161 (Alta. Prov. Ct. 2000) (ordering city to obtain ISO 14001 certification for two of

every case the defendant either proposed or agreed to the order, often because it was considering implementing or certifying an EMS anyway and could expect lower fines and fewer charges in exchange. Prosecutors and judges support such orders because they believe ISO certification will enhance future compliance; moreover it is easy to verify and is obtained at the defendant's expense.[128]

Second, the provinces of Nova Scotia and New Brunswick were among the first jurisdictions in the world to make EMS implementation mandatory for all firms in a particular industry sector.[129] Both provinces have enacted regulations requiring gas pipeline operators to implement ISO 14000-based EMSs.[130] This was

---

its water treatment plants by 2003 and declaring that an ISO 14001 EMS was "far in excess of what the present law and regulations require of a municipality"). Saxe discusses these cases and also mentions a fourth unreported decision, *Regina v. Prototype Circuits Inc.* (ordering circuit board manufacturer to establish an EMS leading to ISO 14000 certification). Saxe, *supra* note 16. Finally, in another case the court ordered the federal government to fund a tribal council's development of an EMS: *Regina v. Canada (Minister of Indian Affairs)*, [2000] O.J. No. 5076 (Quicklaw) (Ont. Sup. Ct. Justice 2000) (ordering Department of Indian Affairs to pay $200,000 to support tribal council's development of a pollution prevention and environmental management system program for fuel storage tanks). [Note: in Canadian prosecutions, *Regina* refers to the Queen, Canada's nominal head of state, as represented by the Crown Prosecutor, not to the city of Regina, Saskatchewan.]

128 Saxe, *supra* note 16, at 26.

129 Governments in Brazil, the Caribbean, Zimbabwe and elsewhere have reportedly considered or enacted legislation requiring all firms in sectors such as forestry or cruise shipping to implement EMSs, and some developing countries have reportedly considered requiring all firms to implement EMSs as an easy fix for inadequate or under-enforced environmental regulation. *See, e.g.*, Meidinger, *Closer Than You May Think, supra* note 44 at 10166; Saxe, *supra* note 16, at 30; Stenzel, *supra* note 21, at 276. The European Union has twice considered the idea of making its own voluntary EMS initiative, the Eco-Management and Audit Scheme (EMAS), mandatory: first when the scheme was developed in the early 1990s and later when it was reviewed and revised between 1998 and 2001. Both times the relevant EU organs rejected the idea.

130 *See* Pipeline Regulations, N.S. Reg. 66/98, § 19(1) (N.S.) (requiring pipeline companies to establish an EMS to the ISO 14000 standard or equivalent); Gas Pipeline Regulation, N.B. Reg. 99-61, § 46 (N.B.) (requiring all gas

part of a move toward greater self-regulation in the sector. The governments supported mandatory ISO 14000 implementation as a credible external benchmark that would make self-regulation acceptable, while industry positively preferred ISO 14000 to government regulation.[131]

Finally, Alberta's LEAD program will make implementation and maintenance of an EMS a licence term and specify the minimum elements of the EMS in the licence itself. This appears to be the first instance in Canada in which regulators will require EMS implementation or certification as a term of an operating permit or administrative order.[132]

Industry's willingness to have these EMS standards turned into binding legal requirements may also reflect the special role that voluntary standards developed by formal standardization bodies such as CSA and ISO play in government regulation. Governments have a long tradition of incorporating voluntary technical standards (*e.g.*, for building materials, construction, plumbing, fire safety, engineering, food safety, medical devices and so on) into mandatory regulations.[133]

---

distributors to develop and implement an EMS) and Gas Distribution and Marketers' Filing Regulation, N.B. Reg. 99-60, § 7(12) (N.B.) (requiring all gas distributors applying for a permit for a gas pipeline that will affect a "sensitive feature" to develop an EMS that meets the requirements of ISO 14000 or a similar standard). Neither province requires companies to have their EMSs certified by a third party.

131 Saxe, *supra* note 16, at 38.

132 *See* Alberta Environment, *LEAD Program Guide, supra* note 52 at 7 and Appendix B. In addition, at least one licensing authority has expressly relied on a regulated entity's plans to obtain ISO 14001 certification as a basis for issuing an environmental approval. *Re Material Resource Recovery SRBP Inc.*, No. EP-97-04 (Ont. Envtl. Assessment Bd. Jan. 21, 1998) (approving hazardous waste facility partly in reliance on applicant's plan to apply for ISO 14001 certification). The decision is discussed in Saxe, *supra* note 16, at 30.

133 *See* SALTER, MANDATED SCIENCE, *supra* note 78, at 25. The CSA estimates that approximately one-third of its standards have been referred to in provincial and federal laws. CSA, "Association activities," in ISO 14001:1996, *supra* note 3 (back matter). Saxe reports that the term "CSA" is mentioned 233 times in Ontario statutes and regulations alone, 170 of these mentions being in

In addition to these "public law" methods, the terms of a voluntary EMS initiative may be made mandatory through private litigation. A firm may agree to adhere to an EMS standard or other voluntary initiative in an agreement with regulators, a commercial supply contract or trade association membership agreement.[134] Such a voluntary undertaking may be converted into a legally binding command when a party to the agreement seeks judicial enforcement of the agreement.[135] Some commentators believe that these private law enforcement tools hold the key to successful regulation of corporate behavior through voluntary codes.[136]

---

building code regulations. Saxe, *supra* note 16, at 37. *See also* Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329 (1978) (examining the use of voluntary standards in the development of U.S. health and safety regulations).

[134] For example, the Canadian Electrical Association has announced that all its members must have an ISO 14001 or equivalent EMS in place by a certain date; the U.S.-based International Council of Cruise Lines recently announced that it will make EMS implementation a mandatory membership condition, in an effort to preempt tougher government regulation and reduce adverse attention to chronic marine pollution; the Canadian Chemical Producers' Association requires its members to implement the Responsible Care program; and numerous other industry associations in Canada and around the world require their members either to subscribe or verifiably demonstrate conformance to various environmental principles or codes of conduct. Courts have held that industry associations may use contract-based actions to discipline members for failure to meet agreed-upon voluntary standards. Webb, *Voluntary Initiatives and the Law, supra* note 75 at 38. Adherence to voluntary initiatives could also be made a term of insurance or finance contracts, although I know of no such contracts involving EMS.

[135] Webb, *Voluntary Initiatives and the Law, supra* note 75; Meidinger, *Closer Than You May Think, supra* note 44.

[136] *See, e.g.*, Webb, *Voluntary Initiatives and the Law, supra* note 75, at 38-39; Dr. Webb has also made this argument in postings to the Voluntary Codes Research Forum listserv (*see supra* note 47). In addition to contract law, voluntary initiatives may also be enforced through property or trust law in certain circumstances. *See* Meidinger, *Closer Than You May Think, supra* note 44.

