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The Green Economy Paradox: A Critical Inquiry into Sustainability Indexes

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The Green Economy Paradox: A Critical Inquiry into Sustainability Indexes

Oren Perez*

ABSTRACT

The idea of green economy, which was placed on the global agenda by the Rio+20 conference, claims to serve as a bridge between the demands of global capitalism and the vision of sustainability. In the corporate social responsibility (CSR) literature, writers such as Michael Porter and Mark Kramer have made a similar claim, arguing that there is a positive correlation between corporate social performance and corporate financial performance. I argue that the claim underlying the green economy thesis, whereby the goals of (classical) economic growth and sustainable development can be achieved concurrently, is highly problematic. First, the claim disregards the extent to which the web of ideas and institutional structures that underpin the global capitalist system constrains the capacity of agents to commit themselves to sustainable policies. Second, it understates the difficult tradeoffs involved in implementing green growth policies. This critique ties in with the debate over the capacity of CSR instruments to promote sustainable development. I examine this general critique in the context the two leading global sustainability indexes: the FTSE4Good Index Series (FTSE4Good) and the Dow Jones Sustainability Indices (DJSI). Sustainability indexes epitomize the green economy thesis because they claim to positively affect the sustainability profile of firms despite the fact that (or precisely because) they are situated at the heart of modern capitalism: the stock exchange. I demonstrate how the paradox at the heart of the green economy thesis manifests in sustainable indexes. In particular, I high-

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light the tension between the indexes' dual role as financial products (tracking the firms' share values) and as CSR instruments. I also show that both indexes suffer from a deep democratic deficit, which is inconsistent with their public function. I conclude with policy recommendations that could bring the indexes closer to a more meaningful understanding of the concept of green economy.

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I. INTRODUCTION

The Rio+20 conference—which took place in Rio de Janeiro, Brazil, on June 20–22, 2012 to mark the 20th anniversary of the 1992 United Nations Conference on Environment and Development (UNCED)—sought to reinvigorate the debate on sustainable development by introducing a new theme, the idea of green economy, into the deliberative arena.¹ This theme played a pivotal role in the discussions that took place at the conference² and was strongly emphasized in the conference’s concluding document, *The Future We Want*.³ According to a key report published by the United Nations Environment Programme (UNEP) a year before the conference, a green economy is

[O]ne that results in “improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities.” In its simplest expression, a green economy is low-carbon, resource efficient, and socially inclusive. In a green economy, growth in income and employment should be driven by public and private investments that reduce carbon emissions and pollution, enhance energy and resource efficiency, and prevent the loss of biodiversity and ecosystem services.⁴

As this definition makes clear, the idea of green economy is closely related to the notion of green growth: the process of “making growth processes resource-efficient, cleaner and more resilient without necessarily slowing them.”⁵ The idea of green

1. *About*, U.N. CONF. ON SUSTAINABLE DEV., <http://www.uncsd2012.org/about.html> (last visited Oct. 9, 2015).

2. See *Green Economy in the Context of Sustainable Development and Poverty Eradication*, U.N. CONF. ON SUSTAINABLE DEV., <http://www.uncsd2012.org/greeneconomy.html> (last visited Oct. 9, 2015); see also WORLD DEV. MOVEMENT, RIO+20 SUMMIT: WHOSE GREEN ECONOMY? (2012), <http://www.globaljustice.org.uk/sites/default/files/files/resources/rio20-green-economy-briefing.pdf>; Oliver Greenfield, *Rio+20 Verdict? The Green Economy is Growing Up*, GREEN ECON. COALITION (June 2012), <http://www.greeneconomycoalition.org/updates/rio20-verdict-green-economy-growing>.

3. G.A. Res. 66/288, annex, *The Future We Want*, ¶¶ 56–74 (July 27, 2012) [hereinafter *The Future We Want*].

4. U.N. Env’t Programme [UNEP], *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication*, at 16 (2011) (citation omitted).

5. Stéphane Hallegatte et al., *From Growth to Green Growth: A Framework 2* (The World Bank, Sustainable Dev. Network, Office of the Chief Economist, Working Paper No. 5872, 2011). For a similar definition of green growth, see World Bank Group [WBG], *Inclusive Green Growth: The Pathway to Sustainable Development*, at 2, WBG Doc. 69125 (2012),

economy operates therefore as a possible bridge between the demands of global capitalism and the vision of sustainability. The understanding of green economy as a framework within which the goals of (classical) economic growth and sustainable development can be achieved *concurrently* is further emphasized in paragraph 56 of *The Future We Want*:

[W]e consider green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving sustainable development and that it could provide options for policymaking but should not be a rigid set of rules. We emphasize that it *should contribute to eradicating poverty as well as sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all, while maintaining the healthy functioning of the Earth's ecosystems.*⁶

Similar reference to the bridging role of the concept of green economy can be found in paragraph 58 of *The Future We Want*, which states that the functions of green economy policies include the promotion of “sustained and inclusive economic growth,” the facilitation of “sustainable consumption and production patterns,” and the enhancement of the welfare of marginalized citizens, taking into account the “three dimensions of sustainable development.”⁷

The attempt of the Rio+20 conference to forge a middle way between the visions of capitalism and sustainable development finds support in the corporate social responsibility (CSR) literature, which examines the potential synergies between sustainability and economic growth at the firm level.

<http://documents.worldbank.org/curated/en/2012/01/16283976/inclusive-green-growth-pathway-sustainable-development> (“[G]rowth that is efficient in its use of natural resources, clean in that it minimizes pollution and environmental impacts, and resilient in that it accounts for natural hazards and the role of environmental management and natural capital in preventing physical disasters. And this growth needs to be inclusive.”); see also Edward B. Barbier, *The Green Economy Post Rio+20*, 338 SCIENCE 887, 887 (2012) (explaining that the theme of the Rio+20 conference was how economies can accomplish green growth).

6. *The Future We Want*, *supra* note 3, ¶ 56 (emphasis added).

7. *Id.* ¶ 58 (“We affirm that green economy policies in the context of sustainable development and poverty eradication should: . . . [r]espect each country’s national sovereignty over their natural resources, taking into account its national circumstances . . . with regard to the three dimensions of sustainable development; . . . [p]romote sustained and inclusive economic growth; . . . [p]romote sustainable consumption and production patterns; . . . [e]nhance the welfare of indigenous peoples . . . of women, children, youth, persons with disabilities . . .”).

One important strand of research within this field examines the links between corporate social performance (CSP) and corporate financial performance (CFP).⁸ A recurring theme in this literature is the argument that there is a positive correlation between CSP and CFP.⁹ This argument provides a business justification for firms to invest in CSR programs,¹⁰ in the same way the green economy thesis claims that sustainability policies also generate broad economic benefits.¹¹

A particularly prominent figure in this literature is Harvard Business School professor Michael Porter, who has published a series of articles on the subject in the past twenty years.¹² A good example is the article entitled *Creating Shared Value*.¹³ Porter and his co-author, Mark Kramer, argued that the notion of shared value can be used to redefine the purpose of the corporation, moving away from the simplistic notion of profit maximization.¹⁴ According to the authors, the commonly invoked idea of externalities generates a self-perpetuating welfare-reducing cycle.¹⁵ The idea of externalities means, they argue, is that society, through its regulatory agencies, “must impose taxes, regulations, and penalties so that firms ‘internalize’ these externalities.”¹⁶ But this notion “has also shaped the strategies of firms themselves, which have largely excluded social and environmental considerations from their economic thinking. Firms have taken the broader context in which they do business as a given, and resisted regulatory standards [and

8. See Donna J. Wood, *Measuring Corporate Social Performance: A Review*, 12 INT'L J. MGMT. REVIEWS 50 (2010) (offering an overview of the literature discussing the correlation between CSP and CFP).

9. *Id.* at 59–62.

10. See *id.*; U.N. Env't Programme Fin. Initiative [UNEP FI], *Integrated Governance: A New Model of Governance for Sustainability*, at 13–14 (2014).

11. See, e.g., U.N. Env't Programme [UNEP], *supra* note 4, at 12 (explaining that “[a] shift to a green economy also means a shift in employment which, at a minimum, will create as many jobs as business as usual”).

12. See Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.–Feb. 2011, at 62 [hereinafter Porter & Kramer, *Creating Shared Value*]; Michael E. Porter & Mark R. Kramer, *The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78; Michael E. Porter & Claas van der Linde, *Green and Competitive: Ending the Stalemate*, HARV. BUS. REV., Sept.–Oct. 1995, at 120.

13. Porter & Kramer, *Creating Shared Value*, *supra* note 12.

14. *Id.* at 64.

15. *Id.* at 65.

16. *Id.*

implicitly the objectives underlying them] as . . . contrary to their interests.”¹⁷ Going beyond these standards has been regarded “as an irresponsible use of shareholders’ money.”¹⁸ Porter argues that “each side [state and firms] has assumed that the other is an obstacle to pursuing its goals and acted accordingly.”¹⁹

Porter and Kramer offered the concept of shared value as an alternative to this self-perpetuating, welfare-reducing cycle.²⁰ The idea of shared value reflects an alternative vision of the firm,²¹ which constitutes a middle path between the contradictory ideas of the firm as an amoral optimizer or as a completely benevolent agent. In contrast to the prevailing paradigm that emphasizes the conflict between the firm and society, the concept of shared value recognizes that markets are defined not only by conventional economic needs but by social ones, as well.²² “It also recognizes that social harms . . . frequently create *internal* costs for firms—such as wasted energy or raw materials, [and] costly accidents.”²³ Furthermore, “addressing societal harms and constraints does not necessarily raise costs for firms, because they can innovate through using new technologies, operating methods, and management approaches—and as a result, increase their productivity and expand their markets.”²⁴ Thus, shared value “is about expanding the total pool of economic and social value.”²⁵

The green economy and shared value theses touch upon two important debates in the CSR literature. The first debate concerns the nature of the firm—in particular whether the model of the firm as an amoral optimizer has a sound empirical and normative basis. A second debate concerns the question of the efficacy of the various global CSR codes that have emerged in the past few years. Against the green economy literature

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. See *id.* at 66 (explaining that “[t]he concept of shared value can be defined as policies and operating practices that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates”).

22. *Id.* at 65.

23. *Id.*

24. *Id.*

25. *Id.*

that argues that CSR promotes both sustainability and financial performance, there is an opposing strand that argues that the CSR movement and the various codes associated with it are nothing but a “greenwash” ploy: a façade of environmental regulation, whose only objective is to enable corporations to pursue their ecologically destructive practices.²⁶

The ideas of green economy and shared value are enticing. By offering a way to bring into harmony the competing ideas of capitalism and sustainability, they respond to a deep human propensity for achieving consistency in our inner cognitive and emotive processes.²⁷ But although these ideas have some foundation in theory, they both suffer from significant shortcomings and blind spots that undermine their capacity to facilitate pro-sustainability changes. The bridging thesis that underpins Rio+20 and Porter and Kramer’s writings underestimates the difficulties of adopting truly sustainable policies under the current global economic system, whether at the national or at the firm level. In particular, the win-win approach that underlies the green economy and shared value theses disregards the extent to which the web of ideas and institutional structures that underpin the global capitalist system constrains the capacity of agents—people, firms, and other market institutions (such as sustainability indexes)—to commit themselves to sustainable policies. Furthermore, the win-win thesis conceals the *difficult trade-offs* that must be addressed if the global society embarks on a genuinely sustainable growth path. What makes these

26. For this critique, see, for example, WAYNE VISSER, *THE AGE OF RESPONSIBILITY: CSR 2.0 AND THE NEW DNA OF BUSINESS* 90–92 (2011); Igor M. Alves, *Green Spin Everywhere: How Greenwashing Reveals the Limits of the CSR Paradigm*, J. GLOBAL CHANGE & GOVERNANCE, Winter/Spring 2009, at 2; Ralph Hamann & Paul Kapelus, *Corporate Social Responsibility in Mining in Southern Africa: Fair Accountability or Just Greenwash?*, 47 DEVELOPMENT 85 (2004); Birgitta Schwartz & Karina Tilling, *‘ISO-lating’ Corporate Social Responsibility in the Organizational Context: A Dissenting Interpretation of ISO 26000*, 16 CORP. SOC. RESP. & ENVTL. MGMT. 289, 296 (2009); Sandra Waddock, *Building a New Institutional Infrastructure for Corporate Responsibility*, 22 ACAD. MGMT. PERSP. 87, 105 (2008). See Thomas P. Lyon & John W. Maxwell, *Greenwash: Corporate Environmental Disclosure Under Threat of Audit*, 20 J. ECON. & MGMT. STRATEGY 1, 7–10 (2011), for a definition of “greenwash.”

27. See Dan Simon & Keith J. Holyoak, *Structural Dynamics of Cognition: From Consistency Theories to Constraint Satisfaction*, 6 PERSONALITY & SOC. PSYCHOL. REV. 283, 284–85 (2002); William B. Swann, Jr. et al., *Self-Verification: The Search for Coherence*, in HANDBOOK OF SELF AND IDENTITY 367, 369 (Mark R. Leary & June Price Tangney eds., 2002).

trade-offs difficult is both the extent of economic sacrifice that might be needed in order to achieve certain sustainability goals and the deep ideological divide that underlies them.

My main objective in this article is to expose the blind spots underlying the ideas of green economy and shared value as they are manifested in the CSR domain. I pursue this path through a close study of sustainability indexes. Sustainability indexes constitute a perfect test case for the green economy thesis because they claim to positively affect the sustainability profile of firms despite the fact that (or precisely because) they are situated at the heart of modern capitalism: the stock exchange. Focusing on sustainability indexes allows me to consider some of the key puzzles underlying the green economy thesis. I argue and demonstrate through an in-depth analysis of the two leading players in the global market of sustainability indexes—the FTSE4Good Index Series (FTSE4Good)²⁸ and the Dow Jones Sustainability Indices (DJSI)²⁹—that the capacity of these schemes to facilitate pro-sustainability changes is limited by deeply entrenched structural barriers, which reflect the impact of modern capitalism. I consider this argument by looking into the capacity of these indexes to positively influence the sustainability profile of firms and by considering their commitment to democratic values.³⁰

In Part II, I begin by outlining the global terrain of private CSR codes, to which sustainability indexes belong. In Part III, I proceed to discuss the efficacy of the CSR movement, and revisit in this context the green economy thesis at the firm level,

28. *FTSE4Good Index Series*, FTSE, <http://www.ftse.com/products/indices/FTSE4Good> (last visited Oct. 18, 2015).

29. *DJSI Family Overview*, ROBECOSAM, <http://www.sustainability-indices.com/index-family-overview/djsi-family-overview/index.jsp> (last visited Oct. 18, 2015).

30. Whereas the efficacy puzzle questions the capacity of sustainability indexes to contribute to sustainable development, the democracy puzzle reflects a different concern: if we take the view that the FTSE4Good and DJSI are not just cheap talk, we implicitly recognize them as a new form of global authority that needs to be legitimized. For a similar argument, see Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, 1 REG. & GOVERNANCE 347, 354 (2007); Sander Chan & Philipp Pattberg, *Private Rule-Making and the Politics of Accountability: Analyzing Global Forest Governance*, 8 GLOBAL ENVTL. POL. 103, 103–04 (2008); Allison Loconto & Eve Foulleux, *Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance*, 8 REG. & GOVERNANCE 166, 167 (2014).

examining the potential contribution of the CSR movement to sustainability. I examine both arguments that support the green economy thesis and some of the systemic barriers that can undermine it. After these general reflections, Part IV turns to the field of sustainability indexes, which, as I argued above, provide a perfect case study for examining the limits of the green economy thesis. I examine first the steering mechanisms employed by FTSE4Good and DJSI, and consider in particular whether these mechanisms allow the indexes to change the sustainability performance of the firms that are part of their index universe. Second, I examine the governance structure of these indexes and consider whether it satisfies the core demands of democratic theory. Drawing on my experience as a member of the public advisory board of the Tel-Aviv Maala Socially Responsible Investment Index,³¹ I also examine the differences between the governance structure of the Tel-Aviv Maala Socially Responsible Investment Index and those of the FTSE4Good and DJSI indexes.

The foregoing analysis exposes several critical flaws in the structure of the FTSE4Good and DJSI, which significantly limit their capacity to trigger pro-sustainability changes in firms' behavior. First, sustainability indexes have to cope with a deep internal paradox. Although the indexes present themselves as being driven by a logic of sustainability, and are constructed through an evaluation process based on sustainability criteria, after their composition has been determined (through that very logic) they are marketed as financial instruments that track changes in the share values of listed firms (without providing a similar tracking of firms' sustainability performance).³² The intermixing of ordinal sustainability ranking and continuous, quantitative measurement of financial performance can undermine the capacity of these indexes to facilitate pro-sustainability changes, both by signalling that financial performance is more valuable than sustainability performance and

31. *CSR Index 2015*, MAALA, <http://www.maala.org.il/> (last visited Oct. 12, 2015).

32. See *DJSI Family Overview*, *supra* note 29; *FTSE4Good Index Series*, *supra* note 28. But see *FTSE ESG Ratings*, FTSE, <http://www.ftse.com/products/indices/F4G-ESG-Ratings> (last visited Nov. 18, 2105) (providing access to the company specific FTSE ESG ratings for investment managers or consultants that wish to license the ratings for use in constructing their own actively managed funds, risk analysis, or research).

by facilitating greenwash behaviour.³³ To rectify this flaw, sustainability indexes must develop, I argue, new metrics that can capture, in a quantitative fashion, the sustainability performance of the listed firms and of the index as a whole, and present them concurrently with the financial data. I suggest some ways in which this idea can be achieved.

