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Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law, and Private Authority in Canada

Stepan Wood

This essay examines the transformation of the public-private divide in Canadian law and politics in the context of a little-known set of voluntary initiatives for corporate "greening," which are known as environmental management system (EMS) standards. These standards are developed and applied in the relative obscurity of corporate offices, management consulting firms, and standardization bodies (national and international organizations that write technical standards). They have received little attention from academics and almost none from the popular news media and non-governmental organizations (NGOs). The standardization bodies that develop them have gone almost entirely unnoticed in the recent wave of controversy and popular protest over globalization and free trade that has swept the major intergovernmental trade and financial institutions. Nonetheless, voluntary EMS initiatives have significant and largely unexplored implications for environmental quality, public health, and the definition of "public" and "private" in Canadian law and politics.

Environmental Management Systems

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

action, and review (which is also known as the "Plan-Do-Check-Act" or PDCA model) is meant to result in the continual improvement of the EMS and, ultimately, the organization's environmental performance.

While many other voluntary environmental initiatives set environmental performance goals for organizations to meet, EMSs leave it up to the organization to set its own environmental performance objectives in accordance with its needs and interests. Thus, an EMS is primarily procedural rather than performance oriented. The thinking behind an EMS is that improved management processes will lead to improved environmental outcomes.

EMSs emerged as a distinct management tool in the late 1980s in the wake of several prominent environmental disasters, including the chemical disaster in Bhopal, India. A growing number of industrial firms, many of them large multinational corporations, expanded and consolidated their existing environmental management tools (for example, environmental policies, environmental audits, public environmental reports, and pollution prevention programs) into systematic programs to manage the environmental impacts of their operations. Many of these EMSs were modelled after the "total quality management" systems that had recently swept the business world. By the early 1990s, many firms supported the development of uniform guidelines for EMSs to enable comparability and to create a level playing field for trade. Standardization bodies in several jurisdictions, buoyed by the meteoric rise of the ISO 9000 quality management standards, took up this challenge and began to develop voluntary EMS standards.

The most prominent EMS standardization initiative is the ISO 14000 series of global standards developed by the International Organization for Standardization (ISO). The ISO 14000 series consists of ISO 14001, which specifies requirements for an EMS that may be objectively audited;¹ ISO 14004, which is a more detailed and flexible guide to designing and implementing an EMS;² and around twenty other supporting standards related to EMS auditing, life-cycle analysis, ecolabelling, environmental performance evaluation, and other matters. The ISO is a global federation of around 140 national standardization bodies. The main work of the ISO and its member bodies is the development of technical standards by business for business. The ISO 14000 standards are expressly intended to be one of the global business community's major contributions to the global public policy goal of sustainable development and to inaugurate a new paradigm of environmental management that is applicable not only to business firms but to all organizations, from hospitals, to universities, to military bases, to government departments.

Having an EMS in place is only part of the story. Many organizations want to be able to demonstrate to relevant external audiences (for example, customers, competitors, trade associations, consumers, or regulators) that their EMS conforms to a recognized standard, thereby realizing reputational,

competitive, or regulatory benefits or responding to customer demand. This is typically achieved by having the EMS audited and certified as conforming to the ISO 14001 standard by an accredited third-party registrar. 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 demonstrate conformance to a broader range of quality, environmental, labour, social, and other criteria. Examples include product ecolabelling programs,³ sustainable forestry or fisheries management programs,⁴ and environmental, quality, or occupational health and safety management system standards, including ISO 14001.

EMSs have become widespread in the private sector in the last ten years, particularly among multinational corporations and corporations operating in international markets. A growing number of multinational corporations require their suppliers to have ISO 14001 EMSs in place. EMS certification is fast becoming a requirement for doing business in a few industry sectors (for example, auto manufacturing), and the number of ISO 14001 certificates worldwide is growing rapidly.⁵

What little scholarship there is about EMS initiatives emphasizes their private and voluntary character. While some writers extol EMSs as evidence of a revolution in corporate environmental practices and an example of the promise of corporate self-regulation,⁶ others see EMSs as an example of corporate "greenwash" and a pretense for governments to retreat from environmental regulation.⁷ Running through these debates is the theme of the increasing power of private authority in public affairs.⁸ This literature makes a contribution to our knowledge by demonstrating that these voluntary initiatives, far from being apolitical, reflect the political agendas and public order conceptions of particular social actors. It also contributes to the burgeoning debates about regulatory "reinvention"⁹ and the role that voluntary corporate initiatives should play in public policy.¹⁰