Benchmarking

Canadian courts often use widely accepted voluntary standards and other evidence of industry custom as benchmarks[137] for determining whether a defendant exercised "reasonable care" in a tort case[138] or "due diligence" to avoid committing a regulatory offence.[139] Several commentators and government officials have suggested that implementation of an ISO EMS constitutes "due diligence".[140] Although no Canadian

---

[137] The term "benchmarking" is often used to describe a technique used by organizations to study "best practices" in other organizations or industries in order to assess and improve their own practices. I do not use the term in that sense but in the sense of a third party adjudicator judging an organization's performance against a chosen external standard.

[138] *See, e.g.,* Webb, *Voluntary Initiatives and the Law, supra* note 75; Meidinger, *Closer Than You May Think, supra* note 44; Saxe, *supra* note 16. Voluntary initiatives may be used to determine the standard for "reasonable use" of land in a nuisance action or, more commonly, "reasonable care" in a negligence action. *See, e.g., Visp Constr. v. Scepter Mfg.*, 45 *Constr. L. Rep.* 170 (Ont. Ct., Gen. Div. 1991) (defendant in product liability action not negligent because its manufacturing process conformed to voluntary CSA standard, CSA standard was reasonable notwithstanding that CSA was made up largely of manufacturers' representatives and that higher standards allegedly existed, and defendant took reasonable care to assure its product met the CSA standard particularly by maintaining CSA certification of its products and manufacturing process).

[139] In Canada, a defendant will not be found guilty of a "strict liability" offence, which includes most environmental regulatory offences, if the person establishes that he or she exercised "due diligence," *i.e.* did everything reasonable in the circumstances to avoid committing the offence. *See Regina v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353 (Can. Sup. Ct. 1978); Elaine L. Hughes, *The Reasonable Care Defences,* 2 J. ENVTL. L. & PRAC. 214 (1992). Due diligence is essentially equivalent to the civil negligence standard. In both civil and regulatory cases, conformance to industry custom is usually strong evidence of reasonableness unless the custom itself is unreasonable or the defendant's particular circumstances require more.

[140] *See, e.g.* Saxe, *supra* note 16, at 21; Taylor, *Environmental Regulation, supra* note 47, at 20; Taylor, *Standardization in Tune, supra* note 15, at 530-531; CESD, *1999 Report, supra* note 93, at § 1.45 (declaring ISO 14001 to be the standard of due diligence). In fact, demonstrating "due diligence" and thereby avoiding regulatory liability appears to be one of the leading motivations for public

court has yet used voluntary EMS standards as a benchmark for liability, the prospect seems increasingly likely. Moreover, the prospect deserves critical attention because, first, it is doubtful that an ISO 14001 EMS satisfies the requirements of reasonable care or "due diligence". While it enables an organization to implement systematically its own environmental goals and prevent unplanned pollution incidents, it does not require the organization to achieve any particular level of environmental performance or legal compliance. Its focus is on ensuring *conformance to the standard* rather than putting in place a system to prevent the commission of regulatory offences or otherwise avoiding breaching legal duties of care.[141]

Second, the use of EMS standards as benchmarks for liability may give voluntary industry-developed initiatives a power they could not achieve on their own, by effectively imposing the terms of such initiatives on organizations that neither used the initiative nor participated in its development.[142] Finally, the prospect of such judicial benchmarking may place other state actors in a dilemma, as Webb points out: if government officials fail to participate in the development of voluntary initiatives "there is a risk that the standards produced will be considered reasonable by judges ... even though they may be viewed as inadequate by government"; but if government

---

sector organizations to implement EMSs, as Canadian public authorities face more frequent environmental prosecutions and increasingly severe penalties if convicted.

[141] In Canada, "due diligence" requires the establishment of "a proper system to prevent commission of the offence." *Regina v. Bata Industries Ltd.*, 9 O.R. (3d) 329 at 339 (Ont. Prov. Ct. 1992). Such a system should include several elements: (1) the firm's directors should establish a "pollution prevention system," including supervision and inspection, improvement of business methods and exhortation of employees; (2) the directors should ensure that corporate officers have been instructed to set up a system "sufficient within the terms and practices of its industry of ensuring compliance with environmental laws" and to report to the board periodically on the operation of the system and promptly on any substantial non-compliance; (3) the directors should ensure that the officers address promptly any environmental concerns brought to their attention by regulators or other interested parties; (4) the directors should immediately and personally react when they notice the system has failed. *Id.* at 362-363.

[142] Webb, *Voluntary Initiatives and the Law, supra* note 75, at 32, 40.

officials do participate in the development of voluntary initiatives in an effort to influence their content, it may be difficult for prosecutors to argue later that the initiative does not constitute "due diligence" even though the government's views may not have been reflected in the initiative as adopted.[143]

Challenge

Another mode of engagement with voluntary initiatives that has been pursued by some public authorities in the environmental arena is to challenge firms to pledge to implement voluntary environmental measures and report their results publicly. This is often used as an alternative to introducing new regulatory measures. In Canada, it has been used to address such issues as greenhouse gas emissions and releases of toxic substances, but no government has yet developed a challenge program involving industry adoption of EMSs.

Borrowing

Finally, public authorities can incorporate voluntary initiatives developed by non-governmental bodies into legal instruments without making their observance mandatory. For instance, statutes, regulations, operating permits or agreements with regulated entities might specify a voluntary standard as a default basis for issuing approvals; make exceedance of a voluntary standard the trigger for documentation, reporting or remediation duties; adopt a voluntary standard's definition of a term; or authorize the use of a voluntary standard for testing, inspecting or measuring a regulated entity's operations, equipment, or products. Although this has not been done with EMS standards in Canada, one could imagine regulations, for example, authorizing the use of ISO environmental auditing standards or specifying ISO 14001 certification as a basis for "deemed" approval of particular kinds of activities.

---

143 *Id.* at 35-36.

Part IV: Beyond the Public-Private Divide: Toward an Alternative Conception of Government

Rethinking "Government"

Most of these interactions among public authorities and voluntary non-state initiatives occur in a quiet corner of environmental politics populated mainly by technical experts—indeed in a space that many participants do not perceive as political. Nonetheless the participants are involved, wittingly or unwittingly, in the definition and redefinition of the scope and concerns of politics and law in the field of the environment. It would not be accurate to view these developments as evidence of a "relentless augmentation of the powers of a centralizing, controlling and regulating state" that has increasingly colonized the "lifeworld".[144] Nor, on the other hand, does the evidence reveal a takeover of public policy making by industry. Rather, what emerges is a range of heterogeneous, shifting links among a variety of public and private authorities, through which these authorities pursue their goals not so much by domination and control as by exercising subtle and unpredictable influences upon the interests, beliefs and choices of firms and individuals. These links rely upon a range of experts and associated bodies of knowledge perceived to be relatively autonomous from both politics and the market (*e.g.*, accounting, engineering, standardization and law); and they involve alliances and tensions not just between public and private authorities, but among a multiplicity of public authorities themselves (*e.g.*, government ministers, environmental commissioners, legislators, regulators, inspectors, prosecutors, judges and government purchasing personnel).