A second critical flaw of sustainability indexes has to do with their democratic profile. The institutional structure of FTSE4Good and DJSI does not provide sufficient participatory opportunities for civic society voices.³⁴ This democratic deficit could give corporations undue influence over the way in which the indexes function. The semi-regulatory powers of sustainability indexes require that they grant civic players greater opportunities to take part in their decision-making processes. This change would also require the indexes to significantly improve their transparency. Currently, most of the information that is collected by the indexes in the firms' evaluation process, as well as some of the details of their governance structure, is not disclosed to the public.³⁵ I discuss these proposed reforms in greater detail in Part V.

Taken together, the two reforms suggested above could strengthen the capacity of the FTSE4Good and DJSI to facilitate pro-sustainability actions in listed firms. By changing the asymmetric reporting structure of financial and sustainability data, sustainability indexes would signal that these two data sets and the values associated with them enjoy equal normative standing, which I think is what the notion of green econo-

33. The indexes asymmetric reporting structure does not allow external observers to accurately analyse the sustainability performance of listed firms (and consequently the aggregate sustainability performance of the indexes), while still allowing listed firms, and the index as a whole, to present themselves as sustainable because they meet a certain minimal threshold of "sustainability." I further elaborate this argument in Section IV.B. below.

34. See, e.g., FTSE RUSSELL, GROUND RULES: FTSE4GOOD INDEX SERIES §§ 2.1–2.2 (version 2.3, Oct. 2015) [hereinafter FTSE4GOOD GROUND RULES], [https://web.archive.org/web/20160108211822/http://www.ftse.com/products/downloads/FTSE4Good_Index_Series.pdf] (stating that a committee consisting of "independent investment professionals experienced in environmental, social and governance factors" and "is responsible for advising on the content and management of the FTSE4Good Index Inclusion Rules").

35. See, e.g., *Academic Request*, ROBECOSAM, <http://www.sustainability-indices.com/academic-request.jsp> (last visited Oct. 24, 2015) ("Due to our confidentiality policy, we do not share any scores or sustainability data with third parties.").

my is intended to convey. This interpretation of green economy is consistent with a value-pluralistic understanding of sustainability.³⁶ Furthermore, the development of such symmetrical disclosure structure would also be critical for understanding the difficult trade-offs that must be addressed if the global society opts for a more sustainable path of development. The need to address these trade-offs is critical more generally to the success of the green economy project.

II. THE LEGAL UNIVERSE OF CSR CODES

To understand the role played by sustainability indexes in the transnational network of CSR codes, we must consider more closely the historical process that has led to the current transnational system of CSR codes. Over the past few years, global environmental regulation has become a hybrid system that includes both conventional treaty instruments—for example, the *United Nations Framework Convention on Climate Change*³⁷ and the *Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships*³⁸—and private instruments. The latter include voluntary corporate codes,³⁹ environmental management systems,⁴⁰ “green label”

36. For a discussion of value-pluralism see *infra* notes 246–53 and accompanying text.

37. *Background on the UNFCCC*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/items/6031.php (last visited Oct. 19, 2015).

38. Int’l Maritime Org. [IMO], *Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships*, IMO Doc. SR/CONF/45 (May 15, 2009), <http://www.imo.org/en/About/conventions/listofconventions/pages/the-hong-kong-international-convention-for-the-safe-and-environmentally-sound-recycling-of-ships.aspx>.

39. E.g., Org. for Econ. Co-operation and Dev. [OECD], *OECD Guidelines for Multinational Enterprises* (May 25, 2011).

40. For a discussion of two such environmental management systems, see Kelly Kollman & Aseem Prakash, *EMS-based Environmental Regimes as Club Goods: Examining Variations in Firm-level Adoption of ISO 14001 and EMAS in U.K., U.S., and Germany*, 35 POL’Y SCI. 43, 43–45, 54 (2002) (discussing the adoption of ISO 14001 and the European Union’s Environmental Management and Audit System (EMAS)). A third example is the Responsible Care program developed by the American Chemistry Council. *Responsible Care*, AM. CHEMISTRY COUNCIL, <http://responsiblecare.americanchemistry.com> (last visited Nov. 2, 2015).

schemes,⁴¹ environmental reporting standards,⁴² green financial schemes,⁴³ and green indexes.⁴⁴

The penetration of private instruments into the global regulatory system has occurred mostly since the mid-1990's. From the 1980's to the mid-1990's, the field of voluntary environmental governance was highly fragmented, mostly consisting of segregated contractual arrangements and isolated organizational routines. But since the mid-1990's, the field has expanded and the nature of the field has changed, with new centers of global governance injecting a great deal of order into the field. This change has affected all the facets of the governance game, from how norms are produced and adopted to how regimes are implemented and enforced. One of the unique features of the emerging field of private governance is the presence of reinforcing accountability loops from the multiple links and cross-sensitivities between distinct regimes, that form what I call an *ensemble regulatory structure*.⁴⁵

It is beyond the scope of this paper to provide a detailed historical account of this transformative process, from fragmented self-regulation to centralized global governance. I focus therefore on two examples: sustainability reporting and ethical investment. Consider first the field of sustainability reporting.

41. The Forest Stewardship Council Certification scheme and the U.S. Energy Star program are two "green label" programs. For a review of green labeling schemes, see Abhijit Banerjee & Barry D. Solomon, *Eco-labeling for Energy Efficiency and Sustainability: A Meta-analysis of US Programs*, 31 ENERGY POL'Y 109 (2003).

42. *E.g.*, GLOBAL REPORTING INITIATIVE, G4 SUSTAINABILITY REPORTING GUIDELINES (2013) [hereinafter G4 GUIDELINES], <https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf>; ACCOUNTABILITY, AA1000 ASSURANCE STANDARD (2008), <http://www.accountability.org/standards/aa1000as/index.html>.

43. Green financial schemes include instruments and codes regulating lending practices and standards for "ethical" investment. For a discussion of such schemes, see Oren Perez, *The New Universe of Green Finance: From Self-Regulation to Multi-Polar Governance*, in RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 151 (Olaf Dilling et al. eds., 2008) [hereinafter Perez, *Green Finance*].

44. Green indexes include the DJSI and FTSE4Good series. *DJSI Family Overview*, *supra* note 29; *FTSE4Good Index Series*, *supra* note 28.

45. For a more in-depth exposition of how ensemble regulation occurs among globalized, intertwined governance regimes, see Oren Perez, *Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics*, 12 THEORETICAL INQUIRIES L. 543, 548–58 (2011) [hereinafter Perez, *Ensemble Regulation*].

Firms, especially multinational enterprises (MNEs), have been publishing different types of non-financial information since the 1980's, but their social/environmental reporting has varied greatly in content and form.⁴⁶ Although there were processes of convergence and reciprocal learning between firms,⁴⁷ there was no central coordination.

Over the past fifteen years, the disordered sustainability reporting landscape of the 1990's was transformed into a much more ordered process owing to the emergence of global private codes that have established clear rules and principles for sustainability reporting and external assurance. The most important code has proven to be the set of reporting standards produced by the Global Reporting Initiative (GRI). The GRI first published its set of guidelines for sustainability reporting in 2002; the most recent version, G4, was published in 2013.⁴⁸ The objective of the GRI Guidelines is to help organizations to "set goals, measure performance, and manage change in order to make their operations more sustainable."⁴⁹ "The GRI Guidelines offer Reporting Principles, Standard Disclosures and an Implementation Manual for the preparation of sustainability reports by organizations, regardless of their size, sector or location."⁵⁰ The 2013 Guidelines require organizations to provide

46. See U.N. CONF. ON TRADE & DEV., DISCLOSURE OF THE IMPACT OF CORPORATIONS ON SOCIETY: CURRENT TRENDS AND ISSUES, at 26–32, U.N. Doc. UNCTAD/ITE/TEB/2003/7, U.N. Sales No. E.04.II.D.18 (Aug. 26, 2004) (listing examples of reporting formats); Josephine Maltby, *Setting Its Own Standards and Meeting Those Standards: Voluntarism Versus Regulation in Environmental Reporting*, 6 BUS. STRATEGY & ENV'T 83, 84 (1997) ("Speakers attempted to identify . . . to whom environmental reports should be addressed, the purpose of reporting, the information needed by users and the mechanisms . . . to ensure . . . reporting was carried out. No clear consensus emerged about any of these issues."); Waddock, *supra* note 26, at 93 ("Because . . . there were no guidelines . . . companies mainly reported what they wanted to, in formats they desired, typically focusing only on positive activities.").

47. See Carol Ann Tilt, *The Content and Disclosure of Australian Corporate Environmental Policies*, 14 ACCT., AUDITING & ACCOUNTABILITY J. 190, 205–07 (2001) (noting how firms learn from each other's practices, but ultimately concluding that there is a lack of an integrated approach to disclosures).

48. G4 GUIDELINES, *supra* note 42. In the following discussion, I will refer to the 2013 G4 Guidelines only.

49. *Id.* at 3.

50. GLOBAL REPORTING INITIATIVE & INT'L ORG. FOR STANDARDIZATION, GRI G4 GUIDELINES AND ISO 26000:2010 HOW TO USE THE GRI G4 GUIDELINES AND ISO 26000 IN CONJUNCTION 2 (2014), http://www.iso.org/iso/iso-gri-26000_2014-01-28.pdf.

information on the economic, environmental, and social aspects of their activities.⁵¹ This choice is based on the idea that “[t]he underlying question of sustainability reporting is how an organization contributes, or aims to contribute in the future, to the improvement or deterioration of economic, environmental and social conditions, developments and trends at the local, regional or global level.”⁵² The GRI Guidelines dominate the global arena of sustainability reporting, having a particularly strong influence on the disclosure practices of MNEs.⁵³

This process of global convergence in reporting has been supported by two intertwined processes. First was the incorporation of disclosure requirements in other CSR instruments. For example, ISO 14001, the European Union’s Eco-Audit and Management Scheme (EMAS), and Responsible Care, which all contain extensive disclosure requirements.⁵⁴ These requirements also form part of the ranking criteria used by the FTSE4Good and DJSI.⁵⁵ Similarly, the 2013 Equator Principles

51. G4 GUIDELINES, *supra* note 42, at 21–23.

52. GLOBAL REPORTING INITIATIVE, GRI G4 SUSTAINABILITY REPORTING GUIDELINES: IMPLEMENTATION MANUAL 10 (2013), <https://www.globalreporting.org/resourcelibrary/GRIG4-Part2-Implementation-Manual.pdf>.

53. Seventy eight percent of reporting companies worldwide refer to the GRI reporting guidelines in their CR reports, a rise of 9 percentage points since the 2011 survey (over 90 percent do so in South Korea, South Africa, Portugal, Chile, Brazil and Sweden). Among the world’s 250 largest companies the rate is even higher . . . 82 percent of G250 companies that report on CR refer to the GRI guidelines as opposed to 78 percent in 2011.

KPMG, THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2013, at 11 (2014). For a comprehensive list of firms using the GRI guidelines, see *Sustainability Disclosure Database*, GRI, <http://database.globalreporting.org/search> (last visited Nov. 2, 2015). Although there are other initiatives, such as the International Integrated Reporting Framework and the Carbon Disclosure Project, they do not threaten the hegemony of the GRI and should be regarded as complementary. See, e.g., INT’L INTEGRATED REPORTING COUNCIL, THE INTERNATIONAL <IR> FRAMEWORK: INTEGRATED REPORTING (2013), <http://www.theiirc.org/international-ir-framework/>; *Catalyzing Business and Government Action*, CDP, <https://www.cdp.net/en-US/Pages/About-Us.aspx> (last visited Oct. 14, 2015).

54. See generally Kollman & Prakash, *supra* note 40 (examining variations in adoption of environmental management systems); Lyon & Maxwell, *supra* note 26, at 28 (“[M]any U.S. firms elect not to adopt ISO 14001 . . . because they wish to limit public access to internal information about their environmental performance.”).

55. FTSE criteria includes a commitment for public reporting to describe the main impacts of the firm, including quantitative data and performance

require each subscribing institution to publish an annual report elaborating on the way it has implemented the Principles.⁵⁶

A second line of support was provided by new public regulation. National securities regulators have recognized that the disclosure requirements placed on publicly-traded companies by securities laws require more extensive disclosure of environmental data for a proper assessment of a firm's material business risks and economic situation.⁵⁷

Another important change has been the emergence of mandatory pollution emissions disclosure programs, such as

against targets. See FTSE, FTSE ESG RATINGS: INTEGRATING ESG INTO INVESTMENTS AND STEWARDSHIP 2 (2014), <http://www.ftse.com/products/downloads/FTSE-ESG-Methodology-and-Usage-Summary-Short.pdf> ("A diverse range of indicators are employed . . . [including] indicators assessing quality of management . . . , corporate data disclosure . . . , [and] quantitative data [used] to make performance judgments."). DJSI Assessment Criteria also include a requirement of environmental and social reporting. See ROBECOSAM, CSA GUIDE - ROBECOSAM'S CORPORATE SUSTAINABILITY ASSESSMENT METHODOLOGY 18–20 (version 2.0, Apr. 2015) [hereinafter ROBECOSAM, CSA METHODOLOGY], <http://www.sustainability-indices.com/images/corporate-sustainability-assessment-methodology-guidebook.pdf> ("An integral component of the Corporate Sustainability Assessment is . . . to identify companies' involvement and response to environmental, economic and social crisis situations.").

56. EQUATOR PRINCIPLES, THE EQUATOR PRINCIPLES III 10–11 (2013), http://www.equator-principles.com/resources/equator_principles_III.pdf ("The EPFI will report publicly, at least annually . . . on its Equator Principles implementation process and experience.").

57. *E.g.*, U.S. ENVTL. PROT. AGENCY, EPA 300-N-01-008, U.S. EPA NOTIFYING DEFENDANTS OF SECURITIES AND EXCHANGE COMMISSION'S ENVIRONMENTAL DISCLOSURE REQUIREMENTS (2001); see also E. Lynn Grayson et al., *SEC Disclosure Obligations: Increasing Scrutiny on Environmental Liabilities and Climate Change Impacts*, in ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS 447, 453–64 (Lawrence P. Schnapf ed. 2011) (providing a historical overview of SEC enforcement over insufficient disclosure of existing environmental liabilities and prospective business risks due to environmental risks, and discussing new developments in environmental disclosures including the SECs 2010 guidance on disclosing climate change related risks). For a general overview of sustainability disclosure requirements in different stock exchanges, see SUSTAINABLE STOCK EXCHANGES INITIATIVE, SUSTAINABLE STOCK EXCHANGES REPORT ON PROGRESS 2014 (2014), <http://www.sseinitiative.org/wp-content/uploads/2012/03/SSE-2014-ROP.pdf>; see also Oren Perez, *Facing the Global Hydra: Ecological Transformation at the Global Financial Frontier: The Ambitious Case of the Global Reporting Initiative*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 459, 465–72 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

the U.S. Toxics Release Inventory (TRI) program,⁵⁸ the European Pollution Emissions Register (EPER),⁵⁹ and the Canadian National Pollutant Release Inventory (NPRI)⁶⁰—which have extended the disclosure obligations of firm.⁶¹ But the GRI scheme goes beyond the requirements set by these state-sponsored disclosure programs: by extending the disclosure requirements to ethical and labor issues; by expanding the scope and scale of environmental data disclosures; and by basing the disclosure requirements on principles that are not economically defined notions of materiality.⁶²

The GRI Guidelines offer reporting firms the option of having the report reviewed by a third party.⁶³ The growth in the number of firms that publish sustainability reports has also generated a demand for independent external assurance.⁶⁴ Two prominent global codes in the emerging field of external assurance are the 2013 Revised International Standard on Assurance Engagements, ISAE 3000—promulgated by the International Auditing and Assurance Standards Board⁶⁵—and the

58. *Toxics Release Inventory (TRI) Program*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/tri> (last visited Oct. 14, 2015).

59. *Home*, EUR. POLLUTANT RELEASE & TRANSFER REG., <http://prtr.ec.europa.eu> (last visited Oct. 14, 2015).

60. *National Pollutant Release Inventory*, ENV'T CAN., <http://www.ec.gc.ca/inrp-npri> (last visited Oct. 14, 2015).

61. Several European countries have taken a more radical approach to environmental disclosures, and now require large or state-owned companies to publish sustainability reports. *See, e.g., Danish Legal Framework*, CORP. SUSTAINABILITY REPORTING, http://www.reportingcsr.org/_denmark-p-46.html (last visited Oct. 14, 2015); *Swedish Legal Framework*, CORP. SUSTAINABILITY REPORTING, http://www.reportingcsr.org/_sweden-p-50.html (last visited Oct. 14, 2015).

62. G4 GUIDELINES, *supra* note 42, at 9, 16–18, 20–23.

63. *Id.* at 36 (describing assurance standards); *see also* GLOBAL REPORTING INITIATIVE, *supra* note 52, at 51.

64. *See generally* Roger Simnett et al., *Assurance on Sustainability Reports: An International Comparison*, 84 ACCT. REV. 937, 937 (2009) (“[C]ompanies seeking to enhance the credibility of their reports and build their corporate reputation are more likely to have their sustainability reports assured, although it does not matter whether the assurance provider comes from the auditing profession. We also find that companies operating in stakeholder-orientated countries are more likely to choose the auditing profession as an assurer.”).