This tendency to focus on the "privatization" of environmental policy tends, however, to underemphasize an important aspect of the politics of voluntary environmental initiatives, namely, the fact that public authorities and legal systems are deeply involved in the constitution and exercise of "private" authority to the point that it may no longer be useful to discuss these voluntary initiatives in terms of a public-private divide. By emphasizing the voluntary and private character of these environmental initiatives, the debates over EMS initiatives tend not to acknowledge the full extent of the entanglement of public authorities and voluntary initiatives.¹¹ Numerous writers have addressed certain aspects of this interaction,¹² but very few have attempted to examine it comprehensively.¹³ This is also true to a lesser extent of the literature on voluntary environmental initiatives generally.¹⁴ In fact, diverse public authorities around the world have begun to participate in, and influence, the development of voluntary EMS initiatives and

incorporate them into their strategies and programs in an increasing variety of ways, including officially endorsing or encouraging private sector EMS implementation, conducting or disseminating research about EMSs, providing financial incentives for EMS implementation, relaxing regulatory requirements or criminal penalties for companies that implement voluntary EMS standards, making the implementation of voluntary EMS standards mandatory through legislation or court order, applying voluntary EMS standards to their own operations, developing or agreeing to international trade rules that may turn voluntary international standards into constraints on governments' regulatory options, and steering the development and use of voluntary EMS standards in particular directions.

It is at this interface between state and non-state regimes that the most interesting questions about EMS standards and other voluntary initiatives arise. Distinctions between public and private, state and non-state, mandatory and voluntary 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. I investigate this interface by exploring the forms of public authorities' engagements with voluntary EMS standards in Canada and examining the "governmental" implications of this important experiment in "private" regulation. In the second part of this chapter, I describe the ways in which Canadian public authorities have engaged with voluntary EMS initiatives. In the third part, I explore the implications of these engagements for the (re)definition of the public-private divide in Canadian law and politics. I conclude with some suggestions about the possible role of law in facilitating or resisting these transformations.

Public Authorities' Engagements with Voluntary EMS Initiatives in Canada

A variety of public authorities in Canada have begun to engage with EMSs and voluntary EMS standards in a range of interesting ways. I use the term "public authorities" broadly to denote the entire 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 EMSs but which can be discerned in their engagements with other voluntary initiatives: benchmarking, challenging, and borrowing. Together these eight categories give an indication of the range

of Canadian public authorities' engagements with "private" governance in the field of environmental protection.¹⁵

Modes of Engagement

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," namely 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 that 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 separate. 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."¹⁶

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. Government 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.¹⁷ In this case, "steering" consists 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.¹⁸

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

"Talking the Talk": Official Policy Pronouncements First, some public authorities in Canada and elsewhere have formulated and pronounced official policies on the private sector use of voluntary EMS initiatives. Such pronouncements, which range from off-the-cuff remarks to detailed policy statements, can have important legitimation or delegitimation effects for

voluntary initiatives.¹⁹ Their content varies from enthusiastic (but often vague) endorsement, to active promotion, to the enunciation of conditions or goals for public authorities' involvement or support, to the enumeration of concerns, to active resistance (although this last initiative 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 inaction is changing as some federal and provincial authorities have begun earnest policy development efforts regarding EMS.²⁰

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 this does not involve the overt direction of standardization activities, it is an interesting but overlooked dimension of interaction between governments and voluntary standardization. Standards-setting bodies in most countries have complicated relationships with the state apparatus. The Standards Council of Canada, which is Canada's principal voluntary standardization organ, and its national ISO member body, is a “quasi-non-governmental organization.”²¹ It is a federal crown corporation, established by statute in 1970. It reports to parliament through Industry Canada and receives federal government funding.²² Its statutory mandate is to promote efficient and effective voluntary standardization in Canada by, *inter alia*, promoting public-private sector cooperation.²³ Thus, its constitutive instrument emphasizes the hybrid public-private character of standardization.²⁴

Participation in Standards Development Third, Canadian government officials have participated directly in the development of EMS standards in Canada and the ISO since the beginning of EMS standardization in the early 1990s, by sitting on national standards committees and by serving as Canadian delegates to ISO meetings.²⁵ Indeed, government officials participate in most voluntary standards development in Canada.²⁶ 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 of consumer, environmental, and labour representatives, academics, and so on).²⁷ Government officials often cite the balanced membership and consensual process of Canadian standards committees and the ISO itself as key reasons to endorse voluntary EMS standards,²⁸ but the impression of balanced consensus may be misleading. Industry and consultants

usually make up a large majority of the committees, and, thus, the Canadian Standards Association (CSA) often has difficulty maintaining the “balanced matrix” of its environmental standards committees,²⁹ and the ISO has been criticized repeatedly for its dominance by big industry from advanced industrial countries.