This hybridization of law and market, state and non-state suggests the need for an alternative characterization of "government" that moves beyond the metaphor of a public-private divide to encompass the entire complex of ideals, goals, rationales, techniques,

---

[144] NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 18 (1999).

procedures and programs by which a diversity of state and non-state authorities seek to shape human conduct to desired ends. This alternative conception of government prompts us, first, to examine law and politics at the level of the mundane techniques by which various authorities seek to effectuate their governmental ambitions. Viewed this way, EMSs and EMS standards instantiate a broader tendency in contemporary practices of government in the advanced industrial democracies to "depoliticize" certain issues and problems by positioning them either as technical matters to be resolved by the application of neutral expertise or as private matters to be resolved by market forces. The EMS example also signals a shift in political rationales, a redrawing of the appropriate aims and forms of "governance," the boundaries of politics, law and market and the distribution of tasks between different authorities. Finally, it is possible to make some tentative suggestions as to the role law might play in facilitating or resisting these transformations (see Section VI).

The problem with employing the metaphor of a public-private divide to analyze contemporary practices of ordering and directing social relations, as Rose and Miller point out, is that

> the political vocabulary structured by oppositions between state and civil society, public and private, government and market, coercion and consent, sovereignty and autonomy and the like, does not adequately characterise the diverse ways in which rule is exercised in advanced liberal democracies.[145]

What is needed is an alternative way of thinking about government that avoids the limitations of these dichotomies. There is nothing new in this suggestion, of course. Rather, this is a lesson that we, as lawyers, seem to be constantly repeating. These dichotomies have been questioned repeatedly by successive waves of criticism in legal studies, from legal realism to feminist legal theory to critical

---

[145] Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 BRIT. J. SOCIOLOGY 173, 174 (1992) [hereinafter Rose & Miller, *Political Power Beyond the State*].

legal studies to legal pluralism. Exploding, fragmenting or contextualizing the state, law, sovereignty, public, private and so on, have been regular features of criticism and innovation in the social sciences and law throughout the last century, so that proclaiming the "death of the state" (or law or sovereignty) has become part of the ritual of renewal in discipline after discipline.[146] To paraphrase Foucault, scholars have repeatedly attempted to sever the "king's head" in social and legal thought, yet the next generation of critics always seems to find it back on the sovereign's shoulders.[147]

That these conventional categories remain central to theories and practices of government after all this critical attention is a puzzle in itself. As I suggested in Part II, we might gain analytical leverage over this puzzle if we focus on the problematics of *government*—the questions of "how we govern and are governed"—instead of over-valuing the problem of *the state*.[148] The example of environmental management systems and standards demonstrates that the regulation of environment-economy interactions is accomplished by an array of public and private authorities and institutions including standardization bodies, EMS auditors and certifiers, consultants, corporate managers, customers, regulatory agencies, legislatures, government inspectors, courts and (to a lesser extent) labor unions, consumers and public interest NGOs. It is the practices and projects of this array of state and non-state authorities that "make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on".[149] In

---

146 *Cf.* David Kennedy, *Thinking Against the Box: When Renewal Repeats*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000) (describing similar dynamics of intellectual renewal in the field of international law).

147 *See* MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: INTRODUCTION 88-89 (1976) (remarking that two centuries after the political revolutions that overthrew the absolutist monarchies of Europe, in the field of political thought we have not yet cut off the king's head).

148 Rose & Miller, *Political Power Beyond the State, supra* note 146, at 174-175.

149 Michel Foucault, *Governmentality, in* THE FOUCAULT EFFECT 87, 103 (Graham Burchell et al. eds., 1991) [hereinafter Foucault, *Governmentality*].

this context the familiar feminist claim that "the personal is political," modified to read "the private is public", may be more appropriate than the metaphor of a public-private divide to characterize the implications of voluntary EMS standards.

Disrupting the public-private dichotomy does not mean denying its continuing relevance, however. Rather, it calls for a broader conception of government that enables us to uncover and examine the ways in which conventional divisions between state, society, law, market, public and private are used to position certain concerns within and others outside the domains of politics, law or the state. This uncovering may in turn allow us to reclaim excluded concerns for contestation or examine how such exclusion or inclusion tracks or reproduces social relations of power and inequality.

In this broader conception, "government" can be understood as the entire collection of goals, rationales, plans, procedures and programs by which a diversity of state and non-state authorities seek more or less systematically to shape the conduct of individuals, organizations (including firms) and populations to desired ends.[150] Michel Foucault coined the term "governmentality" to describe the techniques and justifications by which government in this sense is effectuated.[151] Governmentality can be analyzed in terms of *political rationalities* and *governmental technologies*. Political rationalities are "the changing discursive fields within which the exercise of power is conceptualised, the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such tasks among secular, spiritual, military and

---

[150] In this conception, government includes the government of the state, the government of others and the government of oneself. *See generally* Foucault, *Governmentality*, *supra* note 150; Burchell, Gordon and Miller, *supra* note 83; Rose & Miller, *Political Power Beyond the State, supra* note 146; ROSE, *supra* note 145; DEAN, *supra* note 53; Paul Rutherford, *The Entry of Life into History*, *in* DISCOURSES OF THE ENVIRONMENT 37 (Éric Darier ed., 1999).

[151] Foucault, *Governmentality*, *supra* note 150.

familial sectors."[152] Governmental technologies are "the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions".[153]

Expertise plays a key role in governmentality. In the field of environmental management, expertise in the form of the specialized knowledges and vocabularies of environmental management consultants, standardization experts, auditors and certifiers, provides a link between the governmental objectives of public and private authorities and the minutiae of daily life in factories, offices, markets and homes. Making this link is crucial because neither complete knowledge nor total control of the conduct of individuals, groups, firms or populations is possible. Modern forms of government rely heavily on "action at a distance," recognizing a reserved domain for individual, autonomous action and molding the conception and exercise of this capacity for action without destroying its autonomy.[154] Expertise makes it possible to "reconcile the principle that the domain of the political must be restricted with the recognition of the vital political implications of formally private activities."[155] Experts forge a link between authorities and subjects of rule, while preserving the autonomy of a "private" sphere, by translating the governmental concerns of authorities and the daily worries of individuals and groups into specialized technical vocabularies that claim the power of truth and objectivity and offer techniques to manage better, live healthier and align individual choices with governmental ends.[156]

---

152 Rose & Miller, *Political Power Beyond the State, supra* note 146, at 175.

153 *Id.*

154 This idea of "action at a distance" has been used quite effectively by some proponents of "regulatory reinvention". *See, e.g.*, GUNNINGHAM & GRABOSKY, *supra* note 44, at 10, 123-125; Peter N. Grabosky, *Using Non-Governmental Resources to Foster Regulatory Compliance*, 8 GOVERNANCE 527 (1995).