65. INT’L AUDITING & ASSURANCE STANDARDS BD., ISAE 3000 (REVISED), ASSURANCE ENGAGEMENTS OTHER THAN AUDITS OR REVIEWS OF HISTORICAL FINANCIAL INFORMATION (2013), <http://www.ifac.org/publications-resources/international-standard-assurance-engagements-isae-3000-revised-assurance-eng>.

2008 AccountAbility, AA1000 Assurance Standard.⁶⁶ The GRI Guidelines also include various references to other external assurance standards.⁶⁷

Another example of private ordering “going global” is the field of socially responsible investment (SRI) or ethical investment. SRI is “an investment discipline that considers environmental, social and corporate governance (ESG) criteria to generate long-term competitive financial returns and positive societal impact.”⁶⁸ From a legal perspective, SRI is a form of private rule-making, whereby a private investor contracts with financial institutions to invest within certain rules that are designed and offered by the financial institution. Thus, SRI is both a process of *self-regulation* and *standard contracting*. SRI processes have evolved along a highly fragmented path,⁶⁹ with each financial institution developing its own set of investment criteria based on different types of information, at times relying on external consultants. This disordered picture has improved as new centers of governance have evolved, such as United Nations Environment Programme Finance Initiative (UNEP FI) Principles for Responsible Investment, the Equator Principles, and sustainability indexes (which are the focus of this paper).⁷⁰

66. See ACCOUNTABILITY, *supra* note 42.

67. G4 GUIDELINES, *supra* note 42, at 87–89.

68. SRI Basics, USSIF, <http://www.ussif.org/sribasics> (last visited Oct. 14, 2015).

69. Commission of the European Communities Green Paper on Promoting a European Framework for Corporate Social Responsibility, ¶¶ 84–88, COM (2001) 366 final (July 18, 2001) (“SRI is an emerging market with many specialised screening agencies . . . using a number of different tools and metrics [C]ompanies seem overloaded with excessive and divergent information requests. Thus a further expansion of SRI may . . . need for more convergence between indicators developed by companies and the criteria used by analysts to assess a company’s social and environmental performance. Furthermore, the lack of transparency in evaluation methods . . . may also restrain . . . significant socially responsible investments. There is, therefore, a need for further standardisation, harmonisation and transparency in screening tools and metrics used by screening agencies.”).

70. See generally Perez, *Green Finance*, *supra* note 43 (describing “the various instruments that constitute the new field of ‘green finance,’ distinguishing between three fields of financial regulation: project finance, ethical-green investment, and environmental reporting,” and discussing the causal question over how efficient green finance has been in changing social practices); EQUATOR PRINCIPLES, *supra* note 56; *The Six Principles*, PRINCIPLES RESPONSIBLE INV., <http://www.unpri.org/about-pri/the-six-principles/> (last visited Nov. 13, 2015).

These new schemes provide a general regulatory framework to the ethical investment market. For example, according to the UNEP FI Principles for Responsible Investment, the signatories (institutional investors) commit to: incorporating ESG issues into investment analysis and decision-making processes; seeking appropriate disclosure on ESG issues by the entities in which they invest; and, reporting on their activities and progress toward implementing the Principles.⁷¹ Similarly, the Equator Principles provide a risk management framework for financial institutions, for determining, assessing, and managing environmental and social risks in financed projects.⁷² They are primarily intended to provide a minimum standard for due diligence to support responsible risk assessment processes in financial decision-making.⁷³ Sustainable indexes constitute another important element in this governance network by creating a detailed evaluative framework, which can be used to implement the vision of SRI.⁷⁴

III. REVISITING THE GREEN ECONOMY THESIS AT THE FIRM LEVEL: HOW FAR CAN THE CSR MOVEMENT TAKE US?

A. CSR CODES AND BEYOND COMPLIANCE ACTION: TWO PERSPECTIVES

The green economy and shared value concepts are based on the thesis that capitalism and sustainable development are not entirely at odds with each other. This means that there are possible development paths, what the literature describes as “green growth,” which would allow states and firms to grow and make profits within the constraints of sustainability.⁷⁵ In this section, I consider this thesis at the firm level, looking at two related dilemmas: whether (and under what circumstances) firms would be expected to take beyond-compliance, pro-

71. *The Six Principles*, *supra* note 70 (principles one, three, and six).

72. EQUATOR PRINCIPLES, *supra* note 56, at 5 (“[T]he EPFI will . . . categorise it based on the magnitude of its potential environmental and social risks and impacts.”).

73. *Id.* at 16–17.

74. See Perez, *Green Finance*, *supra* note 43, at 160–61.

75. This view is consistent with the common definition of green growth as “making growth processes resource-efficient, cleaner and more resilient without necessarily slowing them.” Hallegatte et al., *supra* note 5, at 2.

sustainability actions, and whether CSR codes can influence firms, as the codes commonly claim they can, to take such actions.

The green economy and shared value theses challenge the skeptical voice that portrays the firm as an amoral economic optimizing machine and the CSR movement as an exercise in greenwash. This challenge has strong foundations in modern theories of the firm, which draw both on insights from behavioral economics—demonstrating, for example, the prevalence of financially-irrational altruistic behavior⁷⁶—and on complex institutionalist models—such as the firm as a polyphonic organization.⁷⁷ It also reflects a more complex understanding of the structure and dynamics of the global network of CSR codes (the ensemble regulation thesis).⁷⁸ But, as I elaborate below, the

76. See, e.g., Hessel Oosterbeek et al., *Cultural Differences in Ultimatum Game Experiments: Evidence from a Meta-Analysis*, 7 EXPERIMENTAL ECON. 171 (2004) (documenting the prevalence of altruistic strategies in a classic behavioral economics game; an outcome that runs counter to the prediction of traditional economics that presumes financially-selfish behavior); see also, Joseph Henrich et al., “Economic Man” in *Cross-Cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies*, 28 BEHAV. & BRAIN SCI. 795, 816–18, 839 (2005) (discussing observations of financially-irrational altruistic behavior).

77. See, e.g., François Cooren et al., *Communication, Organizing and Organization: An Overview and Introduction to the Special Issue*, 32 ORG. STUD. 1149 (2011) (discussing scholarship developing the COO—Communicative Constitution of Organization—approach that views organizations as “constituted in and through human communications,” views communication as “the means by which organizations are established, composed, designed, and sustained,” and rejects the existing conception of organizations as “objects, entities, or ‘social facts’ inside of which communication occurs”); Oren Perez et al., *The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior*, 43 L. & SOC’Y REV. 593, 594–97 (2009) [hereinafter Perez et al., *Corporate Self-Regulation*] (arguing that the polyphonic model provides “a coherent framework for thinking about the way in which different logics intertwine in the context of the modern corporation”); Dennis Schoeneborn, *Organization as Communication: A Luhmannian Perspective*, 25 MGMT. COMM. Q. 663 (2011) (highlighting aspects of Niklas Luhmann’s theory of social systems that explain organizations as constituted by communication, how that defines the organization as fundamentally and paradoxically contingent and ephemeral, but also allows for almost continual potential for transformation).

78. See Perez, *Ensemble Regulation*, *supra* note 45, at 543–44 (“[T]his new ensemble network has brought about a new transnational political sphere which is associated with an extensive, cross-institutional quest for legitimacy.”).

green economy literature overestimates the strength of the “win-win” argument.

What are the motivations that may bring a firm to abandon its business-as-usual strategy and adopt a more sustainable business model? There are competing views on this question in the literature. The claim that the corporate order is dominated by a logic of consequences, what I will refer to as the “economic optimizer” model,⁷⁹ adopts a highly instrumental approach to this question. Such an approach would argue firms take beyond-compliance actions (e.g., implementing CSR commitments) either if these actions correct sub-optimality in their operational processes (e.g., generating more efficient use of energy) or produce reputational gains that outweigh the associated costs.⁸⁰ Economists distinguish in this context between *strategic* CSR, which is economically justified, and *altruistic* CSR, which requires firms to forego profits.⁸¹ From the perspective of agency cost theory, altruistic CSR is viewed as a case of corporate governance failure, the result of the ability of under-monitored managers to use corporate resources towards their own ideological agenda.⁸²

79. See James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943, 949–51, 954 (1998); James G. March & Johan P. Olsen, *The Logic of Appropriateness*, in THE OXFORD HANDBOOK OF PUBLIC POLICY 689 (Robert E. Goodin et al. eds., 2008).

80. See, e.g., Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 L. & SOC. INQUIRY 307 (2004) (investigating why paper pulp factories emit pollution lower than legal limits and take other actions that go beyond mere compliance with regulatory requirements).

81. Thomas P. Lyon & John W. Maxwell, *Corporate Social Responsibility and the Environment: A Theoretical Perspective*, 2 REV. ENVTL. ECON. POL'Y 240, 241 (2008) (distinguishing between “CSR (which is driven by altruistic motives and is unprofitable) from ‘strategic CSR’ (which is profitable)”). But cf. Forest L. Reinhardt, et al., *Corporate Social Responsibility Through an Economic Lens*, 2 REV. ENVTL. ECON. POL'Y 219, 232 (2008) (“The bulk of the available evidence suggests that most firms view socially responsible actions in the same way that they view more traditional business activities, such as advertising and R&D. Instead of altruistically sacrificing profits, they engage in a more limited—but more profitable—set of socially beneficial activities that contributes to their financial goals.”).

82. As discussed previously in Perez, *Ensemble Regulation*, *supra* note 45, at 563 n.80, from this perspective, altruistic CSR is no different from the “greed capitalism” that characterized the 2009 financial crisis. The solutions are also similar: the adoption of organizational or incentive-based mechanisms ensuring that the incentives of managers and shareholders are aligned. See Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J.

This instrumental view also leads to some skepticism about the capacity of soft-law instruments to bring about significant pro-sustainability changes.⁸³ This skepticism arises because first, it is assumed that a firm would not bear the costs of joining a CSR scheme, in direct expenses or diverted personnel time, unless these costs can be economically justified by resulting gains (e.g., by operational efficiency or reputational gains). This creates an economic cap on the potential impact of CSR programs. Second, skeptics would note that joining a CSR program does not necessarily guarantee that a firm will comply with the provisions in substance or spirit. The instrumental view would assume that if a firm can benefit from the reputation gain associated with a CSR program without improving its environmental performance or genuinely changing its behavior, it would presumably choose this option. Under this approach, the question of whether firms will comply with the provisions of the CSR code and generate significant environmental benefits depends strictly on the strength of the enforcement framework associated with the regime.

The economic optimizer model still allows for the possibility that some voluntary codes may yield beyond-compliance actions. But, such a result must be grounded, as noted above, in the firms' economic logic. For example, Potoski and Prakash's "green club" model suggests that firms would pursue ISO 14001 certification or meeting the inclusion criteria of DJSI and FTSE4Good because of the potential contribution of these codes to their reputation.⁸⁴ With regard to ISO 14001, they ar-

247, 250 (2010) ("At the international level, the Basel II framework has been recently amended to require banking regulators to monitor compensation structures with a view towards aligning them with good risk management."); Joseph Stiglitz, *Regulation and Failure*, in NEW PERSPECTIVES ON REGULATION (David Moss & John Cisternino eds., 2009).

83. For studies using the economic viewpoint, see ASEEM PRAKASH & MATTHEW POTOSKI, THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY ENVIRONMENTAL REGULATIONS 41, 78–80 (2006); Gary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC. REV. 691, 707 (2003); Kollman & Prakash, *supra* note 40.

84. PRAKASH & POTOSKI, *supra* note 83, at 49 ("Affiliating with a green club's positive brand reputation can benefit club members . . . [and is] akin to building organizational reputations . . . [which] shape stakeholders' interactions with the organization."). The issue of reputation may be viewed also from the perspective of stakeholder theory, which highlights the way in which external stakeholders may influence the firm. Gunningham argues that firms

gue that because this scheme includes a relatively effective process for external verification, firms can only capture the reputational benefits of the standard by undertaking a genuine effort at implementation.⁸⁵ Both DJSI and FTSE4Good have a relatively robust compliance system, and a tradition of engagement with companies,⁸⁶ suggesting that a similar argument can be made with regard to them as well.

The economic optimizer model provides, therefore, limited support for the green economy thesis because it subjects any pro-sustainability action to a strict cost-benefit test that is *indifferent to sustainability values in and of themselves*. A somewhat more nuanced approach to the green economy thesis, which can explain why firms might take pro-sustainability actions beyond those predicted by the economic optimizer model, can be found in institutionalist models of the firm. Below I discuss two potential interpretations of the institutionalist framework which look at the firm and the global CSR system: (a) the firm as a *polyphonic system* and (b) the global CSR network as an *ensemble regulatory system*.⁸⁷

In the polyphonic model, the firm is conceptualized as a dynamic, self-organized decision-processing system that is not governed by one rationality, but can accommodate multiple logics.⁸⁸ The calculative logic of profit maximization that is presumed by traditional economics to govern firm behavior, although important, would only constitute one of multiple co-

operate under a "multifaceted 'license to operate,'" reflecting the multiple claims with which they must contend (economic, social, and legal). Gunningham et al., *supra* note 80, at 329. The adoption and implementation of soft law obligations constitutes a rational response, from the economic point of view, to these pressures. *Id.* at 326–28; Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 75 (1995). Stakeholder theory also has a normative facet that argues contrary to the agency-cost model, that managers ought to protect and promote the interests of multiple stakeholders, not only those of shareholders. Thomas Donaldson, *Making Stakeholder Theory Whole*, 24 ACAD. MGMT. REV. 237, 238 (1999).

85. PRAKASH & POTOSKI *supra* note 83, at 78, 92–96 (outlining the effect of rigorous external assurance in ISO 14001 on how firms approach implementing the standard and gaining reputational benefits).

86. See *infra* notes 164–74 and accompanying text; see also Perez, *Ensemble Regulation*, *supra* note 45, at 570–72.

87. On the polyphonic model, see further Perez et al., *Corporate Self-Regulation*, *supra* note 77, at 594–602. On the idea of ensemble regulation, see Perez, *Ensemble Regulation*, *supra* note 45, at 548–50, 561–62.

88. See Perez et al., *Corporate Self-Regulation*, *supra* note 77, at 595–96.

existing logics in the polyphonic model. One of the key aspects of the firm that is highlighted by the polyphonic model is the iterative and reciprocal interaction between the firm's structure and culture and employees' attitudes and beliefs.⁸⁹ In this context, the firm can be understood as an autonomous communicative system that is continually interacting with its constitutive workers in a reciprocal process of structural coupling.⁹⁰ The polyphonic model extends down to individuals in the firm, who are understood with a pluralistic concept of the self that includes the possibility that managers, employees, and shareholders are affected and driven by a complex set of motivations.⁹¹

The polyphonic model sheds new light on the institutional dynamic generated through the adoption of a CSR code by the firm.⁹² Adoption of a CSR code introduces new routines into the firm and requires the firm to observe itself in a different light, which creates new discursive venues where firms must account for their actions both externally and internally. Through these new internal routines, standards such as ISO 14001, the Equator Principles, the GRI Guidelines, or sustainability indexes, *can change the internal dynamics of the firm*, moving it into a new equilibrium between the firm's various motivations and logics. This new equilibrium would combine environmental and economic goals, and would reflect a greater sensitivity to ecological concerns, even at the cost of reduced profitability. For example, a firm implementing ISO 14001 would adopt various routines underlying the code's Environmental Management System (EMS) requirement, and would result in environmental concerns receiving stronger representation in decision-making processes. By inserting these new routines, the firm's structure would then allow for the discursive expression of motivations

89. See *id.* at 597.

90. See *id.*

91. *Id.*; see, e.g., BENJAMIN J. RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW: REGULATING THE UNSEEN POLLUTERS 180–85 (2008) (discussing effects on firm behavior due to shareholder activism that reflects divergent motivations among shareholders and firm management); Sumantra Ghoshal, *Bad Management Theories Are Destroying Good Management Practices*, 4 ACAD. MGMT. LEARNING & EDUC. 75, 82–86 (2005) (highlighting the need for management theory to incorporate more pluralistic concepts of individual motivation given the limitations of focusing on self-interest and opportunism as drivers of individual motivation).

92. See Perez et al., *Corporate Self-Regulation*, *supra* note 77, at 597–601.

and ideas that may have been suppressed or ignored under the previous regime.⁹³ When a firm uses new routines for selecting, ordering, and processing information, it changes the trajectory and cognitive horizon of the organization, for example, by enabling the generation of environmentally-related data that was not available to the organization or considered in decision-making under the old routines.⁹⁴

Another important process highlighted by viewing the firm under the polyphonic model is the potential virtuous cycle that adopting CSR codes, such as ISO 14001, can generate between the new organizational reality and the individual motivations and beliefs of employees and shareholders.⁹⁵ This dynamic is properly understood as a cycle, because it creates a potential for *amplifying feedback* between the organizational and individual levels. The transformation of the institutional culture through new routines facilitates changes at the individual mental level, for example, by enhancing environmental commitment and loyalty to the organization. This, in turn, supports the institutional changes created by the voluntary standard, for example, by increasing the employees' willingness to invoke and apply the new conceptual apparatus inherited from the standard, and to implement the new routines.