Strategic Policy Leadership Fourth, many governments see strategic leadership of national and international standardization activities as a priority for ensuring international competitiveness of their home industry. It was only in March 2000, however, that the Canadian federal government launched the Canadian Standards Strategy, which serves 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.”³⁰ 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.³¹

Regulation of Voluntary Initiatives Finally, public authorities may regulate the development, use, or content of voluntary environmental initiatives. Canadian public authorities have generally taken a “hands off” approach to the development and use of voluntary initiatives,³² including EMSs. Nonetheless, various forms of state regulation may affect the development and use of EMS initiatives directly or indirectly, including:

- 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 (for example, 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 (that is, where international standards exist on a subject, domestic standardization bodies should use them as the basis for their own standards);³³
- the presence or absence of clear ground rules for the development and use of voluntary initiatives, such as the requirements of public participation in the development or implementation of voluntary initiatives or

the public disclosure 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 enforcing existing environmental laws and demonstrating a will to step in with regulatory instruments should the voluntary initiatives fail to achieve public policy objectives.³⁴

Self-Discipline

The second major way that Canadian public authorities have engaged with voluntary EMS initiatives can best be described as self-discipline.³⁵ It is possible to distinguish two forms of self-discipline: (1) when public authorities "walk the walk" by implementing EMSs in their own operations, and (2) when public authorities ratify international agreements that turn voluntary standards into potential constraints on their authority.

"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 the 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 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 the foot dragging that was happening in several departments.³⁶ 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 twenty-five major federal departments and agencies that must file sustainable development strategies.³⁷

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 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 EMSs in the public sector, including:

- Reasons for implementing EMSs: Although Canadian public authorities list many reasons for implementing EMSs, one looms large – to set an example for the private sector.³⁸ 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.³⁹ Far from leading by example, many Canadian public authorities are simply scrambling to keep up with the private sector.⁴⁰

- Endorsement of ISO standards: Most Canadian public authorities' EMSs are modelled on ISO 14004 or (less often) ISO 14001. The federal government has expressly endorsed ISO 14004 as a guide for public sector EMSs.
- Verification and oversight: Verification of the implementation and performance of public sector EMSs in Canada is haphazard and incomplete. Most government organizations disclose basic information about their EMSs, and some report publicly on their EMS performance. The auditor general and the 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 expense involved.
- Variety of settings: Finally, 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.

Voluntary Standards as Self-Imposed Constraints on Public Authority Canada is a party to certain international trade agreements that may transform voluntary international standards developed by obscure, often industry-dominated standardization bodies, such as the ISO, into potential constraints on Canadian governments' freedom to set their own legal standards for health, safety, and the environment. Under the 1994 TBT Agreement, member states must base their domestic "technical regulations" (that is, environmental and other regulations governing products or their related processes or production methods) on existing voluntary standards developed by international standardization bodies such as the 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."⁴¹ 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.⁴²

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, such as when Nova Scotia and New Brunswick made ISO 14000-based EMSs mandatory in the gas pipeline industry,⁴³ those standards may limit governments' authority to design their own regulations.⁴⁴ Ironically, therefore, EMS standards, which are almost universally identified with regulatory flexibility, may ultimately impose a constraint on such flexibility.

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 EMSs. With respect to 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 that have been sponsored by various governments and public-private consortia in the United States and Europe.⁴⁵ 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.⁴⁶ With respect 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 business people 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 through passive means such as government websites. 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 since these are typically addressed in other contexts.⁴⁷

These activities are closely related to official policy development and pronouncement⁴⁸ – research is a crucial input in policy development and education is an important channel for generating support for preferred policies among relevant constituencies. Governments often sponsor or conduct research and education programs 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

outside of government budgets.⁴⁹ In any event, these engagements with voluntary initiatives are usually integrated more or less into the 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 the idea that voluntary initiatives can be the basis for a new relationship between regulators and industry – a relationship that emphasizes flexibility, efficiency, partnership, and market incentives rather than the perceived rigidity and inefficiency of conventional “command and control” regulation. In this light, public authorities in various countries, 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 (that is, the relaxation of existing regulatory requirements or forbearance from introducing new ones), (2) financial incentives, and (3) “green procurement” policies.