155 Rose & Miller, *Political Power Beyond the State, supra* note 146, at 187.

156 The influential and problematic role of expertise has been recognized in numerous other contexts, including the literature on epistemic communities (*see, e.g.*, PETER M. HAAS, SAVING THE MEDITERRANEAN (1990); *Special Issue: Knowledge, Power, and International Policy Coordination*, 46 INTERNATIONAL

Some sociolegal scholars have examined law from a governmentality perspective,[157] and more recently a small number of environmental studies scholars have begun to apply governmentality analysis to environmental politics.[158] In the remainder of this section of the article I explore what it might mean to apply governmentality analysis to the interface between environmental law and corporate EMS initiatives. As will become clear, my principal argument is that the choice of EMSs as a technique of environmental government, along with its accompanying political rationalities, tend to deflect or deactivate the substantial political stakes of corporate environmental management. It is important to point out at the outset that I do not believe this effect is limited to those cases where private sector firms develop or implement EMSs and EMS standards "on their own," largely without the involvement of public authorities. It can also be seen in public authorities' engagements in the development, promotion or implementation of EMS initiatives. In other words, my argument is that these features are characteristic of EMSs generally, whether integrated into public authorities' regulatory and other programs or deployed by the private sector.

Environmental Management Systems as Governmental Technologies

Environmental management systems and EMS standardization can be viewed as technologies for governing human-environment

---

ORGANIZATION 1 (1992)); and the policy networks literature (*see, e.g.,* POLICY NETWORKS: EMPIRICAL EVIDENCE AND THEORETICAL CONSIDERATIONS (Bernd Marin & Renate Mayntz eds., 1991); Michael M. Atkinson & William D. Coleman, *Policy Networks, Policy Communities and the Problems of Governance*, 5 GOVERNANCE 158 (1992)).

[157] *See, e.g.,* Nikolas Rose & Mariana Valverde, *Governed By Law?*, 7 SOC. & LEG. STUD. 541(1998); ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE (1994); ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993).

[158] *See, e.g.,* Darier, *Environmental Governmentality, supra* note 53.

interactions. They are collections of standard procedures, routines, techniques and documents through which the aspiration to manage the environmental impacts of organizations' activities, products and services is rendered operable. It is through these sorts of detailed, repetitive, mundane mechanisms—such as identifying and assessing the significance of the environmental impacts of an organization's activities, setting environmental objectives and targets, developing and applying environmental performance indicators, assigning organizational roles and responsibilities, establishing and documenting operational procedures and controls, training employees, measuring and monitoring the organization's performance, testing and calibrating measurement equipment, calculating, computing and analyzing data, maintaining and managing records, and auditing and reviewing the management system—that the governmental ambitions and schemes of public and private authorities are instantiated.

What is revealed by viewing voluntary EMS initiatives in this light? EMSs treat the problem of environmental degradation as a question of managerial technique, to be resolved by the application of neutral technical expertise in light of the judgments of commercial actors in the marketplace. Conflicts about public health, environmental quality, competitiveness, corporate accountability and dominance among competing firms or trading blocs are acted out as if they were merely technical matters.[159] The result, as we shall see, is the depoliticization of a set of important environmental, public health and economic issues.

While public authorities play a part in the development, standardization and implementation of EMSs, these processes are driven by industry. Within the EMS standardization community and among most public authorities this is generally acknowledged as appropriate: industry is the primary user of the standards and should play the major role in developing and implementing them.[160] EMS standards are primarily understood as a form of corporate self-

---

159 *Cf.* Salter, *Housework of Capitalism*, *supra* note 82, at 106 (commenting on standardization generally).

160 *Cf. id.* at 109-110.

regulation and as such it is no surprise that their development is dominated by business firms (especially mulitnational corporations) and associated professionals, and that their content reflects the needs and interests of increasingly mobile capital in a global economy.[161]

It is also no surprise that environmental management systems address a number of issues with vital political implications. These issues include:

- *The acceptable environmental impacts of business*: EMSs address this issue by establishing processes within each organization to identify the significant environmental impacts of its activities, products and services and set, implement, monitor and measure its own environmental objectives and targets;
- *The improvement of environmental performance*: EMSs leave it to each organization to decide whether, how and at what rate to improve its environmental performance;[162]
- *The question of how to manage the risk of disaster*: EMSs consider the risk of environmental disaster as a matter for proper emergency planning rather than a reason to question the continued use of certain activities or substances;
- *The role of public consultation and accountability in environmental management*: most EMSs treat public environmental reporting and the views of local communities, the public and NGOs as matters for "stakeholder management,"

---

[161] *Cf.* Cutler et al., *supra* note 67 (identifying and analyzing inter-firm regulation as one of the principal expressions of private authority in international affairs).

[162] While "continual improvement" is usually understood in the environmental policy community as meaning continual improvement of environmental performance, ISO 14001 and 14004 define it as the "process of enhancing the environmental management system to achieve improvements in overall environmental performance," and emphasize that the rate and extent of improvement in environmental performance are up to the organization to determine and will not necessarily follow simply from the establishment and operation of an EMS. *See, e.g.*, ISO 14001, *supra* note 3 at §§ 3.1 and A.1.

to be used by the organization to the extent it considers necessary or desirable to maintain its viability or competitiveness;[163]

- *The relationship between voluntary initiatives and state regulatory systems*: EMSs erect a distinct barrier between themselves and state regulatory systems, positioning the latter as a special element of the EMS's external environment that generates obligations and expenses for the organization and possesses exclusive authority and responsibility to determine societal environmental goals and impose corresponding legal requirements. The EMS addresses this external regulatory system through a policy commitment to legal compliance and a set of processes that treat legal requirements much like other performance parameters,[164] but the incompleteness of the arbitrage between legal systems and the EMS is underlined by the fact that organizations have been convicted of environmental regulatory violations yet still been certified as conforming to ISO 14001; and
- *Verification of environmental claims and performance*: EMSs treat the question of verification of organizations' environmental performance or their adherence to particular standards as matters for objective, neutral determination by independent commercial experts who operate with specialized professional training, tools and vocabularies, provide verification services for profit and treat the information on which verification is

---

163 For an account of the "stakeholder management" approach to corporate social responsibility and a proposal for an alternative "rights"-based approach, see Richard Boele et al., *Shell, Nigeria and the Ogoni: A Study in Unsustainable Development. II—Corporate Social Responsibility and 'Stakeholder Management' Versus a Rights Based Approach to Sustainable Development*, 9(3) SUSTAINABLE DEV. 121 (2001).