A virtuous cycle between organizational and individual levels can uncover and develop human and economic resources that were invisible under the previous organizational setting. These resources are developed because the new routines and the virtuous cycle have increased both the employees' internally-driven willingness to think strategically about, and engage in, pro-environmental behaviors and their commitment to the organization.⁹⁶ These two changes can help explain the capacity of voluntary green standards to create enduring changes

93. *See id.* at 598.

94. *Id.*

95. *Id.* at 599–600; *see also* C.B. Bhattacharya et al., *Strengthening Stakeholder-Company Relationships Through Mutually Beneficial Corporate Social Responsibility Initiatives*, 85 J. BUS. ETHICS 257, 257 (2009) (“[I]n the employment realm, CSR activity has been shown to have a positive effect on job seeking intent, as well as behaviors on the job like interpersonal cooperation and job-related effort.” (citations omitted)).

96. For an empirical analysis supporting these claims, *see* Perez et al., *Corporate Self-Regulation*, *supra* note 77, at 603–22; Francesco Perrini et al., *Deconstructing the Relationship Between Corporate Social and Financial Performance*, 102 J. BUS. ETHICS 59, 63 (2011).

within firms and how firms can bear the financial and personnel time costs of certification (e.g., ISO 14001) without compromising profits. A firm's implementation of a voluntary green standard can thus form the impetus for the creation of a corporate culture that is informed by social norms, rather than driven exclusively by economic incentives.⁹⁷

Evaluating the firm at an institutionally sensitive frame of observation like under the polyphonic model highlights the importance of analyzing the broader institutional setting that distinct CSR instruments operate within. This frame is especially important for understanding how the ensemble structure of the new global order of private CSR regulation and public incentives affects the efficacy of any individual CSR scheme.⁹⁸ By ensemble regulation I refer to the combination of multiple autonomous regulatory schemes that together form a regulatory network that enforces a common core of basic principles and from which develops positive enforcement and normative externalities (positive complementarities).⁹⁹ The ensemble structure of the global CSR network has two effects. First, the cross-linkages between common elements of different standards create a system of *positive enforcement externalities*, where the requirements of one regime can also serve to bolster compliance with the other regimes that comprise the network, thus generating an amplified compliance effect. The consequence of this cross-linked network of ensemble regulatory structures is that firms participating in the world of CSR will find it increasingly difficult to reap the various reputational gains associated with adopting voluntary CSR codes if they do not make real organizational efforts at implementation and change.¹⁰⁰ For example, once a firm is publishing environmental reports under the GRI

97. See Perez et al., *Corporate Self-Regulation*, *supra* note 77, at 600–01; see also DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 80–83 (2008); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, VA. L. REV. 733, 749–52 (2007); Lynn A. Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 9 (2003).

98. See Perez, *Ensemble Regulation*, *supra* note 45, at 549–50.

99. I have developed and deployed this concept in a number of earlier works, see, for example, *id.* at 548–50, 561–62; Perez, *Green Finance*, *supra* note 43, at 163, 174–76.

100. This cross-regime effect is neglected by some authors, see, for example, Schwartz & Tilling, *supra* note 26, at 296.

guidelines, has adopted ISO 14001, and has met the inclusion criteria for a sustainability index like FTSE4Good or DJSI, it would be difficult to renege or gloss over environmental commitments as they are now multi-dimensional promises.

But the ensemble structure of this new private order has also another, more subtle effect. There is a positive feedback between the multi-focal invocation of the idea of sustainability across the ensemble, the social standing of the idea as a moral-political principle, and the perceived legitimacy of the ensemble and of each of its constituent regimes. The mutual engagement with the concept of sustainability through the distinct regime-spaces and the normative cross-reference it facilitates is thus also a source of positive normative externality.¹⁰¹

The foregoing analysis has tentative empirical support in the literature. For example, multiple studies have documented a positive effect from implementing ISO 14001 on both increasing the environmental commitment and decreasing the ecological footprint of firms.¹⁰² Other studies have documented a similar but less pronounced positive influence on firms' sustainability performance from inclusion in sustainability indexes,¹⁰³ and to the positive effect of the Equator Principles on the global financial market.¹⁰⁴ But other studies have demonstrated that certain prominent CSR schemes, such as Global Compact¹⁰⁵ and Responsible Care,¹⁰⁶ have failed to bring about

101. Perez, *Ensemble Regulation*, *supra* note 45, at 561.

102. PRAKASH & POTOSKI, *supra* note 83, at 146–70; Perez et al., *Corporate Self-Regulation*, *supra* note 77, at 603–22. See generally Aaron K. Chatterji & Michael W. Toffel, *How Firms Respond to Being Rated*, 31 STRATEGIC MGMT. J. 917, 918 (2010) (discussing their study indicating firms respond positively to environmental ratings).

103. See Chatterji & Toffel, *supra* note 102; Craig Mackenzie et al., *Do Responsible Investment Indices Improve Corporate Social Responsibility? FTSE4Good's Impact on Environmental Management*, 21 CORP. GOVERNANCE, 495, 510 (2013); Rieneke Slager, *What Gets Measured Gets Managed – Exploring the Link Between Sustainability Indices and Responsible Corporate Behaviour* (2009) (unpublished article), http://backup.oikos-international.org/fileadmin/oikos-international/international/PRI_Academy/paper/oikosPRI_paper_RienekeSlager.pdf.

104. John M. Conley & Cynthia A. Williams, *Global Banks as Global Sustainability Regulators?: The Equator Principles*, 33 L. & POL'Y 542, 546 (2011); Ariel Meyerstein, *Transnational Private Financial Regulation and Sustainable Development: An Empirical Assessment of the Implementation of the Equator Principles*, 45 N.Y.U. J. INT'L L. & POL. 487, 577 (2012).

105. Daniel Berliner & Aseem Prakash, *"Bluewashing" the Firm?: Voluntary Regulations, Program Design and Member Compliance with the United Nations Global Compact*, 43 POL'Y. STUD. J. 115, 116 (2014).

an improvement in the sustainability performance of their signatories, relative to non-signatories.

B. THE STRUCTURAL LIMITS OF THE CSR AND GREEN ECONOMY PROJECTS

The institutionalist framework (as manifested in the polyphonic and ensemble regulation models) provides a more optimistic view regarding the capacity of green economy ideas to transform the way corporations do business. However, even within this more optimistic framework the green economy thesis and the CSR movement—which implements it at the corporate domain—face significant limitations. Although it is a mistake to dismiss the CSR movement as mere cheap talk, we must be realistic about the capacity of CSR codes to trigger radical pro-sustainability changes. The CSR project remains constrained by the precepts of modern capitalism and by the broad institutional framework in which both corporations and CSR institutions are situated. There is no room within the institutional setting of the CSR project for challenging the basic principles of the global financial system, with its demand for profit and the evaluative metrics associated with this demand. The green economy model is constrained by the basic presuppositions upon which the current global capitalist order is based, and it does not offer a way to criticize this order.

One way of making these limitations explicit is to point out the failure of the Rio+20 concluding document to acknowledge and openly discuss the difficult tradeoffs involved in implementing green growth policies.¹⁰⁷ These tradeoffs are present both at the national level and at the firm level. Investing in pro-sustainability actions can create the following tradeoffs between sustainability and economic production, which ultimately can reduce the profitability of the firm. These tradeoffs come in two primary forms:¹⁰⁸

- (1) Pro-sustainability actions can reduce productivity by causing firms to “use more expensive or less productive technologies.” Examples include using “renewable energy

106. *E.g.*, Shanti Gamper-Rabindran & Stephen R. Finger, *Does Industry Self-regulation Reduce Pollution? Responsible Care in the Chemical Industry*, 43 J. REG. ECON. 1, 26 (2013).

107. *See* Barbier, *supra* note 5.

108. *See* Hallegatte et al., *supra* note 5.

sources that are more costly than coal” or petrol,¹⁰⁹ hiring people with disabilities,¹¹⁰ and providing longer maternity leaves beyond what is required by law.¹¹¹

(2) Pro-sustainability actions can “result in the early retirement of physical capital,”¹¹² if it is based on polluting or non-sustainable technologies (e.g., a building that is not suited for people with disabilities¹¹³).

Although some of these actions may produce benefits that outweigh the costs by increasing the effective quantity of production inputs (e.g., water or energy), others *may not have such effects* either because their positive effects occur outside the firm, or because the costs outweigh the associated benefits, or because the benefits will emerge only in the distant future. From a social perspective, a reduction in economic productivity at the firm level due to pro-sustainability actions may be justified by a decrease in external adverse effects (pollution), by contribution to external positive effects (e.g., increased welfare gains achieved by the integration of disabled people in the community), or by non-instrumental conception of the ‘good society’. However, these positive external effects are not reflected in the accounts of the firm. In Porter and Kramer’s ‘shared value’ narrative,¹¹⁴ these tradeoffs are blurred. Furthermore, the difficulty of firms is exacerbated by the fact that they are still being judged primarily by their financial and not by their sus-

109. *Id.* at 8.

110. See Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, REGULATION, Spring 2000, at 21, 21 (“The added cost of employing disabled workers to comply with the accommodation mandate of ADA has made those workers relatively unattractive to firms.”); Karen Needels, *Framework for Employer Decision-Making*, in ECONOMIC AND SOCIAL COSTS AND BENEFITS TO EMPLOYERS OF RETAINING, RECRUITING AND EMPLOYING DISABLED PEOPLE AND/OR PEOPLE WITH HEALTH CONDITIONS OR AN INJURY 23, 34 (Karen Needels & Robert Schmitz eds., 2006) (noting monetary effects of employing disabled people, “such as the cost of workplace adjustments or the benefits or costs that arise due to different productivity levels for disabled and non-disabled workers”).

111. See Nita Ghei, *The Argument Against Paid Family Leave*, NEWSWEEK (Aug. 4, 2009, 8:00 PM), <http://www.newsweek.com/argument-against-paid-family-leave-78741> (“Mandated paid family leave makes it more expensive to hire workers.”). See generally *Maternity & Parental Leave*, AUSTL. GOV’T FAIRWORK OMBUDSMAN, <http://www.fairwork.gov.au/Leave/maternity-and-parental-leave> (last visited Oct. 13, 2015).

112. Hallegatte et al., *supra* note 5, at 8.

113. See Needels, *supra* note 110.

114. See Porter & Kramer, *Creating Shared Value*, *supra* note 12.

tainability performance. As I argue below, this evaluative bias is present even when it comes to sustainability indexes.

Naturally, these tradeoffs also exist at the level of the economy as a whole. In considering whether to introduce some pro-sustainability regulation, such as a carbon tax,¹¹⁵ protection of rare species (e.g., the endangered Indian tiger),¹¹⁶ prolonged maternal or parental leave,¹¹⁷ or mandatory targets for hiring of people with disabilities,¹¹⁸ governments would have to weigh the potential benefits of such actions against their projected costs. But unlike firms, governments must take into account also those benefits that occur outside firms, such as health benefits due to reduced air pollution or the improvement in the lives of people with disabilities when their prospects of getting a job increase.¹¹⁹ At the same time, it is clearly mistaken to claim that environmental and social benefits necessarily outweigh the costs of achieving them by focusing on only the narrow sense of benefit—improving firm productivity. Climate change is a case in point. Making the reductions in global emissions that are needed in order to prevent a dangerous deterio-

115. See Edward Barbier, *Sustainability: Tax 'Societal Ills' to Save the Planet*, 483 NATURE 30, 30 (2012); John C. V. Pezzey & Frank Jotzo, *Carbon Tax Needs Thresholds to Reach Its Full Potential*, 3 NATURE CLIMATE CHANGE 1008, 1008–11 (2013).

116. See *Species: Tiger*, WORLD WILDLIFE FUND, <http://www.worldwildlife.org/species/tiger> (last visited Oct. 13, 2015).

117. See, e.g., JOAN BLADES & KRISTIN ROWE-FINKBEINER, *THE MOTHERHOOD MANIFESTO: WHAT AMERICA'S MOMS WANT AND WHAT TO DO ABOUT IT* 20–47 (2006) (describing the reality of navigating work, finances, and having children in the United States, and for advocating paid family leave policies).

118. See, e.g., DISABILITY INV. GRP., *THE WAY FORWARD: A NEW DISABILITY POLICY FRAMEWORK FOR AUSTRALIA* 44–48 (2009), https://www.dss.gov.au/sites/default/files/documents/05_2012/dig_report_19oct09.pdf; DISABILITY EMP. AUSTL., *IMPROVING THE EMPLOYMENT PARTICIPATION OF PEOPLE WITH DISABILITY IN AUSTRALIA: A RESPONSE FROM DISABILITY EMPLOYMENT AUSTRALIA* 12–13 (2013), <http://disabilityemployment.org.au/file/494af7ce8d9ced3f55a68416be25be5c43a25e6b/improving-the-employment-participation-of-people-with-disability-in-australia.pdf>.

119. See, e.g., COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, *THE ECONOMICS OF PAID AND UNPAID LEAVE* 8 (2014) (describing the benefits of paid leave on overall public health including lowered infant mortality, and long-term effects like increased higher educational attainment, higher IQ scores, and higher earnings in adulthood for children whose mothers had taken maternity leave), https://web.archive.org/web/20140627075322/https://www.whitehouse.gov/sites/default/files/docs/leave_report_final.pdf.

ration in the Earth's climate probably requires significant economic sacrifices.¹²⁰ Justifying these sacrifices is not trivial because the benefits associated with them would mostly be felt by future generations, and may be difficult to evaluate in monetary terms because they involve non-market goods (e.g., preventing the loss of certain species, such as polar bears).¹²¹ Making policy choices in cases that involve such multi-dimensional tradeoffs is extremely difficult.¹²² In many cases these tradeoffs involve incommensurable values. How much economic effort should be invested in preserving polar bears? What is the economic value of the continued existence of small island nations threatened with partial or virtually-total inundation by future rises in sea level?¹²³

The reluctance of Rio+20 to confront the tension between green growth and conventional economic growth and the difficult tradeoffs underlying it¹²⁴ reflects a more general lack of

120. See, e.g., Joeri Rogelj et al., *Probabilistic Cost Estimates for Climate Change Mitigation*, 493 NATURE 79, 79, 82 (2013) (indicating total mitigation costs in the range of 0.8–1.3% of gross world product, just to achieve a 66% probability of limiting global temperature increase to 2 degrees Celsius by the year 2100).

121. See Hallegatte et al., *supra* note 5, at 22 (noting the cost of delaying action to cope with climate change); Péter K. Molnár et al., *Predicting Survival, Reproduction and Abundance of Polar Bears Under Climate Change*, 143 BIOLOGICAL CONSERVATION 1612, 1612 (2010) (noting that polar bear populations are predicted to be negatively affected by global warming).

122. See S. Stoll-Kleemann et al., *The Psychology of Denial Concerning Climate Mitigation Measures: Evidence from Swiss Focus Groups*, 11 GLOBAL ENVTL. CHANGE 107, 115 (2001) (“The findings from this study reveal both a coherence and a rationality to dissonance and denial that will not make it easy for democracies to gain early consent for tough climate change mitigation measures.”); see also Gregory S. Berns et al., *Intertemporal Choice – Toward an Integrative Framework*, 11 TRENDS COGNITIVE SCI. 482, 482 (2007); Mark Sagoff, *The Quantification and Valuation of Ecosystem Services*, 70 ECOLOGICAL ECON. 497, 500 (2011); Alexa Spence et al., *The Psychological Distance of Climate Change*, 32 RISK ANALYSIS 957, 957 (2012); Nicholas Stern, *Ethics, Equity and the Economics of Climate Change Paper 2: Economics and Politics*, 30 ECON. & PHIL. 445 (2014).

123. Among the most vulnerable of these island states are the Marshall Islands, Kiribati, Tuvalu, Tonga, the Federated States of Micronesia, and the Cook Islands (in the Pacific Ocean); Antigua and Nevis (in the Caribbean Sea); and the Maldives (in the Indian Ocean). See Intergovernmental Panel on Climate Change [IPCC], Working Group II, *Climate Change 2001: Impacts, Adaptation, and Vulnerability* 935 (2001), <http://www.ipcc.ch/ipccreports/tar/wg2/index.php?idp=671>.

124. For a more detailed discussion of this tension, see Hallegatte et al., *supra* note 5, at 19.

political will to implement policies that could support (true) green growth. Indeed, the conference ended without an agreement on new global mechanisms that could facilitate the realization of the green economy vision. It failed to create new financial mechanisms for long-term funding of sustainable development, and was unable to agree on the much-needed transformation of UNEP into a specialized U.N. Agency.¹²⁵ Greenpeace described the conference as a “failure of epic proportions” that “will go down in history as Greenwash+20.”¹²⁶ Prof. Tim Jackson argued that the failure of Rio+20 is most vividly reflected in the use of the phrase “sustained economic growth” instead of the concept of sustainable growth: “The ‘G’ word is a signifier for not changing the system. It is synonymous with western consumerism which we are locked into. Green growth is the emperor’s new clothes, it is an empty concept.”¹²⁷

One of the problems that governments are facing when they consider whether to introduce meaningful green economy measures is that the conventional indicator of economic growth, increase in real gross domestic product (GDP),¹²⁸ does not measure overall welfare and therefore fails to capture many of

125. See Barbier, *supra* note 5, at 888 (noting the importance of a proposal that was not adopted but would have transformed UNEP “into a full-fledged specialized UN agency capable of generating binding negotiated agreements and principles among members” a status held by similar U.N. agencies like the International Labor Organization (ILO) and World Health Organization (WHO)); see also Barbier, *supra* note 115 (writing prior to the conference about the paramount importance and difficulty of agreeing on financing).