Regulatory Relief and Forbearance First, governments in several jurisdictions have begun to establish programs that relax existing regulatory requirements (such as permits, reports, inspections, or technology requirements) for firms that implement EMSs.⁵⁰ In 2001, Alberta became the first Canadian jurisdiction to launch an official program offering regulatory relief to firms that have EMSs in place.⁵¹ Alberta Environment's Leaders Environmental Approval Document (LEAD) program, which is currently in a pilot phase, requires participating facilities to implement a very rudimentary EMS,⁵² maintain a clean compliance record, demonstrate past environmental performance that exceeds legal requirements, commit to future environmental performance goals and measures that exceed legal requirements and that 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 pre-approval 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. Ontario is likely soon to follow with its own program, and other Canadian governments may be considering such programs as well.⁵³ In addition to these general regulatory exemption programs, some Canadian public authorities have experimented to a small degree with incorporating EMSs or EMS-related initiatives into government-industry negotiated agreements, but it is unclear to what extent such agreements have

involved the relaxation of existing regulations or a forbearance from introducing new rules.⁵⁴

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. However, this is not the case 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.⁵⁵ Upon conviction, courts may consider the 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.⁵⁶

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, Canadian public authorities, to date, have not made much use of these tools.⁵⁷

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 implementation a formal purchasing preference or requirement.⁵⁸ 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.⁵⁹

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 occasion that such commands have been issued in Canada, it has been with the affected firms' or industry's support, either because they found the alternatives even worse, they were already planning to implement or obtain certification of an EMS, or they stood to benefit directly from the arrangement.

First, in a handful of cases, Canadian judges have used creative sentencing powers⁶⁰ to order an environmental offender to implement an ISO 14001-based EMS or to obtain ISO 14001 certification.⁶¹ In every case, the defendant

has either proposed or agreed to the order, often because it was considering implementing or certifying an EMS anyway and could therefore 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.⁶² Second, 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.⁶³ Both provinces have enacted regulations requiring gas pipeline operators to implement ISO 14000-based EMSs.⁶⁴ These developments were 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.⁶⁵ 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 decision 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.⁶⁶

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 the CSA and the ISO, play in government regulation. Governments have a long tradition of incorporating voluntary technical standards (for example, for building materials, construction, plumbing, fire safety, engineering, food safety, medical devices, and so on) into mandatory regulations.⁶⁷

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.⁶⁸ Such a voluntary undertaking may be converted into a legally binding command when a party to the agreement seeks judicial enforcement of the agreement.⁶⁹ Some commentators believe that these private law enforcement tools hold the key to successful regulation of corporate behaviour through voluntary codes.⁷⁰

Other Engagements

Finally, three other modes of engagement can be discerned in Canadian public authorities' interactions with voluntary initiatives other than EMSs. These engagements may at some point be employed in relation to EMS initiatives.

Benchmarking Canadian courts often use widely accepted voluntary standards and other evidence of industry custom as benchmarks⁷¹ for determining

whether a defendant exercised "reasonable care" in a tort case⁷² or "due diligence" to avoid committing a regulatory offence.⁷³ Several commentators and government officials have suggested that implementation of an ISO EMS constitutes "due diligence."⁷⁴ Although no Canadian court has yet to use voluntary EMS standards as a benchmark for liability, the prospect is increasingly likely and deserves critical attention because:

- it is doubtful that an ISO 14001 EMS satisfies the requirements of reasonable care. 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 avoiding breach of legal duties of care;
- the use of EMS standards as benchmarks for liability may give voluntary industry-developed initiatives a power that 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;⁷⁵ and
- the prospect of such judicial benchmarking may place other state actors in a dilemma, as Kernaghan 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 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.⁷⁶

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 the 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, 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.

Implications for the Public-Private Divide

For the most part, 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 even 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."⁷⁷ It would be absurd to suggest that Canadian public authorities' engagements with voluntary environmental initiatives evidence a takeover of society and the market by the agents and machinery of the state. 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 free 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 (for example, accounting, engineering, standardization, and law); and they involve alliances and tensions not just between public and private authorities but also among a multiplicity of public authorities themselves (for example, 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, procedures, and programs by which a diversity of state and non-state authorities seek to shape human conduct to their 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," of the boundaries of politics, law, and market, and of 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.