164 For example, ISO 14001 and 14004 provide frameworks for identifying and documenting applicable legal requirements, setting objectives and targets for them, monitoring, measuring and reviewing their achievement and taking corrective action when noncompliance is discovered.

based as confidential so that the only information disclosed publicly is the fact of the organization's conformity or nonconformity to an EMS standard.

On one hand, standardization bodies and other EMS proponents frequently acknowledge these political stakes at least implicitly, for example by characterizing voluntary EMS standards as a contribution to public policy goals such as sustainable development, admitting that the development and use of EMS standards implicate important public interests or calling for broader "stakeholder" participation in standards development and corporate environmental management. On the other hand, the same actors regularly remind each other and anyone else that EMSs (and standards generally) are primarily useful tools developed by business, for business, pointedly declining to characterize the involvement or conflicting interests of industry participants as "political".[165]

What is most interesting for present purposes is that the choice to employ the techniques of management systems and standardization—whether made by a firm, industry association, public authority or other actor—appears to predispose the resolution of this ambivalence about the political stakes of corporate environmental management. The techniques and procedures of standardization and environmental management systems deactivate these political stakes by transforming them into technical matters to be resolved by the application of professional expertise according to apparently neutral technical criteria, and simultaneously into matters of consumer or commercial preference to be resolved by the exercise of autonomous choice in market transactions. EMSs constitute environmental protection as an apolitical matter to be administered through bureaucratic organizations. While they can, in theory, be adapted to organizations of all types and sizes, EMSs are modeled on the

---

[165] *Cf.* Salter, *Housework of Capitalism*, *supra* note 82, at 113 (commenting on standardization generally). As Salter explains, this tendency does not reflect a desire to disguise the dominant role played by industry in standardization, but simply to deny that this role is political.

management hierarchies and processes of large business organizations. They emphasize hierarchy, routine, procedure, paperwork, formality and technical expertise. They rely largely on private market dynamics to signal the need for and success of these technical procedures and decisions, through the preferences and demands of customers, suppliers or ultimate consumers. The EMS is quintessentially a technology of the large bureaucratic organization.[166]

Standardization, for its part, transforms conflicts over market dominance, trade barriers, international competitiveness, health, safety and environmental protection into technical decisions for experts and it submits determination of the appropriateness of the resulting standards to the market through firms' decisions to purchase and implement the standards and market participants' demand for certified products or firms.[167] Standardization has been called "the housework of capitalism": like housework, it is "detailed, mundane, repetitive, and never completed," and it is "both essential and unrecognized in the constitution and reproduction of economic and class relationships."[168]

Standardization is "usually considered a 'MEGO' ('my eyes glaze over') subject" in most corporate boardrooms.[169] This fact is more significant than it might first appear. EMSs and EMS standards are a significant form of governmental technology precisely *because*

---

166 This fact may help explain the growing use of EMSs by government departments and might justify the inference that the EMS is a mechanism by which multinational corporations and other large private organizations such as standardization bodies are redrawing the lines between public and private, in informal alliances with large public organizations.

167 *See, e.g.*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO'S LONG-RANGE STRATEGIES 1999-2001: RAISING STANDARDS FOR THE WORLD (1998). An executive summary of this publication is available online at http://www.iso.ch/iso/en/prods-services/otherpubs/pdf/longrang.pdf (last visited Nov. 25, 2002) ("ISO develops only those standards which are required by the market. This work is carried out by experts on loan from the industrial, technical and business sectors which have asked for the standards, and which subsequently put them to use").

168 Salter, *Housework of Capitalism*, *supra* note 82, at 107.

169 Sheldon, *Introduction*, *supra* note 25, at 11.

they make one's "eyes glaze over"—that is, they mute the struggles over the distribution of risks, harms, jobs and profits inherent in environmental politics. By transforming debates over justice, poverty, racism, ecological integrity, animal rights, the intrinsic value of nature, and so on, into matters of managerial expertise and market preference, these technologies both enable relations of inequality and repression to be perpetuated and disguise their own role in that perpetuation.

In these respects EMSs and standardization instantiate a broader tendency in contemporary liberal practices of government to depoliticize certain political stakes by positioning them either as "technical" matters to be resolved by the application of neutral expertise or "private" matters to be resolved by market forces.[170] The tendency to "technicalize" is commonly associated with welfare state liberalism (*e.g.*, the creation of social insurance schemes), while the "privatization" tendency is commonly associated with free-market neoliberalism. EMSs, interestingly, embody both tendencies, perhaps reflecting some of the complexity and ambivalence in the encounter between welfarist and neoliberal mentalities in contemporary government.

In general, Canadian public authorities have allowed or encouraged this (re)drawing, without attempting to push the content or use of EMSs in any particular direction, although there are now indications that public authorities might be attempting to encourage "ISO 14001-Plus" EMSs through regulatory incentive programs such as Ontario's Cooperative Agreements framework.[171] Their engagements—*e.g.*, implementing their own EMSs as examples for industry, encouraging or requiring firms to implement EMSs and beginning to offer crudely crafted regulatory relief programs to firms with EMSs—have been relatively credulous and unreflective in comparison to those of American and European public authorities. One might criticize these engagements as an abdication of governmental

---

[170] *See generally,* Rose & Miller, *Political Power Beyond the State, supra* note 146, at 196-201.

[171] *See supra* notes 116-121 and accompanying text.

authority to regulate corporate practices, but this begs the question of the extent to which state regulation differs from "private" self-regulation. Among the possible differences are the following. First, official regulations are not developed by regulated entities themselves but by government officials with ultimate accountability to an electorate. This separation between regulators and regulated in standard-setting is often criticized as illusory, however, due to heavy reliance on industry for information, an increasing "customer service" orientation toward regulated industry in some governments, intense negotiation with industry over pollution standards, and the risk of regulatory capture. Second, state regulatory systems usually have public consultation processes that do not depend on the regulated entity's discretion (*e.g.*, notice and comment, environmental assessment and judicial review), yet these are often perceived to be underused and ineffective. Third, there is Garret Hardin's famous question, "who will watch the watchers?"[172] Most governments have established formal, public mechanisms to monitor the behavior of regulatory agencies, from government watchdog agencies to citizen suits and judicial review, whereas monitoring of EMS auditors and certifiers is generally non-public and achieved mainly through accreditation processes supervised by standardization bodies themselves or even more obscure institutions.[173] Moreover, since

---

[172] Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245-46 (1968) ("Quis custodiet ipsos custodes?").