126. Press Release, Greenpeace Int’l, Greenpeace Press Statement: Rio+20 Earth Summit – A Failure of Epic Proportions (June 22, 2012), <http://www.greenpeace.org/international/en/press/releases/Greenpeace-Press-Statement-Rio20-Earth-Summit-a-failure-of-epic-proportions/>; see also WWF *Rio+20 Closing Statement*, WWF GLOBAL (June 21, 2012), http://wwf.panda.org/wwf_news/?205343 (last visited Oct. 8, 2015). See generally Harriet Bulkeley et al., *Governing Sustainability: Rio +20 and the Road Beyond*, 31 ENV’T & PLANNING C 958 (2013).

127. See Jo Confino, *Rio+20: Tim Jackson on How Fear Led World Leaders to Betray Green Economy*, GUARDIAN (June 25, 2012), <http://www.theguardian.com/sustainable-business/rio-20-tim-jackson-leaders-green-economy>.

128. *Measuring Economic Growth*, BANK OF CAN., <http://www.bankofcanada.ca/core-functions/monetary-policy/measuring-economic-growth/> (last visited Oct. 9, 2015) (describing methods of measuring GDP). See, e.g., IMF, *Recovery Strengthens, Remains Uneven*, World Economic Outlook (Apr. 2014) (measuring global economic growth in GDP).

the benefits associated with pro-sustainability actions.¹²⁹ For example, the GDP does not include depreciation of capital stocks used up in production.¹³⁰ Furthermore, GDP has no debit side that takes into account the negative externalities of current production, such as the environmental costs of pollution.¹³¹ GDP interprets every expense as positive, even if it is associated with an activity that reduces welfare. For example, the costs associated with the clean-up and remediation of oil spills increases GDP, but the environmental damage does not enter into the calculation of GDP, although it clearly detracts from overall well-being.¹³² Likewise, market values of life betterment services and activities, such as housework, volunteer work, ecosystem services, and leisure time are not measured by GDP.¹³³ This means that pro-sustainability action by governments could lower the GDP of the country, with potentially adverse consequences such as lowering its credit rating,¹³⁴ even if in practice such action increases the overall welfare of citizens.

Critics of GDP have developed alternative measures, such as the Index of Sustainable Economic Welfare (ISEW), the Genuine Progress Indicator (GPI), the Sustainable Net Benefit Index (SNBI), and the Gross National Happiness developed in Bhutan.¹³⁵ These indicators offer better measurement of

129. See Kenneth J. Bagstad et al., *Methodological Developments in US State-Level Genuine Progress Indicators: Toward GPI 2.0*, 45 *ECOLOGICAL INDICATORS* 474, 475 (2014); Ida Kubiszewski et al., *Beyond GDP: Measuring and Achieving Global Genuine Progress*, 93 *ECOLOGICAL ECON.* 57, 57 (2013); JOSEPH E. STIGLITZ ET AL., REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 77–80, 239–41 (2009), http://www.insee.fr/fr/publications-et-services/dossiers_web/stiglitz/docommission/RAPPORT_anglais.pdf.

130. Tim Callen, *Gross Domestic Product*, INT'L MONETARY FUND (Mar. 28, 2012), <http://www.imf.org/external/pubs/ft/fandd/basics/gdp.htm> (noting that GDP does not include depletion of capital stock used to produce output).

131. *Id.* (noting that GDP does not measure overall well-being and does not count externalities of increased production, which could lead to an overall net reduction in individual well-being because “increased output may come at the cost of environmental damage or other external costs”).

132. Jeroen C.J.M. van den Bergh, *Abolishing GDP* 8–9 (Feb. 2007) (unpublished article), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=962343.

133. *Id.* at 7–8.

134. See António Afonso et al., *Short- and Long-Run Determinants of Sovereign Debt Credit Ratings*, 16 *INT'L J. FIN. & ECON.* 1, 1 (2011).

135. See van den Bergh, *supra* note 132, at 12–16; *Bhutan GNH Index*, GNH INDEX, <http://www.grossnationalhappiness.com/articles/> (last visited Oct. 9, 2015).

changes in welfare, correcting important deficiencies of conventional GDP by adding or subtracting certain partially calculated amounts of money to or from GDP.¹³⁶ By incorporating processes that are not evaluated by the market, such as inequality or environmental degradation, these indexes seek to provide better estimates of economic welfare.¹³⁷ Some studies have shown that at the global level, despite the steady increase in global GDP/capita, which in some countries (such as China and India) has been dramatic, GPI has decreased.¹³⁸ This shows that although GDP growth is increasing benefits, these are outweighed by rising inequality of income and an increase in environmental costs.¹³⁹ Despite the growing literature discussing these alternative measures, however, the conventional GDP measure continues to dominate current economic discourse.

IV. SUSTAINABILITY INDEXES: SOCIAL INFLUENCE AND THE POLITICS OF LEGITIMACY

The field of sustainability indexes provides an interesting case study for exploring the limits of the green economy thesis because they attempt to promote sustainability thinking from within the heart of global capitalism—the stock exchange. Like the alternative measures to GDP discussed above, sustainability indexes reflect an attempt to develop more complex measures of firms' performance, which could reflect not only their financial performance but also their sustainability efforts. In this way, sustainability indexes seek to encourage firms to consider their business strategies from a broader perspective. But, as I argue below, there are several key flaws in the way in which sustainability indexes are structured, which could undermine this effort.

Two key questions arise in the study of sustainability indexes. The first concerns their capacity to act as instruments of social steering; the second concerns their strategies of legitimation. The latter question arises because the potential effect of sustainability indexes on the behavior of firms turns the indexes into regulatory players, with powers comparable to those of

136. See Bagstad et al., *supra* note 129, at 475; Kubiszewski et al., *supra* note 129, at 57; van den Bergh, *supra* note 132, at 12–16.

137. See van den Bergh, *supra* note 132, at 12–16.

138. Kubiszewski et al., *supra* note 129.

139. See, e.g., *id.* at 67.

public institutions such as the UNEP Finance Initiative.¹⁴⁰ The two questions are critical for understanding the capacity of sustainability indexes to contribute to the realization of the green economy vision. The following sections explore these questions from theoretical and empirical perspectives, focusing on the differences between FTSE4Good and DJSI—the two major global players¹⁴¹—based on a close analysis of their supporting documents and on an extensive literature review.

DJSI draws on the expertise of a leading global environmental research agency: the SAM Group; FTSE has recently ended its long-term relationship with the UK-based agency Eiris, and started to perform the ESG assessment in-house.¹⁴² The Dow Jones and FTSE indexes both focus on positive criteria for selecting companies,¹⁴³ but have developed different se-

140. See *About*, U.N. ENV'T PROGRAMME FIN. INITIATIVE, <http://www.unepfi.org/about/> (last visited Oct. 9, 2015).

141. For some other noteworthy social-environmental indexes, see *ESG Indexes*, MSCI, <https://www.msci.com/esg-indexes> (last visited Oct. 10, 2015); *Indices Euronext Vigeo*, VIGEO, <http://www.vigeo.com/csr-rating-agency/en/actualites-a-presse/blog-9> (last visited Oct. 10, 2015); *Jantzi Social Index*, SUSTAINALYTICS, <http://www.sustainalytics.com/JSI> (last visited Oct. 10, 2015). Other related players are ranking initiatives, see, for example, *100 Best Corporate Citizens*, CORP. RESP. MAG., Mar.–Apr. 2015, at 10, <http://www.thecro.com/files/100%20Best%20List%202015.pdf>; CK Staff, *The Global 100 Most Sustainable Corporations*, CORP. KNIGHTS (Jan. 21, 2015), <http://www.corporateknights.com/magazines/2015-global-100-issue/2015-global-100-results-14218559/>; *CR Index 2015*, THE PRINCE'S RESP. BUS. NETWORK, http://www.bitc.org.uk/system/files/7771_cr_index_0.pdf (last visited Oct. 10, 2015). The fact that the FTSE4Good and DJSI indexes are not merely ranking exercises but also act as a central source of information for financial decisions makes them more influential. Furthermore, they are embedded in much more developed institutional structures than other indexes.

142. *FTSE4Good Ends 12-year Relationship with Eiris*, CORPORATEREGISTER, <http://www.corporateregister.com/news/item/?n=534> (last visited Oct. 10, 2015); see EIRIS, <http://www.eiris.org/> (last visited Oct. 10, 2015); *Sustainability Investing*, ROBECOSAM, <http://www.sustainability-indices.com/sustainability-assessment/sustainability-investing.jsp> (last visited Oct. 10, 2015). FTSE4Good has introduced some revisions to its ESG assessment process in 2014, which will be reviewed later.

143. FTSE uses some built-in exclusion criteria, whereas DJSI, which does not rely on negative screening in its general indexes, offers some exclusion indexes. *E.g.*, *Dow Jones Sustainability World Enlarged Index ex Alcohol, Tobacco, Gambling, Armaments & Firearms and Adult Entertainment Fact Sheet*, S&P DOW JONES INDICES (Mar. 5, 2014), http://www.djindexes.com/mdsidx/downloads/fact_info/Dow_Jones_Sustainability_World_Enlarged_Index_ex_Alcohol_Tobacco_Gambling_Armaments_and_Firearms_and_Adult_Entertainment_Fact_Sheet.pdf. For a detailed description of the selection methodologies of both index families, see FTSE, INDEX

lection approaches.¹⁴⁴ DJSI tracks the financial performance of the leading sustainability-driven companies worldwide, and includes companies in its various indexes based on a “best-in-class” criterion, which picks out the best performers within each industrial sub-sector.¹⁴⁵ Each DJSI benchmark index has a different target number. For example, the Dow Jones Sustainability World Index (DJSI World) includes the top 10% of the leading sustainability companies out of the largest 2,500 companies in the S&P Global BMI, whereas DJSI Europe includes the top 20% of companies among the 600 largest developed European companies listed in the S&P Global BMI.¹⁴⁶ Since the launch of DJSI World, in 1999, other indexes have been added to the series.¹⁴⁷ The FTSE4Good Index Series, which was launched in July 2001, is based on a similar vision: “to measure the performance of companies demonstrating strong Environmental, Social and Governance (ESG) practices.”¹⁴⁸ But, unlike the DJSI series, the FTSE4Good series is based on a principle of eligibility (an absolute threshold approach), so that “[a]ll companies in each constituent Universe index that pass the eligibility criteria detailed in the FTSE4Good Index Inclusion Rules at the review date are included in the relevant FTSE4Good Benchmark Index.”¹⁴⁹

INCLUSION RULES FOR THE FTSE4GOOD INDEX SERIES (version 1.6, June 2015) [hereinafter FTSE4GOOD INDEX INCLUSION RULES], [<https://web.archive.org/web/20151029122349/http://www.ftse.com/products/downloads/F4G-Index-Inclusion-Rules.pdf>]; S&P DOW JONES INDICES, DOW JONES SUSTAINABILITY INDICES METHODOLOGY (Oct. 2015) [hereinafter DJSI METHODOLOGY], [https://web.archive.org/web/20151117035807/http://www.djindexes.com/mdsidx/downloads/meth_info/methodology-dj-sustainability-indices.pdf].

144. For a detailed evaluation of the selection criteria developed by DJSI and FTSE4Good and other ranking schemes, see Cory Searcy, *Corporate Sustainability Performance Measurement Systems: A Review and Research Agenda*, 107 J. BUS. ETHICS 239, 247–50 (2012); Cory Searcy & Doaa Elkhawas, *Corporate Sustainability Ratings: An Investigation into How Corporations Use the Dow Jones Sustainability Index*, 35 J. CLEANER PROD. 79, 90 (2012); Elena Escrig-Olmedo et al., *Lights and Shadows on Sustainability Rating Scoring*, 8 REV. MANAGERIAL SCI. 559, 559–74 (2014); Wendy Stubbs & Paul Rogers, *Lifting the Veil on Environment-Social-Governance Rating Methods*, 9 SOC. RESP. J. 622, 622–40 (2013).

145. DJSI METHODOLOGY, *supra* note 143, at 3.

146. *Id.* at 8, 10.

147. See *id.* at 17–18. For the full list see, *DJSI Family Overview*, *supra* note 29.

148. FTSE4GOOD INDEX INCLUSION RULES, *supra* note 143, § 1.1.

149. FTSE4GOOD GROUND RULES, *supra* note 34, § 5.3.2.

A. SUSTAINABILITY INDEXES AS INSTRUMENTS OF SOCIAL STEERING

There are several potential paths by which sustainability indexes can influence corporate behavior and society as a whole. First, firms may be impelled to improve their behavior owing to reputational concerns associated with the potential negative or positive repercussions of being excluded or included in the index.¹⁵⁰ This effect was demonstrated, for example, with regard to ranking schemes in other fields, such as the influential *U.S. News & World Report* ranking of law schools.¹⁵¹ Second, sustainability indexes may exercise a more subtle impact by creating a widespread evaluation matrix that permeates throughout the firm and corporate order, and has an effect irrespective of actual instrumental calculations. Scholars examining the influence of ranking schemes, have found rankings can affect the internal routines and cognitive structures of the measured organization, leading to changes in organizational self-perceptions. The rankings create continuous processes of observation, measurement, and evaluation, which can generate reflexive processes of institutional change, as the organizations adapt and develop anticipatory, self-disciplinary structures based on the evaluative metrics.¹⁵² The way in which both FTSE4Good and DJSI engage with the firms participating in the index evaluation process supports this hypothesis.

A third route of influence is in the effect sustainability indexes have on the broader market for Socially Responsible Investment (SRI). The methodologies used by DJSI and FTSE4Good for selecting and ranking companies could become

150. See Chatterji & Toffel, *supra* note 102, at 918.

151. Wendy Nelson Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 33 (2007) (using media rankings of law schools to explore how the methodological concept in sociology of “reactivity—the idea that people change their behavior in reaction to being evaluated, observed, or measured—” can be a helpful model for understanding how ratings change firm behavior); see Michael Bastedo & Nicholas Bowman, *U.S. News & World Report College Rankings: Modeling Institutional Effects on Organizational Reputation*, 116 AM. J. EDUC. 163, 163 (2010); Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 L. & SOC’Y REV. 105, 105 (2006).

152. Espeland & Sauder, *supra* note 151; Wendy Nelson Espeland & Mitchell L. Stevens, *A Sociology of Quantification*, 49 EUR. J. SOC. 401, 416 (2008).

a type of normative benchmark for the SRI market as a whole.¹⁵³ Through their influence on ethical investors, sustainability indexes may have a further effect on firms by indirectly influencing their cost of capital.¹⁵⁴ Finally, the normative benchmarks developed by the indexes can influence the thematic horizon of CSR discourse as a whole.¹⁵⁵

The foregoing hypotheses have some empirical support in the literature.¹⁵⁶ A questionnaire-based survey conducted in May 2004 explored the FTSE4Good index's effect on corporate behavior of companies listed on the FTSE4Good UK and Europe indexes.¹⁵⁷ The study found that the FTSE4Good initiative had some influence on the companies' internal dynamics, especially reporting and management procedures.¹⁵⁸ A study of the KLD Indexes by Chatterji and Toffel examined the reputational effect of index rating (isolating a similar dynamic as Potoski and Prakash's "green club" model¹⁵⁹), and argued that poor rat-

153. A related area of research interrogates the considerations that may lead individuals to invest in ethical funds. Eva Hofmann et al., *A Comparison of Models Describing the Impact of Moral Decision Making on Investment Decisions*, 82 J. BUS. ETHICS 171, 173 (2008); Eva Hofmann et al., *The Decision Process for Ethical Investment*, 12 J. FIN. SERV. MKT. 4, 5 (2007).

154. Whether the SRI market has an influence on the cost of capital of "sustainable" companies is a debatable issue. See Geoffrey M. Heal, *Corporate Social Responsibility – An Economic and Financial Framework*, 30 GENEVA PAPERS ON RISK & INSUR. 387, 397–98 (2005) (noting that "[i]f significant sums of money are invested preferentially in companies with good CSR records, their cost of capital will fall," but that there is little evidence this is occurring); Darren D. Lee & Robert W. Faff, *Corporate Sustainability Performance and Idiosyncratic Risk: A Global Perspective*, 44 FIN. REV. 213, 215 (2009) (arguing that lagging returns by firms with high social performance is incorporated into investor willingness to pay price premiums for firms with lower expected risk, and concluding that "one of the main benefits of having a leading CSP profile is that a firm is able to reduce its business risk relative to lagging CSP firms and secure a lower cost of equity capital").

155. A good example for this phenomenon is inclusion of new climate change criteria among the FTSE4Good criteria in 2007. See *FTSE Group Introduces New Climate Change Criteria to its FTSE4Good Series*, CSRWIRE (Feb. 7, 2007, 3:00 AM), http://www.csrwire.com/press_releases/17420-FTSE-Group-Introduces-New-Climate-Change-Criteria-to-its-FTSE4Good-Series.

156. Although, as I argue in the next section, there are some basic problems in the structure of these indexes that can significantly weaken their capacity to achieve far-reaching pro-sustainability changes in firms' behavior.

157. GEORGE COBB ET AL., FTSE4GOOD: PERCEPTIONS AND PERFORMANCE 35–49 (2005).

158. *Id.* at 5.