Beyond the Public-Private Divide:

An Alternative Conception of Government

One of the questions posed by the organizers of this symposium was whether the metaphor of a public-private divide is still appropriate. The problem with using such language to analyze contemporary practices of ordering and directing social relations, as Nikolas Rose and Peter 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 characterize the diverse ways in which rule is exercised in advanced liberal democracies."⁷⁸

What is needed is an alternative way of thinking about government, which avoids the limitations of these dichotomies. There is nothing new in this suggestion, of course. These dichotomies have been questioned repeatedly by successive waves of criticism in legal studies, from legal realism, to feminist legal theory, to critical legal studies, to legal pluralism. Exploding, fragmenting, or contextualizing categories of state, 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 much so, that proclaiming the "death of the state" has become part of the ritual of renewal in discipline after discipline.⁷⁹ 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.⁸⁰

The fact that these conventional categories remain central to the theories and practices of government after all this critical attention is a puzzle in itself. We might gain analytical leverage over this puzzle if we focus on the *problematics of government* instead of over-valuing the problem of the *state*.⁸¹ The example of EMSs and EMS 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) labour 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."⁸² In 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, however, does not mean denying its continuing relevance. Rather, it calls for a broader conception of government, which 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 their desired ends.⁸³ Michel Foucault coined the term "governmentality" to describe the techniques and justifications by which government, in this sense, is effectuated.⁸⁴ 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 conceptualized, 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 familial sectors."⁸⁵ 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."⁸⁶

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. Liberal forms of government rely on "action at a distance," recognizing a reserved domain for individual, autonomous action and moulding the conception and exercise of this capacity for action without destroying its autonomy.⁸⁷ 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.”⁸⁸ 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.⁸⁹

A few socio-legal scholars have examined law from a governmentality perspective,⁹⁰ and, more recently, a small number of environmental studies scholars have begun to apply governmentality analysis to environmental politics.⁹¹ In the next two sections, I explore what it might mean to apply governmentality analysis to the interface between environmental law and voluntary corporate initiatives.

EMSs as Governmental Technologies

EMSs and EMS standardization can be viewed as technologies for governing human-environment interactions – collections of standard procedures, routines, techniques, and documents through which the aspiration to manage the environmental impacts of an organization’s activities, products, and services is rendered operable. It is through these sorts of detailed, repetitive, mundane mechanisms – such as assessing 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 market place. 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.⁹² The result, as we shall see, is the depoliticization of a set of important environmental, public health, and economic issues.

The development, standardization, and implementation of EMSs are driven and dominated by industry. Within the EMS standardization community and among most public authorities, this is generally acknowledged as being

appropriate – industry is the primary user of the standards and should play the major role in developing and implementing them.⁹³ EMS standards are primarily a form of corporate self-regulation, and, as such, it is no surprise that their development is dominated by business firms (especially multinational corporations) and associated professionals and that their content reflects the needs and interests of increasingly mobile capital in a global economy.⁹⁴ It is also no surprise that EMSs 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;⁹⁵
- 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 as 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,” which are to be used by the organization to the extent that it considers necessary or desirable to maintain its viability or competitiveness;⁹⁶
- 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,⁹⁷ but the incompleteness of the arbitrage between legal systems and the EMS is underlined by the fact that organizations, which have been convicted of environmental regulatory violations, have still been certified as conforming to ISO 14001; and
- verification of environmental claims and performance: EMSs treat the question of verification of an organization’s 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 based as confidential so that the only information disclosed publicly is whether the organization has conformed or not conformed with an EMS standard.

On the 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, by admitting that the development and use of EMS standards implicate important public interests, or by 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."⁹⁸

What is most interesting for our present purposes is that the choice to employ the techniques of management systems and standardization appears to predispose the resolution of this ambivalence about the political stakes of corporate environmental management. The techniques and procedures of standardization and EMSs 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, while simultaneously turning them 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 modelled on the management hierarchies and processes of large business organizations. They emphasize 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.⁹⁹

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 the 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.¹⁰⁰ 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."¹⁰¹ It is "usually considered a 'MEGO' ('my eyes glaze over') subject" in most corporate boardrooms.¹⁰²