[173] Accreditation refers to the designation of individuals or organizations as accredited to certify an organization or product's conformance to a voluntary standard. Accreditation of ISO 14001 certifiers is done by standards bodies themselves, and while there have been rumors about the inferior quality of some certifiers, particularly in the developing world, this is usually left to the market to sort out. There is very little oversight either of accreditation or accredited certifiers. Some coordination of accreditation is achieved through organizations such as the International Accreditation Forum and the International Social and Environmental Accreditation and Labeling Alliance. On the latter, *see* Errol Meidinger, "Emerging Trans-Sectoral Regulatory Structures in Global Civil Society: The Case of ISEAL (the International Social and Environmental Accreditation and Labeling Alliance)," paper presented at joint meetings of Law and Society Association and Research Committee for the Sociology of Law, 4-7 July, 2001, Budapest, Hungary, at

auditors and certifiers rely on their clients for income, there is some risk of "regulatory capture" by the client companies. While this danger is real, the risk of regulatory capture also exists in state agencies, particularly given the recent tendency of many environmental agencies and their political masters to reinvent industry as clients to be served rather than polluters to be controlled.

More importantly, the technologies of contemporary state environmental regulation embody, to a significant extent, the same managerialist tendencies as EMSs to obscure the stakes, struggles and repressions of environmental politics, relying heavily on technical expertise, detailed, mundane, repetitive techniques of measurement, monitoring, calculation, assessment, inspection, etc., and relying increasingly on private market dynamics. While EMSs are a particularly clear example of these tendencies, state environmental regulation shares the same characteristics to a significant degree.

Viewed as governmental technologies, then, EMSs and standardization render environmental management a matter of technical expertise, organizational routine and market preference, contributing to the expulsion of a set of environmental and economic issues from the political domain.[174] Not all voluntary corporate initiatives share these characteristics, but this case nonetheless draws attention to the benefits of examining the problems of "government" at the level of the mundane technologies by which rule is effectuated. Such examination can enable one to expose redrawings of the public/private divide and reclaim environmental management as an arena for political contestation.

---

http://law.buffalo.edu/homepage/eemeid/scholarship/ISEAL.pdf (last visited Aug. 1, 2001).

[174] The success of this expulsion is reflected in the fact that despite their major implications for environmental quality, public health, international competitiveness and regulatory autonomy, voluntary EMS initiatives have received little attention from academics, almost none from news media and grassroots organizations, and have only recently begun to attract serious attention from public authorities.

The Political Rationalities of Environmental Management Systems

The case of EMSs and EMS standards signals a shift in the rationales of governance, not just in the area of corporate environmental management but in discourse about government generally. Political rationalities can be thought of as the discursive "software" through which governmental technologies operate and produce effects.[175] My main argument in this section is that the political rationalities of environmental management systems and standardization—that is, the discursive fields within which the forms and goals of government, the proper boundaries of state and market and the roles of public and private authorities are conceptualized and justified—reinforce the tendency described in the previous section to depoliticize environmental management.

The political rationalities of EMSs consists of a loose set of ideas, claims, justifications, themes and story-lines about environmental management that are developed and maintained by a transnational coalition of corporate managers, industry groups, management consultants, trade publications, standardization professionals, public authorities, academics and others. These actors are united not by a common goal or strategy (indeed, many of them have never met let alone agreed on goals or strategies) but by their employment of a particular set of claims and story-lines about the challenge of environmental degradation and the appropriate tools and actors to address it.[176]

First, as hinted in the previous section, the discourse of EMS reflects a distinctly "managerialist" view of the challenge of environmental degradation. Improving management practices—in particular, by adopting an organization-wide management system based on the "total quality management" concept—is the best way to

---

175 *Cf.* MAARTEN HAJER, THE POLITICS OF ENVIRONMENTAL DISCOURSE 60 (1995).

176 *Cf. id.* at 12-13, 58-68; Dorte Salskov-Iversen et al., *Governmentality, Globalization and Local Practice: Transformations of a Hegemonic Discourse*, 25 ALTERNATIVES: SOC. TRANSFORMATION & HUMANE GOVERNANCE 183 (2000).

improve the environmental performance of organizations and their products.[177] This implies a particular conception of the environmental crisis. While acknowledging that industrial society has produced severe environmental degradation, the managerialist conception does not view this crisis as a fundamental challenge to existing institutions and practices of industrial society. Rather, major environmental disasters of recent memory are interpreted primarily as management process failures, the environmental crisis is seen as under control and gradually improving, and well-planned and properly implemented management systems are seen as the key to managing the adverse environmental impacts of business.[178] The environmental crisis is something to be managed through the application of managerial skill, objective technical expertise, organizational routine and individual motivation.

Second, this managerialist approach is portrayed as both effecting and depending for its own effectiveness upon a transformation of corporate culture. The main potential of an EMS is often identified as its capacity to change organizational culture by integrating environmental protection into all activities and decisions of the enterprise.[179] This cultural transformation is accompanied by an ethic of individual responsibility for environmental protection, from the CEO to the lowliest employee. An EMS "gathers all your

---

[177] *See, e.g.*, ISO Technical Committee 207, *About ISO/TC 207*, *at* http://www.tc207.org/abouttc207/aboutTC207_main.html (last visited Nov. 25, 2002) [hereinafter ISO/TC 207]; Cary Coglianese and Jennifer Nash, *Environmental Management Systems and the New Policy Agenda*, *in* COGLIANESE & NASH, REGULATING FROM THE INSIDE, *supra* note 2, 1, at 11 [hereinafter Coglianese & Nash, *EMS and the New Policy Agenda*].

[178] *See, e.g.*, Sheldon, *Introduction*, *supra* note 25, at 12; Joseph Cascio, "The ISO 14001 Standard," in CASCIO, ISO 14000 HANDBOOK, *supra* note 2, 24 at 25.

[179] *See, e.g.*, Coglianese & Nash, *EMS and the New Policy Agenda*, *supra* note 178, at 12; Cascio, *Introduction*, *supra* note 73, at 4; John D. Wolfe, *CSA's Environmental Management Program and its Relationship to other National and International Environmental Management Systems Initiatives*, *in* ENVIRONMENTAL MANAGEMENT SYSTEMS: PREPARING FOR THE NEW REALITY (The Canadian Institute 1992).

employees and managers into a system of shared and enlightened awareness and personal responsibility for your organization's environmental performance," relying on training, competence and motivation of individual employees rather than blind obedience to regulations or corporate directives and punishment of errors.[180] This theme of the "responsibilization" of the individual for his or her own well-being or the well-being of organizations or society is found not only in the environmental management context but throughout public policy discourses in recent years.