159. PRAKASH & POTOSKI, *supra* note 83, at 78–79.

ings shame firms and threaten their legitimacy.¹⁶⁰ These poorly rated firms would be particularly likely to respond in ways that improve their ranking, causing managers to “implement practices aimed at improving their firms’ standing with the independent rating agencies.”¹⁶¹ They further suggest “that the subset of poorly rated firms that face lower-cost improvement opportunities . . . [are] especially likely to make the investments needed to improve their ratings.”¹⁶² They found that firms with lower starting KLD ratings improved their environmental performance more than firms with initially higher ratings, and that this trend was more pronounced in highly regulated industries and among firms where there were more low-cost opportunities to improve.¹⁶³

Both FTSE4Good and DJSI have engagement programs with firms that are based on continuous dialogue and have seemingly positive outcomes. In a recent report summarizing the first ten years of the index, FTSE emphasized the efficacy of its engagement program, which is “[o]verseen by an independent, expert Policy Committee and supported by an evolving criteria platform and direct company engagement programme, FTSE4Good has made a significant and measurable impact on the behaviour of companies.”¹⁶⁴ A recent study by Mackenzie, Rees, and Rodionova provides tentative empirical corroboration of this claim.¹⁶⁵ The authors used a natural experiment provided by the FTSE4Good upgrade of their environmental management criteria in 2002, when they engaged with index member firms that would not meet the new requirements, but did not engage with non-member firms that would similarly fail.¹⁶⁶ By 2005, 49% of the 377 large and internationally diverse firms that had received engagement and been threatened with exclusion from the FTSE4Good index had complied, as opposed to 24% of the 652 firms that were not subject to engagement or potential exclusion.¹⁶⁷ This result is statistically significant even after controlling for some environ-

160. Chatterji & Toffel, *supra* note 102, at 918.

161. *Id.*

162. *Id.*

163. *Id.* at 920–22.

164. FTSE, FTSE4GOOD: 10 YEARS OF IMPACT & INVESTMENT 9 (2011), http://www.ftse.com/products/downloads/FTSE4Good_10_Year_Report.pdf.

165. Mackenzie et al., *supra* note 103, at 509–10.

166. *Id.* at 500.

167. *Id.* at 500 fig.2.

mental risk, industry, country, governance, and financial performance.¹⁶⁸ Further results indicate that the effect of FTSE engagement produces a difference in compliance that persists for at least five years.¹⁶⁹ These results are consistent with the claim that the engagement process undertaken by FTSE, coupled with the threat of being excluded from the FTSE4Good index, is efficient in causing firms to comply with FTSE evaluation criteria.¹⁷⁰

In their 2010 yearbook, SAM offered a similar assessment of the DJSI company engagement program.¹⁷¹ In the DJSI engagement process, SAM sends each firm an annual “company-specific benchmarking report” that allows firms to see how they compare to their peers, often triggering a dialogue with SAM.¹⁷² From 2001 to 2009, an average of 70% of participating firms improved their total scores.¹⁷³ This claim received indirect support from evidence of the value of being listed in sustainable indexes as far as reputation and market value are concerned, which indicates that firms have strategic reasons to take this engagement process seriously (and the implicit threat of being deleted from the index).¹⁷⁴

168. *Id.* at 504–07.

169. *Id.* at 507.

170. *Id.* at 509.

171. SAM & PRICEWATERHOUSECOOPERS, THE SUSTAINABILITY YEARBOOK 2010 (2010), <http://www.pwc.com/gx/en/sustainability/assets/sustainability-yearbook-2010.pdf>.

172. *Id.* at 20.

173. *Id.* at 21; accord Chatterji & Toffel, *supra* note 102, at 918 (finding that firms improve performance due to ratings). However, as I have noted in earlier work, Perez, *Ensemble Regulation*, *supra* note 45, at 572 n.113, other authors have failed to find that CSR rating and reporting has an influence on firm behavior. Steven Scalet & Thomas F. Kelly, *CSR Rating Agencies: What is Their Global Impact?*, 94 J. BUS. ETHICS 69, 77 (2009). Scalet and Kelly presented an empirical study of CSR rating agencies (Innovest and CRO Magazine). Contrary to Chatterji and Toffel, they found that being dropped from a CSR ranking appears to do little to encourage firms to acknowledge and address problems related to their social and environmental performance. *Id.* But the authors noted that their methodology cannot capture all the possible effects of ranking institutions, and considered their study primarily as an exploratory exercise. *Id.* For a skeptical view of the efficacy of DJSI in improving corporate environmental performance, see Charles H. Cho et al., *Do Actions Speak Louder than Words? An Empirical Investigation of Corporate Environmental Reputation*, 37 ACCT. ORG. & SOC’Y 14, 23 (2012).

174. Michael Robinson et al., *Signaling Sustainability Leadership: Empirical Evidence of the Value of DJSI Membership*, 101 J. BUS. ETHICS 493, 503–

But do sustainability indexes also have an influence on the structure of the SRI market? Authors like Fowler and Hope have examined this question “by looking at total investment funds managed using sustainability indexes.”¹⁷⁵ From this approach, the authors concluded that, as of 2003, the effect of sustainability indexes had been limited.¹⁷⁶ The methodology used by Fowler and Hope focuses on funds tracking the indexes, but does not necessarily capture some broader effects of the indexes, which also likely have indirect influence on the methodologies and choices of individual investment agents.¹⁷⁷ Other authors like Chatterji, Levine, and Toffel have generally assumed that environmental ratings would have a meaningful influence within the SRI market,¹⁷⁸ but relied mostly on only anecdotal evidence to support this claim.¹⁷⁹ However, their study mainly focused on slightly separate question: whether sustainability ratings (focusing on the KLD index) can help investors and stakeholders identify which companies are truly “environmentally responsible.”¹⁸⁰ As of the end of March 2015, DJSI reports that ten billion dollars in assets are invested based on the DJSI index family, and that other investors rely on the indexes in designing their ethical investment strategy.¹⁸¹

04 (2011); see Isabel Costa Lourenço et al., *The Value Relevance of Reputation for Sustainability Leadership*, 119 J. BUS. ETHICS 17, 25 (2014).

175. Stephen J. Fowler & C. Hope, *A Critical Review of Sustainable Business Indices and Their Impact*, 76 J. BUS. ETHICS 243, 249 (2007).

176. *Id.* at 249–50. As I have noted in earlier work, Perez, *Ensemble Regulation*, *supra* note 45, at 572 n.112, they found that as of December 2003, \$2.94 billion dollars were managed by funds tracking the DJSI index, with less than that amount using the FTSE4Good. Fowler & Hope, *supra* note 175, at 249–50. This is a relatively small figure given that total funds under management in the U.S. alone were \$19.2 trillion at the time. *Id.* at 250. Since this paper was published, the number of index-based financial products has increased significantly, and as of the end of March 2015 the assets managed under DJSI indexes totaled approximately \$10 billion dollars. *RobecoSAM Indices*, ROBECOSAM, <http://www.sustainability-indices.com/about-us/robecosam-indices.jsp> (last visited Nov. 13, 2015).

177. Fowler & Hope, *supra* note 175, at 251.

178. Aaron K. Chatterji et al., *How Well Do Social Ratings Actually Measure Corporate Social Responsibility?*, 18 J. ECON. & MGMT. STRATEGY 125, 126–32 (2009).

179. *Id.* at 126–27 (noting that TIAA-CREF sold \$50 million dollars of Coca-Cola Co. stock after KLD dropped the company from its Broad Market Social Index).

180. *Id.* at 127, 165.

181. *RobecoSAM Indices*, *supra* note 176; SAM & PRICEWATERHOUSE-COOPERS, *supra* note 171, at 22.

B. THE LIMITS OF FTSE4GOOD AND DJSI: THE SUSTAINABILITY-PECUNIARY PARADOX AND THE DEMOCRATIC DEFICIT PROBLEM

The evidence described in the previous section provides tentative support for the argument that sustainability indexes have some steering capacity, although current research does not provide a clear picture of the extent and scope of their pro-sustainability impact. I argue, however, that we have good reasons to doubt the extent to which FTSE4Good and DJSI can have significant, game-changing effects on firms' CSR performance, because of two key structural features of these indexes. First, as I elaborate below, the intermixing of continuous financial monitoring and ordinal sustainability ranking can undermine the capacity of the indexes to change corporate behavior. Second, the governance structure of the indexes does not provide sufficient participatory opportunities for civic players. This democratic deficit could give corporations undue influence over the way in which the indexes function.

1. The Tension Generated by Intermixing Financial Tracking and Sustainability Ranking

The way in which FTSE4Good and DJSI combine financial monitoring and sustainability ranking generates a problematic mismatch. The indexes present themselves as being driven by a logic of sustainability, reflected in the criteria through which they evaluate firms.¹⁸² But once their composition is determined through that very logic, they are marketed as financial instruments that track the value of the shares of listed firms.¹⁸³ The indexes do not provide quantified data on the sustainability performance of listed firms after they join the club.¹⁸⁴ The

182. See *supra* notes 143–49 and accompanying text.

183. *DJSI Family Overview*, *supra* note 29 (“The family tracks the stock performance of the world’s leading companies.”); *FTSE4Good Index Series Factsheet*, FTSE (Oct. 30, 2015), <http://www.ftse.com/Analytics/FactSheets/Home/DownloadSingleIssue?openfile=open&issueName=4GL1> (“The indexes are calculated based on price and total return methodologies, both real time and end-of-day.”).

184. ROBECOSAM, CSA METHODOLOGY, *supra* note 55, at 21–22 (noting that CSA scores are only used in-house for RobecoSAM and parent Robeco’s “asset management offering[s] and sustainability benchmarking activities,” and other internal product and analysis uses). FTSE does some limited release of their company specific sustainability ratings for investors or analysts that license the sustainability ratings for use in constructing their own actively managed funds or investment analysis. *FTSE ESG Ratings*, *supra* note 32.

result is problematic because sustainability-conscious firms are being judged, even within the institutional framework of sustainability indexes, according to their financial success rather than sustainability scores.

The intermixing of ordinal sustainability ranking (which is being determined in yearly intervals¹⁸⁵) and quantitative measurement of financial performance (determined on a daily basis¹⁸⁶) can undermine the capacity of these indexes to facilitate pro-sustainability changes. First, the fact that firms are being continuously monitored with respect to their share values (financial performance), but not with respect to their sustainability performance, conveys the message that financial performance continues to be more valuable even within the green setting of sustainability indexes. Such interpretation is reinforced by the institutional emphasis sustainability indexes place on the financial performance of the indexes, as discussed below. This interpretative result is inconsistent with the indexes' attempt to present themselves as champions of sustainability.

Second, the asymmetric reporting structure of the indexes can facilitate greenwash behavior. Whereas listed firms can present themselves as sustainable because of the ordinal-binary nature of the indexes' ranking procedure, the indexes do not provide the necessary data that could allow external observers to scrutinize the sustainability performance of the firms (or, consequently, the indexes' aggregate sustainability performance).¹⁸⁷ Finally, this informational asymmetry also prevents a much-needed discussion on the trade-offs associated with a shift to a green economy regime because it does not allow external observers to compare firms' sustainability achievements (e.g., cuts in carbon emissions) against related economic sacrifices (e.g., increased operational costs due to the use of green energy).

Below I illustrate this asymmetric reporting structure more vividly. The primary measure of sustainability performance provided by the indexes is of an ordinal-binary nature: a firm is either *part of the index* or *it is not*.¹⁸⁸ Recently both in-

185. DJSI METHODOLOGY, *supra* note 143, at 14.

186. *Id.* at 19.

187. *Cf.* Cho et al., *supra* note 173, at 19–24 (finding that actual environmental performance correlated negatively with being listed in DJSI).

188. For example, the DJSI annual review highlights the largest ten additions and deletions to and from the DJSI World Index. *See* ROBECOSAM, DJSI

dexes have created an additional layer of excellence, which they call “sustainability leaders” (which is again structured as an ordinal-binary measure).¹⁸⁹ The DJSI publishes a list of Industry Group Leaders in each of the twenty-four industrial sectors represented in the DJSI World Index,¹⁹⁰ and FTSE has created a unique index, the FTSE4Good Environmental Leaders Europe 40 Index, which is based on a similar logic and seeks to identify European companies with leading environmental practices.¹⁹¹

Table 1 shows the list of DJSI Industry Group Leaders as of September 2015.

Table 1: List of DJSI Industry Group Leaders (September 2015)¹⁹²

Name	Industry Group	Country
Bayerische Motoren Werke AG	Automobiles & Components	Germany
Westpac Banking Corp	Banks	Australia

2015 REVIEW RESULTS 11 (2015),
[https://web.archive.org/web/20160110200848/http://www.sustainability-indices.com/images/review-presentation-2015.pdf]. The ten largest additions in 2015 include: Bank of America Corp., Telefonica SA, BHP Billiton Ltd., Deutsche Telekom AG, Societe Generale SA, BHP Billiton PLC, Mitsubishi Corp., Vinci SA, GDF Suez, Nomura Holdings Inc. The ten largest deletions in 2015: Cisco Systems Inc., PepsiCo Inc., Royal Bank of Canada, Diageo PLC, ABB Ltd., Canadian Imperial Bank of Commerce, Air Products & Chemicals Inc., Waste Management Inc., Henkel AG & Co. KGaA, Experian PLC. *Id.*

189. DJSI METHODOLOGY, *supra* note 143.

190. See *Industry Group Leaders 2015*, ROBECOSAM (Sept. 2015), [https://web.archive.org/web/20151009130025/http://www.sustainability-indices.com/review/industry-group-leaders-2015.jsp]. Between 2014 and 2015, the industry leaders in sixteen of these twenty-four sectors remained the same, see *Industry Group Leaders 2014*, ROBECOSAM (Sept. 2014), [https://web.archive.org/web/20141008151616/http://www.sustainability-indices.com/review/industry-group-leaders-2014.jsp].

191. The index is constructed by including “all European companies in the FTSE4Good Index Series that have obtained the ‘best practice’ environmental rating of at least four (out of five), ranking them by full market capitalization, and then selecting the top 40.” *FTSE4Good Environmental Leaders Europe 40 Index Factsheet*, FTSE (Oct. 31, 2015), <http://www.ftse.com/Analytics/FactSheets/Home/DownloadSingleIssue?issueName=4ELE>. See Appendix for a list of the Top 10 Constituents of the Europe 40 Index *infra* Table 2.

192. *Industry Group Leaders 2015*, *supra* note 190.

CNH Industrial NV	Capital Goods	United Kingdom
SGS SA	Commercial & Professional Services	Switzerland
LG Electronics Inc	Consumer Durables & Apparel	Republic of Korea
Sodexo	Consumer Services	France
UBS Group AG	Diversified Financials	Switzerland
Thai Oil PCL	Energy	Thailand
METRO AG	Food & Staples Retailing	Germany
Unilever NV	Food, Beverage & Tobacco	Netherlands
Abbott Laboratories	Health Care Equipment & Services	United States
Kao Corp	Household & Personal Products	Japan
Swiss Re AG	Insurance	Switzerland
Akzo Nobel NV	Materials	Netherlands
Telenet Group Holding NV	Media	Belgium
Roche Holding AG	Pharmaceuticals, Biotechnology & Life Sciences	Switzerland
Stockland	Real Estate	Australia
Lotte Shopping Co Ltd	Retailing	Republic of Korea
Taiwan Semiconductor Manufacturing Co Ltd	Semiconductors & Semiconductor Equipment	Taiwan
Fujitsu Ltd	Software & Services	Japan
Alcatel-Lucent	Technology Hardware & Equipment	France
KT Corp	Telecommunication Services	Republic of Korea
Air France-KLM	Transportation	France
Gas Natural SDG SA	Utilities	Spain

Although the ordinal rankings generated by the indexes provide valuable information on firms' commitment to sustain-

ability, they do not provide any quantified, time-sensitive data on the sustainability performance of the listed firms—even those identified as leaders—or of the sustainability performance of the indexes as a whole.¹⁹³ In contrast, both DJSI and FTSE4Good provide detailed data about the financial performance of each of the indexes included in their index-series by tracking changes in share prices.¹⁹⁴ This data is regularly compared to the performance of non-sustainability indexes.¹⁹⁵ For example, the DJSI World Index quarterly presentations from RobecoSAM are exclusively comprised of financial performance and risk comparisons between the DJSI World Index and a broad market index, the MSCI All Country Index.¹⁹⁶ Factsheets and information on specialized sustainability index products, like the FTSE4Good Environmental Leaders Europe 40 Index, likewise report only market performance and returns against various benchmarks.¹⁹⁷

The evaluative bias that is generated by the indexes' asymmetrical informational structure is also reflected in the academic literature. Dozens of papers have examined the financial performance of ethical financial instruments or of sustainable indexes relative to conventional instruments or indexes, and the financial performance of firms that are considered more sustainable than comparable firms that are less sustainable.¹⁹⁸ But, the informational structure of the indexes does not

193. See *supra* note 187 and accompanying text.

194. *DJSI Family Overview*, *supra* note 29; *FTSE4Good Index Series*, *supra* note 28.

195. See *FTSE4Good Index Series Factsheet*, *supra* note 183 (comparing to various benchmarks); *infra* note 198 and accompanying text.

196. See ROBECOSAM, DOW JONES SUSTAINABILITY INDICES (DJSI): JUNE 2015 (2015), [<https://web.archive.org/web/20151004203149/http://www.sustainability-indices.com/images/quarterly-djsi-presentation-web.pdf>]. For the MSCI All Country Index, see *Market Cap Indexes*, MSCI, <https://www.msci.com/market-cap-weighted-indexes> (last visited Nov. 16, 2015).