EMSs and EMS standards are a significant form of governmental technology precisely *because* they make one's "eyes glaze over" – that is, they mute the struggles over the distribution of risks, harms, jobs, and profits, which are 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.¹⁰³ The tendency to "technicalize" is commonly associated with welfare state liberalism (for example, 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 the use of EMSs in any particular direction. Their engagements (for example, 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 authority to regulate corporate practices, but this point begs the question of how different state regulation is 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 the regulated in standard-setting is often criticized as being illusory, however, due to a 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" of government agencies by industry. Second, state regulatory systems usually have public consultation processes that do not depend on the regulated entity's discretion (for instance, 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?"¹⁰⁴ Most governments have established formal, public mechanisms to monitor the behaviour 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 that are supervised by standardization bodies themselves or even more obscure institutions.¹⁰⁵ Moreover, since 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 regulatory agencies, particularly given the recent tendency of many environmental agencies and their political masters to reinvent industry as clients to be served rather than as 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, and so on, 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, an organizational routine, and market preference, contributing to the expulsion of a set of environmental and economic issues from the political domain.¹⁰⁶ 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 mundane mechanisms of rule. Such an examination can enable one to expose the redrawings of the public-private divide and reclaim environmental management as an arena for political contestation.

EMSs and the Shifting Rationales of Governance

The organizers of this symposium asked participants to consider the extent to which the blurring of the public-private divide signals a shift in the rationales of governance.¹⁰⁷ The case of an EMS provides evidence of such a shift of political rationalities, not just in the area of corporate environmental management but also in governance generally. Political rationalities provide the discursive "software" through which governmental technologies operate and produce effects.¹⁰⁸ The political rationality of EMSs – that is, the discursive field within which the forms and goals of governance, the proper

boundaries of state and market, and the roles of public and private authorities are conceptualized and justified – reinforces the tendency of EMSs and standardization, described earlier, to depoliticize environmental management.

The political rationality of EMSs consists of a 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 rather 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.¹⁰⁹

First, the discourse of an 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 improve the environmental performance of organizations and their products.¹¹⁰ 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 being 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.¹¹¹ 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.¹¹² This cultural transformation is accompanied by an ethic of individual responsibility for environmental protection, from the chief executive officer to the lowliest employee. An EMS "gathers all your 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 on blind obedience to regulations or corporate directives and the punishment of errors.¹¹³

Third, one of the most striking attributes of the discourse of EMSs, which is 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 the 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 (for example, via energy conservation or waste recycling), and promoting innovation (for instance, product and process improvements).¹¹⁴ On the other hand, EMSs are portrayed as defensive tools to maintain and increase competitiveness, especially in the face of globalization and trade liberalization.¹¹⁵

Fourth, EMSs and EMS standards are portrayed as a basis for a constructive new relationship with regulators and the public, which is based on cooperation and partnership rather than on coercion and mistrust.¹¹⁶ The traditional “command and control” mode of regulation is acknowledged to have produced many successes, but it 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.¹¹⁷ 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.¹¹⁸ In turn, the citizen, who was 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.¹¹⁹ This claim is common in the discourses of corporate greening and is shared not just with most corporate environmental initiatives but also with almost all environmental policy initiatives in the last decade.

Finally, the discourse locates EMSs in a non-political arena. While acknowledging the political effects of EMSs and EMS standards (for example, their contribution to sustainable development, international trade, or state regulatory policy), the discourse of an 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.¹²⁰ The political rationality of an EMS thus redefines 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 NGOs,

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.¹²¹ Ecological modernization understands environmental harm to be a systematic product of the modern industrial “risk” society, but one that can be addressed through technocratic management. In this vision, the environmental crisis no longer represents a fundamental threat to industrial society, as it did in the 1970s, but rather as an opportunity for its further development. Environmental protection and industrial development are compatible “win-win” propositions. The pursuit of sustainable development, which is one of the key moral justifications of EMSs, is intimately linked with ecological modernization by virtue of its emphasis on the integration of environmental considerations into all business and governmental decision-making, the consideration of, and communication with, a broad range of stakeholders, and the susceptibility of environmental crisis to rational management. The political rationality of EMSs thus coincides very closely with the discourse of ecological modernization.

Another prominent discourse in contemporary environmental politics, which is closely related to, and perhaps subsumed in, ecological modernization, is the discourse of “smart” or “responsive” regulation.¹²² 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 scepticism 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 enlists non-state resources and mechanisms, such as self-regulation, EMSs, ecolabelling schemes, environmental reporting, and industry-community agreements, in furtherance of the notion of “governing