Third, one of the most striking attributes of the discourse of EMS, shared by most contemporary voluntary environmental initiatives, is its reinvention of environmental protection as "good business" rather than an unfortunate cost. The discourse presents both aggressive and defensive business rationales for EMSs. On one hand, EMSs create "win-win" opportunities to improve environmental performance and increase shareholder value by enhancing corporate image, improving customer relations, realizing cost-savings (*e.g.*, via energy conservation or waste recycling) and promoting innovation (*e.g.*, product and process improvements).[181] On the other hand, EMSs are portrayed as defensive tools to maintain and increase competitiveness, especially in the face of globalization and trade liberalization.[182]

Fourth, EMSs and EMS standards are portrayed as a basis for a constructive new relationship with regulators and the public based

---

180 Cascio, "The ISO 14001 Standard," *supra* note 112 at 24-25.

181 *See, e.g.*, Coglianese & Nash, *EMS and the New Policy Agenda*, *supra* note 178, at 11; Oswald A. Dodds, *An Insight into the Development and Implementation of the International Environmental Management System ISO 14001*, in HILLARY, ENVIRONMENTAL MANAGEMENT SYSTEMS AND CLEANER PRODUCTION, *supra* note 13, 27; Dick Hortensius & Mark Barthel, *Beyond 14001: An Introduction to the ISO 14000 Series*, *in* SHELDON, ISO 14001 AND BEYOND, *supra* note 2, 19; Gabriele Crognale, *Environmental Management at a Crossroads: Time for a Radical Breakthrough*, in ENVIRONMENTAL MANAGEMENT STRATEGIES: THE 21ST CENTURY PERSPECTIVE (Gabriele Crognale, ed. 1999) 2 at 2.

182 *See, e.g.*, Wolfe, *Drivers for International Integrated Environmental Management*, *supra* note 14, at 15.

on cooperation and partnership rather than coercion and mistrust.[183] The traditional "command and control" mode of regulation is acknowledged to have produced many successes but is seen as having reached its limit. EMSs are presented as a market-driven, voluntary, flexible, efficient and effective alternative or supplement to sclerotic, inefficient, costly, rigid, near-sighted, backlogged, overtaxed, sometimes adversarial and ineffective regulatory systems.[184] Private market dynamics, in the form of supply-chain pressures, consumer demand and trade association requirements, are positioned as constructive alternatives to messy political deliberations and inflexible, inefficient legal systems.[185] In turn, the citizen formerly dependent on welfare state paternalism is reinvented as the autonomous, self-helping consumer, exercising individual environmental responsibility through consumer choice.

All of these claims and story-lines are linked by an overarching goal and moral justification: that EMSs and EMS standards will contribute to the realization of sustainable development.[186] This claim is common in the discourses of corporate greening and is shared not just with most corporate environmental initiatives but with almost all environmental policy initiatives in the last decade. The ISO 14000 series of standards, in particular, was expressly designed to be one of the business community's major contributions to the global public policy goal of sustainable development and to inaugurate a new approach to environmental management not only for

---

183 *See, e.g.*, Hortensius & Barthel, *supra* note 182, at 32.

184 *See, e.g.*, Reiley, *supra* note 12; Murray, *supra* note 44; Pezzoli, *supra* note 44; Stenzel, *supra* note 21; Lally, *supra* note 12; Crognale, *supra* note 115; Cascio, *Introduction*, *supra* note 73; Coglianese & Nash, *EMS and the New Policy Agenda*, *supra* note 178, at 7-9.

185 *See, e.g.*, Sheldon, *Introduction*, *supra* note 25, at 14.

186 *See, e.g.*, ISO/TC 207, *supra* note 178; Crognale, *supra* note 115 at 6; Cascio, *Introduction*, *supra* note 73, at 4. ISO's work on EMS standards, for instance, was explicitly initiated as one of the global business community's main contributions to sustainable development in the context of the 1992 Rio Earth Summit. *See, e.g.*, ISO/TC 207, *supra* note 178; Hortensius & Barthel, *supra* note 182.

business but for any organization, from hospitals to universities to military bases to government departments.

Finally, the political rationalities of EMSs locate EMSs in a non-political arena. While acknowledging the political effects of EMSs and EMS standards (*e.g.*, their contribution to sustainable development, international trade or state regulatory policy), the discourse of EMS positions corporations, standards bodies and EMSs as operating outside politics, in contrast to such "politically oriented bodies" as environmental NGOs, political parties and public authorities.[187]

The political rationalities of EMSs thus redefine the legitimate concerns of the state in a manner that carves out a substantial chunk of environmental politics for organizations such as business firms to resolve on their own through technocratic management and private market signals. It vests the elaboration and application of important norms of conduct and the delivery of certain environmental public goods in large non-governmental organizations such as multinational corporations, standardization bodies, consulting firms, auditors and certifiers. It presents a particular conception of the appropriate roles of the firm, market, employee, citizen and state in managing environmental risks and harms and justifies these arrangements for the exercise of power in terms of good business sense, proper management processes, individual employee responsibility, the potential for autonomous consumer choice, the limits of the regulatory state and the ultimate pursuit of sustainable development.

This redrawing of the domain and forms of government is closely linked to two broader political discourses, ecological modernization and smart regulation. Ecological modernization has emerged, since the late 1970s, as the dominant way of conceptualizing environmental problems in the advanced industrial democracies.[188] Ecological modernization understands environmental harm as a systematic product of the modern industrial "risk" society, but one that can be addressed through technocratic management. In this vision

---

187 *See, e.g.*, Cascio, THE ISO 14000 HANDBOOK, *supra* note 2, at 10.

188 *See generally* HAJER, *supra* note 176.

the environmental crisis no longer represents a fundamental threat to industrial society, as it did in the 1970s, but an opportunity for its further development. Environmental protection and industrial development are compatible "win-win" propositions. The pursuit of sustainable development, one of the key moral justifications of EMSs, is intimately linked with ecological modernization by virtue of its emphasis on integration of environmental considerations into all business and governmental decision-making, consideration of and communication with a broad range of stakeholders, and the susceptibility of environmental crisis to rational management. The political rationalities of EMSs thus coincide very closely with the discourse of ecological modernization.

Another prominent discourse in contemporary environmental politics that is closely related to and perhaps subsumed in ecological modernization, is the discourse of "smart" or "responsive" regulation.[189] This discourse acknowledges the accomplishments of "command and control" regulation but argues that it has reached the limits of its cost-effectiveness and technical capacity, due to cost, inefficiency, inflexibility and regulators' resource and information constraints. On the other hand, this discourse also rejects neoliberalism, with its radical skepticism about the capacities of the state to govern for the best and its enthusiasm for free markets, property rights and deregulation. It argues that most "regulation" is already in the hands of actors other than the state and uses this insight to propose a new conception of the regulatory process that transcends sterile regulation-deregulation and market-state dichotomies. It proposes new regulatory strategies that combine state, market, private and public actors and forms of regulation and enlist non-state resources and mechanisms such as self-regulation, EMSs, eco-labeling schemes, environmental reporting and industry-community agreements in furtherance of "governing at a distance."[190] Some variants of this discourse draw upon private sector management discourses to

---

189 *See generally* GUNNINGHAM & GRABOSKY, *supra* note 44, at 5-19; Ayres & Braithwaite, *supra* note 52; Osborne & Gaebler, *supra* note 52.