197. See *FTSE4Good Environmental Leaders Europe 40 Index Factsheet*, *supra* note 191.

198. E.g., Rob Bauer et al., *The Ethical Mutual Fund Performance Debate: New Evidence from Canada*, 70 J. BUS. ETHICS 111, 113–22 (2007) (comparing Canadian ethical mutual funds to conventional mutual funds and a market index); Yacine Belghitar et al., *Does It Pay to Be Ethical? Evidence from the FTSE4Good*, 47 J. BANKING & FIN. 54, 56–61 (2014) (comparing FTSE4Good indexes to conventional and market indexes); Felipe Arias Fogliano de Souza Cunha & Carlos Patricio Samanez, *Performance Analysis of Sustainable Investments in the Brazilian Stock Market: A Study About the Corporate Sus-*

allow observers to conduct a detailed evaluation of the sustainability performance of listed firms (whether in isolation or vis-à-vis non-listed firms). For such an analysis researchers must turn to external sources.¹⁹⁹

2. Critical Examination of FTSE4Good and DJSI Governance Structure from a Democratic Perspective

The foregoing discussion demonstrates that both FTSE4Good and DJSI possess significant regulatory powers; they cannot be dismissed as mere exercises in cheap talk. However, this understanding raises a different question: how far are these bodies committed to the precepts of democratic governance, and are the legitimation mechanisms they have developed consistent with these precepts?²⁰⁰ The demand for democratization is based on normative and instrumental justifications. From the perspective of democratic theory, the fact that both FTSE4Good and DJSI hold semi-regulatory powers that can affect third parties creates a valid claim for the

tainability Index (ISE), 117 J. BUS. ETHICS 19, 29–35 (2012) (comparing conventional indexes to the Corporate Sustainability Index of the Brazilian Securities, Commodities and Futures Exchange); Renato J. Orsato et al., *Sustainability Indexes: Why Join In? A Study of the 'Corporate Sustainability Index (ISE)' in Brazil*, 96 J. CLEANER PROD. 161, 165–68 (2015) (assessing sixteen studies that compare conventional indexes to the Corporate Sustainability Index of the Brazilian Securities, Commodities and Futures Exchange); Miriam von Wallis & Christian Klein, *Ethical Requirement and Financial Interest: A Literature Review on Socially Responsible Investing*, 8 BUS. RES. (forthcoming 2015) (published online at 11–29) (presenting a meta-analysis of fifty-three studies comparing performance of SRI and conventional investments over the period from 1986 to 2012); see also Heal, *supra* note 154, at 400–02 (comparing studies of SRI performance against conventional funds). The evidence on performance compared to conventional instruments is mixed across these and other studies, and I do not discuss it here.

199. Cf. Daniel Berliner & Aseem Prakash, *The United Nations Global Compact: An Institutional Perspective*, 122 J. BUS. ETHICS 217, 219–21 (2014) (highlighting various information sources and proxies that have been used to assess the effect of CSR regimes); Aseem Prakash, *Responsible Care: An Assessment*, 39 BUS. & SOC'Y 183, 197–98 (2000) (discussing difficulties in testing and verifying sustainability performance from one CSR regime).

200. More generally, on the questions of democracy and legitimacy at the transnational level, see Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25, 37 (2003); Judith G. Kelley & Beth A. Simmons, *The Power of Performance Indicators: Rankings, Ratings and Reactivity in International Relations* 17–20 (2014) (unpublished article), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2451319.

justification of these powers. One type of justification advocated by democratic theory is to subject the exercise of authority to deliberative scrutiny that would reflect the views of the community influenced by the authority in question.²⁰¹ This claim also reflects the current understanding of sustainability as incorporating a commitment to participatory values. For example, *Agenda 21*, a key international document on sustainability, emphasizes in various places the value of democratic processes.²⁰² Similarly, the academic literature on sustainable development has referred to “democracy” or “governance” as the fourth pillar of sustainability.²⁰³ Epistemic justification of a power to regulate based, for example, on the expertise of the regulatory body is usually not considered sufficient.²⁰⁴ This democratic expectation does not rely on instrumental considerations; it holds even if the projected deliberative process does not yield tangible benefits (e.g., improvement in the quality of regulatory standards).

The argument for democratization can also be cast in instrumental fashion. Here the claim is that the absence of democratic processes can adversely affect the capability of the indexes to promote pro-sustainability changes. This potentially negative effect is due, first, to the fact that a governance structure that does not grant sufficient representation to civic voices may give corporations disproportionate influence over the operation of the indexes, thereby weakening their sustainability

201. See Perez, *supra* note 200, at 29 (“The broadening acceptance of the democratic ideal in contemporary (global) society means that the legitimacy of transnational regimes is judged, increasingly, by the nature of the process that led to the regimes’ creation This tendency reflects a widely-shared expectation that the people affected by a certain normative structure should be involved in its design and implementation.” (footnote omitted)).

202. U.N. Conference on Environment and Development, *Agenda 21*, ¶¶ 1.3, 2.6, 3.2, 3.7, 5.12, U.N. Doc. A/CONF.151/26 (Vol. I–III) (Aug. 12, 1992); accord EARTH CHARTER INT’L, THE EARTH CHARTER, at princs. 3, 13 (2012), http://www.earthcharterinaction.org/invent/images/uploads/echarter_english.pdf.

203. See Tom Waas et al., *Sustainable Development: A Bird’s Eye View*, 3 SUSTAINABILITY 1637, 1651 (2011).

204. See Oren Perez, *The Hybrid Legal-Scientific Dynamic of Transnational Scientific Institutions*, 26 EUR. J. INT’L L. 391, 397 (2014) (“Legal authority cannot transform epistemic claims into truths [And] epistemic authority cannot produce binding prescriptions.”).

bite.²⁰⁵ Such corporate influence may be reflected both in the design of the inclusion criteria and in their implementation (e.g., in the engagement process and decisions about delisting).²⁰⁶ Second, in the long term, the democratic deficit in the indexes' structure can undermine their public legitimacy and ultimately the value of their brand to listed firms and their overall efficacy.²⁰⁷

Below I expose in detail the extent of this democratic deficit in both organizations. In particular, I will argue that although DJSI and FTSE4Good have made some effort to open up their decision making process,²⁰⁸ the level of transparency of both schemes and the opportunities they provide for civic participation fall short of what should be expected from organizations with semi-regulatory powers.²⁰⁹ Further, I will argue that in the past four years both DJSI and FTSE4Good seem to have downscaled their commitment to democratic values.²¹⁰

205. See, e.g., Prakash, *supra* note 199, at 184, 197–98 (noting intense distrust from critics of a CSR regime designed and controlled by an industry association and its members).

206. See, e.g., *id.*

207. See, e.g., *id.* (noting an industry association's inability to get buy-in from firms to improve the CSR regime after public criticism).

208. Other transnational regulatory institutions have been engaged with similar efforts. See, e.g., Adi Ayal et al., *Science, Politics and Transnational Regulation: Regulatory Scientific Institutions and the Dilemmas of Hybrid Authority*, 2 TRANSNATIONAL ENVTL. L. 45, 61 (2013) ("ICNIRP has also established an open review process on its guidelines. Since 2009, it has been subjecting all of its exposure guidelines to an open consultation process prior to publication."); Bernstein & Cashore, *supra* note 30, at 353 (noting improvements to incorporate democratic principles in organizations like UNEP, the World Bank, the Global Environmental Facility, the Marine Stewardship Council, and the Forest Stewardship Council).

209. Another legitimation strategy used by DJSI and FTSE4Good to improve their legitimacy is based on an epistemological understanding of authority and seeks to establish DJSI and FTSE4Good as leading experts in the field of ESG evaluation. Clearly, over the past decade the teams behind DJSI and FTSE4Good (which include SAM, and until 2013, Eiris) have developed unique expertise in ESG assessment. However, this kind of epistemological justification is usually not considered sufficient to justify the use of regulatory powers.

210. I draw in that context on the findings of a study I published in 2011, which explored the institutional structures of FTSE4Good and DJSI. In that study I highlighted significant differences between the two indexes. Whereas FTSE4Good had established a relatively robust system of public consultation and representation in its decision-making processes, DJSI seemed to draw exclusively on the epistemic authority of SAM, one of the leading global sus-

Consider first the institutional structure of FTSE4Good. At the end of 2013, FTSE revised the management structure of the indexes, ending its twelve year relationship with Eiris and opting to conduct all ESG evaluation in-house.²¹¹ The new institutional structure of FTSE4Good is set out in four documents: *Index Inclusion Rules for the FTSE4Good Index Series - Version 1.6 June 2015*,²¹² *Ground Rules for the FTSE4Good Index Series - Version 2.3 October 2015*,²¹³ *FTSE Russell ESG Advisory Committee: Terms of Reference - December 2015*,²¹⁴ and *Appeals Against Decisions - Version 1.5 October 2015*.²¹⁵ The new regime reflects a significant watering down of FTSE commitment to democratic values both by strengthening FTSE control over the regime's governing bodies and by avoiding making formal commitments for public participation.²¹⁶

The new regime provides an important role for an independent committee—the FTSE ESG Advisory Committee—which is given oversight authority over the FTSE ESG Ratings.²¹⁷

tainability investment groups, and provided few opportunities for public consultation. Perez, *Ensemble Regulation*, *supra* note 45, at 573–78.

211. *FTSE4Good Ends 12-year Relationship with Eiris*, *supra* note 142.

212. FTSE4GOOD INDEX INCLUSION RULES, *supra* note 143.

213. FTSE4GOOD GROUND RULES, *supra* note 34.

214. FTSE RUSSELL, FTSE RUSSELL ESG ADVISORY COMMITTEE: TERMS OF REFERENCE (2015) [hereinafter FTSE ESG ADVISORY COMMITTEE], [https://web.archive.org/web/20160113172251/http://www.ftse.com/products/downloads/FTSE_Russell_ESG_Advisory_Committee.pdf].

215. FTSE RUSSELL, APPEALS AGAINST DECISIONS (version 1.5, Oct. 2015) [hereinafter FTSE APPEALS AGAINST DECISIONS], [https://web.archive.org/web/20151020053355/http://www.ftse.com/products/downloads/Appeals_Against_Decisions.pdf].

216. I also found no indication or records on the FTSE4Good website that the transition into the new regime was accompanied a public consultation process.

217. FTSE4GOOD INDEX INCLUSION RULES, *supra* note 143, § 2.3 (“The FTSE ESG Ratings also fall under the oversight of an independent committee comprising experts from the investment community, companies, NGOs, unions and academia. They meet regularly to oversee ESG Rating reviews and methodology development.”); The functions of that Committee are set out in two documents: *Ground Rules for the FTSE4Good Index Series* and *ESG Advisory Committee: Terms of Reference*. FTSE4GOOD GROUND RULES, *supra* note 34, §§ 2.1, 2.2, 6.4, 6.5, 7.2 (“To assist in the oversight of the FTSE4Good Index Series FTSE has established the FTSE ESG Advisory Committee The membership of the Committee includes independent investment professionals experienced in environmental, social and governance factors. The Committee is responsible for advising on the content and management of the FTSE4Good Index Inclusion Rules and may also recommend changes to

The responsibilities of the Committee are to:

- Provide guidance on the development of the criteria and the construction of the FTSE ESG ratings and ESG indexes including the FTSE4Good Index Series;
- Comment on the index reviews for the FTSE4Good Index Series;
- Periodically review the Ground Rules and Inclusion Criteria for the FTSE4Good Index Series at the frequency set out in those rules;
- Oversee the sub-groups that FTSE Russell may constitute to provide more detailed feedback on specific components of the methodology;
- Discuss proposed changes, as appropriate, to the Ground Rules and Inclusion Criteria for the FTSE4Good Index Series and make recommendations for changes for subsequent approval by the FTSE Russell Governance Board.²¹⁸

The Committee consists of “senior market practitioners who are representative of appropriate sectors of the investment community, together with other stakeholder representatives with specific ESG expertise.”²¹⁹ But FTSE retains sole authority to decide whom to appoint to the committee.²²⁰ There is not even a process for members of the public to offer their candidacy.²²¹

The current regime differs from the previous one in several key aspects. First, what was then called the Policy Committee under the previous regime had the ultimate authority to approve changes to the constituents of the FTSE4Good universe (that is, any additions to and deletions from the indexes).²²² Under the current regime, the process of deletion or addition has become semi-automatic, determined by the relevant eligibility algorithm, and its *de facto* implementation is in the

those Rules.”); FTSE ESG ADVISORY COMMITTEE, *supra* note 214, § 2 (“The purpose of the Committee is to provide . . . the underlying methodologies of the FTSE ESG ratings and associated index products . . .”).

218. See FTSE ESG ADVISORY COMMITTEE, *supra* note 214, § 3.1.

219. *Id.* § 1.1.

220. See *id.* § 4 (“Appointment to the Committee is by invitation and extended on a personal level to individual market practitioners and other stakeholder representatives.”).

221. See *id.*

222. See SUSTAINABILITY, RATE THE RATERS PHASE FIVE QUESTIONNAIRE FOR READERS: FTSE4GOOD INDEX SERIES 4 (2013), <http://www.sustainability.com/library/attachment/428> (“[A]n independent policy committee makes decisions regarding additions and deletion to the index, and regarding new criteria development.”).

hands of the FTSE team.²²³ Second, appeals against inclusion or deletion decisions are now decided by a new body called the FTSE Jury of Appeal, whose composition differs from that of the Advisory Committee.²²⁴

A further problem with the current regime is that it does not offer a detailed commitment to public consultation in the criteria development process. Under the previous regime, the process consisted of five stages that were overseen by the FTSE4Good Criteria Development Subcommittee:

1. Experts identified issues;
2. Focus groups found or tested “potential criteria that could be used, and to find areas of consensus that different stakeholders (e.g., investors, NGOs, and companies) could all support;”
3. Market consultation was conducted on proposed criteria options;
4. The results of the consultation and recommendations were passed on to the FTSE4Good Policy Committee, which made the final decisions and approved the final criteria;
5. The criteria were implemented in stages.²²⁵

The detailed commitment to public consultation has been abandoned in the current regime.²²⁶ One can find references to this vision in non-binding statements, but this does not seem satisfying.²²⁷

223. See FTSE4GOOD INDEX INCLUSION RULES, *supra* note 143, § 3.4 (“If a constituent of the Index still scores below 2.5 following a 12 month period they will be deleted unless the FTSE ESG Advisory Committee approves a longer period to apply.”).

224. FTSE APPEALS AGAINST DECISIONS, *supra* note 215, § 3 (“The FTSE Russell Jury of Appeal will consist of past or present market practitioners of the most experienced level who are representative of all appropriate sectors of the investment community and who are independent from FTSE Russell at the time of the appeal hearing at which they are present.”). The identity of the members of the Jury was not disclosed on the FTSE website as of fall 2015.

225. FTSE, CRITERIA DEVELOPMENT AND COMPANY ENGAGEMENT PROGRAMME: 2003–2004 REPORT 3 (2004), [https://web.archive.org/web/20130414100044/http://ftse.com/Indices/FTSE4Good_Index_Series/Downloads/FTSE4Good_Company_Engagement_Report.pdf]; FTSE, IMPACT OF NEW CRITERIA & FUTURE DIRECTION: 2004–2005 REPORT 8 (2005), [https://web.archive.org/web/20130414031703/http://ftse.com/Indices/FTSE4Good_Index_Series/Downloads/FTSE4Good_New_Criteria_&Future_Impact_report.pdf].

226. For a detailed description of the previous management structure see Perez, *Ensemble Regulation*, *supra* note 45, at 573–78.

227. FTSE4Good Index Series Factsheet, *supra* note 183 (“Criteria are developed using an extensive market consultation process and are approved by an independent committee of experts. A broad range of stakeholders help shape the criteria, including NGOs, governmental bodies, consultants, academics, the investment community and the corporate sector.”).

How transparent is the current regime? One noticeable change is that “[t]he criteria are based only on publicly available data, and in assessing ESG practice FTSE does not accept data or information privately provided by companies. This improves the credibility of data and enhances transparency across the market.”²²⁸ But except for this improvement over the previous regime, civic observers will find it difficult to understand how FTSE4Good selects its companies and to understand the institutional architecture of the scheme. For example, the membership of the two most important bodies, the Advisory Committee and the FTSE Jury, is not disclosed.²²⁹

The DJSI regime reflects an even less enthusiastic approach to the ideal of civic participation, coupled with an overall lack of transparency.²³⁰ DJSI has eliminated some mechanisms for civic input that were in place four years ago. Currently, under the *Dow Jones Sustainability Indices Methodology - October 2015*, the indexes are governed by the DJSI Index Committee, which consists of an equal number of representatives of S&P Dow Jones Indices and of RobecoSAM,²³¹ currently two representatives of each.²³² The Committee has two primary responsibilities. First, it is responsible

228. FTSE4GOOD INDEX INCLUSION RULES, *supra* note 143, § 2.3.

229. It is possible that the lack of transparency regarding the composition of committees is temporary, and that it is associated with the governance changes and the cessation of relations with Eiris. Under the old regime, a list of committee members was listed on the FTSE website. *See* SUSTAINABILITY, *supra* note 222, at 4–5 (“The list of all committee members and their affiliations are available publicly on the FTSE4Good website The committees are comprised of independent members . . . to ensure impartiality in decision making regarding company inclusion. Approximately half the members are from the investment community and the other half represent a range of expertise drawing from NGO, corporate and union backgrounds. Committee members are chosen carefully to avoid any potential conflict of interest.”); *see, e.g.*, FTSE, FTSE4GOOD POLICY COMMITTEE MEMBERS, [https://web.archive.org/web/20131021174347/http://www.ftse.com/Indices/FTSE4Good_Index_Series/Downloads/CommitteeMembers.pdf].