190 GUNNINGHAM & GRABOSKY, *supra* note 44, at 10-13.

promote competition and marketization in government functions, a "client service" orientation in public administration (regulated entities as clients, state as service provider), individual autonomy (individuals as self-helping, autonomous, co-responsible entrepreneurs) and managerialism (conceptualization of life in entrepreneurial terms; use of managerial techniques).[191] This discourse of regulatory reinvention meshes well with the discourse of EMS, and provides the broader rationale for most of the engagements I have observed between Canadian public authorities and EMS initiatives.

This examination of the political rationalities of EMS suggests two things: first, that the deactivation of political conflict seen in the discourses of EMSs and standardization will be one of the key political challenges in the era of "smart regulation". The political rationalities I have described constitute the realm of EMSs as a private, voluntary order in dichotomous, sometimes antagonistic relation to the messy, inefficient, cumbersome public realm of law and politics, and simultaneously obscure the process by which this division between public and private realms is created, by representing EMSs as always already private, voluntary and apolitical.[192] The interpretation of environmental crisis as a "win-win" proposition, an opportunity for entrepreneurial thinking, a matter for expert, technocratic management "at a distance," reinforces this tendency to mute the political struggles and distributive stakes of environmental management.

Second, it seems likely that "steering" may emerge as the most prominent form of engagement of public authorities with private authority in the field of environmental governance. The increasing emphasis on "action at a distance" in current mentalities of government points to a conception of the state as helmsman, selectively

---

191 Salskov-Iversen *et al.*, *supra* note 177.

192 De Larrinaga makes a similar argument regarding Shell's statements about its (non-)involvement in the repression of the Ogoni people in Nigeria. Miguel de Larrinaga, *(Re)Politicizing the Discourse: Globalization Is a S(h)ell Game*, 25 ALTERNATIVES: SOCIAL TRANSFORMATION AND HUMANE GOVERNANCE 145 (2000).

steering the development and use of regulatory strategies and tools by others through participation in the creation of voluntary programs, funding of non-state policy development institutions such as standardization bodies, provision of high-level strategic direction for non-state policy-making, pronouncement of official positions on voluntary initiatives, and regulation of the ground-rules, boundaries and limits of non-state governance by manipulating competition, securities, corporate and consumer protection law, public participation rules and regulatory "backstops". One might also expect "reward" and "self-discipline" to figure prominently in state strategies as public authorities attempt to steer environmental self-government by offering regulatory incentives and setting examples through self-application of voluntary disciplines.

Part V: What Role for Law?

I conclude with some tentative suggestions about the role for law in the transformation of the public/private divide in Canadian politics. My research into EMSs and EMS standards reveal two important characteristics of contemporary government: first, that government, understood as all the more or less systematic attempts to direct human conduct to appropriate ends, is widely distributed among myriad public and private authorities in a hybridized public-private space; but second, that in any given problem space the unequal distribution of governmental authority tends to produce and reproduce social relations of power and inequality.

Two general conclusions follow from these observations: that some form of "smart regulation," relying on a mix of state and non-state actors and regulatory tools is appropriate to deal with the distributed character of government; but that a key challenge in the design and exercise of such government will be to resist the tendency to "depoliticize" through the move to neutral technical expertise and private market transactions. Opening space for such resistance requires, first of all, attention to the political stakes that EMSs and EMS standards tend to submerge. This involves asserting the politics

of "merely technical" choices[193] such as the decision to delegate authority to technical experts or the private market and the construction of the citizen as autonomous consumer and self-helping entrepreneur. It also calls for more concrete exploration of the distributive consequences of corporate environmental management decisions than I have attempted here, along with more detailed examination of how the rationalities and technologies of environmental management produce and obscure such consequences.

Law and legal practitioners can play numerous roles in the politics of voluntary EMS standards, in some cases facilitating and shaping the expansion of "private" non-regulatory initiatives, in others resisting it, and in others playing little or no role. While strategies and techniques deployed in legal relations can probably have a significant impact on the transformation of the public-private divide, in the case of EMS standards this potential has so far gone largely unrealized in Canada. Although Canadian regulators, legislators and courts have employed most of the modes of engagement I describe in Part II, it is fair to say that their responses to voluntary EMS initiatives have been minimal and incoherent.

The important question for present purposes is whether and how law can be used to resist the depoliticization of environmental management; *i.e.* to insist on the political stakes of environmental management decisions and create space to work toward greater justice, equality, human health and ecological integrity? At a minimum, law might be deployed as a "border guard" to define and protect certain "public" stakes of EMSs. EMSs can be a very useful tool for organizations internally and in their relations with business partners and market participants, but many (including ISO 14001-based EMSs) provide inadequate guarantees of public consultation and accountability, environmental performance and legal compliance to merit giving them any particular weight in non-market relations with governments and the public.

---

[193] *Compare* Duncan Kennedy, *The Political Stakes in 'Merely Technical' Issues of Contract Law*, paper presented at Osgoode Hall Law School, Toronto (September 17, 2000) (copy on file with author).

Legal tools and strategies should be designed, at a minimum, to insist on these basic public stakes when rewarding or relying on them in state regulatory instruments, for instance by requiring more than the minimal "basic EMS" defined in Alberta's new LEAD program, requiring public consultation and transparency in the setting, monitoring and review of environmental performance and rewarding only firms that consistently exceed compliance with legal requirements (including improvement of performance on non-regulated parameters). Basic corporate governance rules requiring maximization of shareholder value might be revisited to expand the range of "stakeholders" whose interests managers are permitted (or required) to take into account. Moreover, legal actors such as prosecutors and courts should be urged to take a firmly skeptical attitude toward EMSs and EMS standards and inform themselves fully of their characteristics before incorporating them in orders or using them as a standard for liability.

More ambitiously, governments, lawyers and citizens might use law as part of a broader political strategy to influence the redefinition of public and private in the context of environmental management. The role of law and legal practitioners in this strategy could be to claim and defend a broad space for democratic experimentation in the face of the homogenizing tendencies of global trade liberalization (as evidenced, for instance, in the TBT Agreement) and government "reinvention". Just how this might be done is a question for further reflection and action.[194]

---

[194] Unger's ideas about institutional imagination and democratic experimentalism present interesting possibilities in this direction, the exploration of which is unfortunately beyond the scope of this paper . *See, e.g.*, ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996); ROBERTO MANGABEIRA UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE (1998).