230. *See* Perez, *Ensemble Regulation*, *supra* note 45, at 576 (“DJSI, has taken a more opaque and less open approach.”).

231. DJSI METHODOLOGY, *supra* note 143, at 20 (“The indices are governed by the DJSI Index Committee consisting of an equal number of S&P Dow Jones Indices and RobecoSAM representatives.”).

232. As of December 2015, the DJSI Index Committee members were David Blitzer, Managing Director, S&P Dow Jones Indices; Christopher Greenwald, Head of SI Research, RobecoSAM AG; Manjit Jus, Head of Sustainability Application & Operations, RobecoSAM AG; Christopher Pretlove, Associate Director, Index Management, S&P Dow Jones Indices. *Corporate Sustainabil-*

for overseeing the management of all changes affecting the DJSI Indices that are related to the Total Sustainability Scores . . . including any additions or deletions of companies . . . arising from (i) a change in the Total Sustainability Score of an existing index constituent; or (ii) either a change in, or a newly created, Total Sustainability Score of a company that, at the time of the decision, is not a constituent of any DJSI index.²³³

Second, it is responsible “for monitoring overall policy guidelines and index methodologies, as well as additions to and deletions from these indices and treatment of corporate actions.”²³⁴ The Committee decides “on all matters relating to methodology, maintenance, constituent selection in accordance with the index rules and index procedures.”²³⁵

Until the end of 2011, the DJSI was governed by two committees.²³⁶ The DJSI World Index Design Committee had similar authority to that of the current DJSI Index Committee.²³⁷ But the DJSI framework included an additional committee, the DJSI Advisory Committee, which was open to external stakeholders and was “composed of independent, third party professionals from the financial sector and corporate sustainability

ity *Assessment*, ROBECOSAM, [https://web.archive.org/web/20151208125620/http://www.sustainability-indices.com/sustainability-assessment/corporate-sustainability-assessment.jsp] (last visited Dec. 8, 2015). In this respect DJSI is more transparent than FTSE4Good.

233. DJSI METHODOLOGY, *supra* note 143, at 20.

234. *Id.*

235. *Id.*

236. *Compare* DOW JONES SUSTAINABILITY INDEXES, DOW JONES SUSTAINABILITY WORLD INDEXES GUIDE 43 (version 10.1, Sept. 2008) [hereinafter DJSI WORLD INDEX GUIDE 2008], [https://web.archive.org/web/20151121221419/http://www.ideaspaz.org/tools/download/47354] (describing the roles of the DJSI World Index Design Committee and the DJSI Advisory Committee in index management), *and* DOW JONES SUSTAINABILITY INDEXES, DOW JONES SUSTAINABILITY WORLD INDEX GUIDE BOOK 40 (version 11.5, Jan. 2011) [hereinafter DJSI WORLD INDEX GUIDE 2011] (on file with author and the Minnesota Journal of Law, Science & Technology) (describing the roles of the DJSI Index Design Committee and the SAM Faculty in index management), *with* ROBECOSAM, DOW JONES SUSTAINABILITY WORLD INDEX GUIDE 36 (version 12.1, Apr. 2013), [https://web.archive.org/web/20130503040827/http://www.sustainability-indices.com/images/djsi-world-guidebook_tcm1071-337244.pdf] (describing only the role of the DJSI Index Design Committee in index management).

237. *Compare* DJSI WORLD INDEX GUIDE 2008, *supra* note 236, at 43, *with* DJSI METHODOLOGY, *supra* note 143.

performance experts.”²³⁸ Its powers and functions were limited, however, to “provide insights into the field of sustainability and investing, give advice on possible implications for sustainability-driven portfolio management and offer input regarding the methodology, marketing as well as product development for the Dow Jones Sustainability Indexes.”²³⁹ By the end of 2010, the DJSI Advisory Committee was replaced by a different body, called SAM Faculty, a move driven by an attempt to create a broad pool of knowledge based on people representing different voices.²⁴⁰ The Faculty was supposed to consist of five to ten members (one of whom was a Dow Jones employee or designee) who could provide a broad range of perspectives on sustainability topics.²⁴¹ SAM Faculty was incorporated into versions of the *DJSI Guide Book* published in November 2010 and January 2011.²⁴² But this idea was quickly abandoned for reasons I could not verify based on public knowledge.²⁴³ The current structure of DJSI index management provides no formal paths for civic participation, whether directly or through representatives.²⁴⁴ In this respect, FTSE4Good offers a more inclusive vision because the FTSE ESG Advisory Committee does include external stakeholders with ESG expertise.

Overall, despite their public influence, neither FTSE4Good nor DJSI provide sufficient opportunities for public involvement or allow meaningful public monitoring.

V. GREENING THE FTSE4GOOD AND DJSI: A MORE SUSTAINABLE VISION OF SUSTAINABILITY INDEXES

To become real champions of green economy, FTSE4Good and DJSI must respond to the two challenges: the intermixing

238. DJSI WORLD INDEX GUIDE 2008, *supra* note 236, at 43.

239. *Id.*

240. DJSI WORLD INDEX GUIDE 2011, *supra* note 236, at 40.

241. *Id.*

242. *Id.*; Perez, *Ensemble Regulation*, *supra* note 45, at 477.

243. I found a single mention of SAM Faculty in the SAM Sustainable Asset Management AG response to the PRI Reporting and Assessment Survey 2011 (response to Q. 57). SUSTAINABLE ASSET MGMT., PRI REPORTING AND ASSESSMENT SURVEY 20 (2011), [http://unpri.org/report11/2011_responses/PRI%202011%20-%20Full%20Responses%20for%20publication%20-%20SAM%20Sustainable%20Asset%20Management%20AG%20\(0017000000N7czw\).pdf](http://unpri.org/report11/2011_responses/PRI%202011%20-%20Full%20Responses%20for%20publication%20-%20SAM%20Sustainable%20Asset%20Management%20AG%20(0017000000N7czw).pdf).

244. See Perez, *Ensemble Regulation*, *supra* note 45, at 576 (“DJSI relies primarily on its inhouse expertise and internal knowledge.”).

of continuous financial monitoring with ordinal sustainability ranking and democratic deficits. Below I suggest ways in which these goals can be achieved.

A. THE “INTERMIXING” CHALLENGE: DEVELOPING NEW SUSTAINABILITY METRICS

Consider first the problem created by the way in which these indexes intermix ordinal sustainability ranking and quantitative measurement of financial performance. This intermingled framework creates a problematic result where sustainability-oriented firms are judged, even within the framework of sustainability indexes, primarily by their financial rather than sustainability scores. To rectify this flaw, the indexes must develop new metrics that provide quantitative measures of the sustainability performance of listed firms and of the index as a whole, and of the manner in which this performance changes over time. There are two key options in which such measurement may be implemented:

(1) Developing objective sustainability indicators that can be used to measure sustainability performance of firms, covering various dimensions of sustainability;

(2) Tracking changes in the overall sustainability scores of the firms based on the indexes’ internal scoring systems.

The first option is based on developing indicators that reflect important facets of firms’ sustainability strategy.²⁴⁵ This option reflects a pluralistic understanding of sustainability, which makes it, I argue, more in line with contemporary thinking about sustainability. A value-pluralistic understanding of sustainability calls for using multiple languages of valuation (which cannot be translated into a single super-scale) in the consideration of firms’ behavior.²⁴⁶ Value pluralism is “the idea

245. This approach assumes that it is not possible to capture sustainability performance using a single indicator (comparable to money). See STIGLITZ ET AL., *supra* note 129, at 73 (rejecting the idea that sustainability can be captured in one number).

246. See Boeraeve Fanny et al., *How (Not) to Perform Ecosystem Service Valuations: Pricing Gorillas in the Mist*, 24 BIODIVERSITY & CONSERVATION 187, 189 (2015) (“[C]onsideration of multiple languages of valuation can be critical to address the wider societal value of ES.” (citations omitted)); see also ERIK GOMEZ-BAGGETHUN ET AL., STATE-OF-THE-ART REPORT ON INTEGRATED VALUATION OF ECOSYSTEM SERVICES 6–7 (2014), http://www.openness-project.eu/sites/default/files/Deliverable%204%201_Integrated-Valuation-Of-Ecosystem-Services.pdf.

that there are multiple values which in principle may be equally correct” and could in various contexts “conflict with each other.”²⁴⁷ Contrary to value monism, value pluralism would argue that these multiple values are not reducible to a single value and their potential conflicts are not governed by some single meta criteria.²⁴⁸

This pluralistic understanding of sustainability has gained wide support over the past decade. The Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES) has recently published a conceptual framework for the valuation of nature that considers a whole range of values from monetary to spiritual and from instrumental to relational.²⁴⁹ A similar pluralistic vision can also be found in the influential 2009 report of the Commission on the Measurement of Economic Performance and Social Performance. After a detailed discussion of various alternatives to GDP, the Commission concluded that measuring sustainability requires multiple measures that include both monetary indexes of sustainability and “a well-chosen set of physical indicators.”²⁵⁰ In the words of the Commission, the “dashboard” we use to assess the performance of the economy (in our context, the firm) should include multiple indicators.²⁵¹ The Commission noted that in order to measure sustainability, we need,

indicators that tell us the sign of the change in the quantities of the different factors that matter for future well-being. Putting the sustainability issue in these terms compels recognition that sustainability requires the simultaneous preservation or increase in several ‘stocks’: quantities and qualities not only of natural resources but also of human, social and physical capital. Any approach that focuses on

247. GOMEZ-BAGGETHUN ET AL., *supra* note 246, at 7.

248. *Id.*; STIGLITZ ET AL., *supra* note 129, at 12 (“Such a system must, of necessity, be plural – because no single measure can summarize something as complex as the well-being of the members of society, our system of measurement must encompass a range of different measures.”).

249. See Intergovernmental Platform on Biodiversity and Ecosystem Services [IPBES], Dec. IPBES-2/4, annex, *Conceptual Framework for the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, ¶¶ 6, 8, 9 (Aug. 26, 2013), http://www.ipbes.net/images/decisions/Decision%20IPBES_2_4.pdf (“Nature contributes to societies through the provision of benefits to people (instrumental and relational values . . .) and has its own intrinsic values, that is, the value inherent to nature, independent of human experience and evaluation and thus beyond the scope of anthropocentric valuation approaches.”).

250. STIGLITZ ET AL., *supra* note 129, at 79.

251. *Id.* at 17, 62–64.

only a part of these items does not offer a comprehensive view of sustainability.²⁵²

What is needed therefore is, “a set of well-chosen *physical* indicators, which would focus on dimensions of environmental sustainability that are either already important or could become so in the future, and that remain difficult to capture in monetary terms.”²⁵³

The approach of the Commission provides a good guideline for a possible revision of the measurement strategy used by the indexes. To facilitate a more sustainability-oriented evaluation of firms’ behavior, sustainability indexes should develop objective measures that cover key aspects, both environmental and social, of corporations’ sustainability profiles. These measures should be reported alongside the conventional indicators that track changes in firms’ share values. Two examples of such potential indicators can illustrate this idea.

The first example focuses on a possible environmental measure: an indicator that tracks carbon emissions. This indicator can serve as a good proxy of the firms’ commitment to the environment.²⁵⁴ The issue of climate change is already heavily emphasized in the inclusion criteria of both FTSE4Good and DJSI.²⁵⁵ The Carbon Disclosure Project (CDP) illustrates how such an indicator can work. CDP seeks “to transform the way the world does business to prevent dangerous climate change and protect our natural resources.”²⁵⁶ CDP holds “the largest collection globally of self reported climate change, water and forest-risk data.”²⁵⁷ One of their products, the *A List: The CDP*

252. *Id.* at 77–78.

253. *Id.* at 79.

254. See U.N. DEPT OF ECON. & SOC. AFFAIRS, INDICATORS OF SUSTAINABLE DEVELOPMENT: GUIDELINES AND METHODOLOGIES, at 12, 60, U.N. Sales No. E.08.II.A.2 (2007), <http://www.un.org/esa/sustdev/natlinfo/indicators/guidelines.pdf> (listing carbon emissions as one of the core indicators of sustainable development).

255. See ROBECOSAM, CSA METHODOLOGY, *supra* note 55, at 9, fig. 4 (listing climate change governance and climate strategy as two out of twelve environmental parameters that also include, among others, bio-diversity, environmental reporting, and water-related risks); *FTSE Group Introduces New Climate Change Criteria to its FTSE4Good Series*, *supra* note 155; *FTSE All-World ex Fossil Fuels Index Series*, FTSE, <http://www.ftse.com/products/indices/ex-fossil-fuels> (last visited Nov. 20, 2015) (providing All-World and North America indexes negatively screened for companies heavily invested in fossil fuels and coal).

256. *Catalyzing Business and Government Action*, *supra* note 53.

257. *Id.*

Climate Performance Leadership Index, lists companies around the world that are doing the most to combat climate change (CPLI Firms).²⁵⁸ In 2014, the list included 187 firms out of 1,971 firms that have responded to CDP's call to provide climate change data.²⁵⁹ CPLI firms differ from their less committed peers by investing more in activities to reduce emissions, by being more effective in reducing their emissions, and by making significantly better progress with their targets for absolute emission reductions.²⁶⁰ The activities of CLPI firms yield annual emissions reductions of nine percent on average per company, while their non-listed peers achieved only six percent.²⁶¹ The A List has "collectively reduced its absolute emissions by 33 million metric tons" in 2013, "with total emissions standing at 693.7 million metric tons."²⁶² Figure 1, based on data provided to the author by CDP, describes changes in the total carbon emissions of CPLI firms.²⁶³ The figure shows a decrease in total emissions over this period (after some increase in 2013).

258. CARBON DISCLOSURE PROJECT, THE A LIST: THE CDP CLIMATE PERFORMANCE LEADERSHIP INDEX 2014, at 6–8 (2014), <https://www.cdp.net/CDPResults/CDP-climate-performance-leadership-index-2014.pdf>.

259. *Id.* at 8.

260. *Id.* at 9.

261. *Id.*

262. *Id.*

263. I would like to thank CDP, in particular Emma Whelan, for providing me these data. The data are also available on the CDP website, although not in the aggregated format provided here. See *Corporate Climate Leaders Revealed*, CDP, <https://www.cdp.net/en-US/Pages/events/2014/cdp-leaders.aspx> (last visited Nov. 20, 2014). The charts report aggregate and average carbon emissions of CPLI firms between 2012 and 2014. The emission data include both Scope 1 (S1) emissions, all greenhouse gas (GHG) emissions "directly from sources that are owned or controlled by the reporting entity," and Scope 2 (S2) emissions, "all indirect greenhouse gas (GHG) emissions from the consumption of purchased electricity, heat, or steam. Indirect GHG emissions are a consequence of the activities of the reporting entity, but occur at sources owned or controlled by another entity." For this distinction, see, CDP, CLIMATE ACTION AND PROFITABILITY: CDP S&P 500 CLIMATE CHANGE REPORT 2014, at 43 (2014), <https://www.cdp.net/CDPResults/CDP-SP500-leaders-report-2014.pdf>. The data for 2014 (and respectively for previous years) reflect data collected in the CDP 2014 cycle. Exact dates for each company vary. For the majority of firms, the 2014 data reflect emissions from January 1, 2013 to December 31, 2013. Some companies may report May 1, 2013 to April 30, 2014. The charts include only reports that contained full information for 2012 to 2014 (eight firms were omitted because of partial information).

Figure 1. CPLI total carbon emissions per year²⁶⁴

I argue that FTSE4Good and DJSI should develop a similar carbon emissions index that tracks the carbon emissions of listed firms in each of their various indexes (on an annual basis). Such an index would provide an important yardstick for evaluating the environmental performance of listed firms and of the index as a whole, which in turn could be compared with the financial performance of the firms and of the index.²⁶⁵ FTSE4Good and DJSI cannot rely exclusively on carbon emissions because such index would capture only one aspect of the firms' sustainability efforts. It is necessary to develop additional indicators that could measure other dimensions of firms' sus-

264. See *Corporate Climate Leaders Revealed*, *supra* note 263.

265. For an attempt to develop indicators to measure the level of efforts on sustainable use of water by companies, see ManMohan S. Sodhi & Ekaterina Yatskovskaya, *Developing a Sustainability Index for Companies' Efforts on Responsible Use of Water*, 63 INT'L J. PRODUCTIVITY PERFORMANCE MGMT. 800 (2014).

tainability performance. For example, an index that tracks the gender diversity of listed firms' corporate boards may be used as a proxy for their sensitivity to gender equality. The issue of board gender diversity has attracted growing research interest in recent years, reflecting a more general concern over underrepresentation of women and female perspectives in corporate decision making and firms' attention to work-life balance and families.²⁶⁶ Such an index could be designed by calculating the percentage of board seats occupied by women at listed firms and how this percentage changes over time. The National Association for Female Executives (NAFE) publishes a report listing the *NAFE Top 50 Companies for Executive Women*, which includes such an indicator.²⁶⁷ At the NAFE Top 50, the percentage of female board members has increased from 23% in 2010, to 27% in 2014, while women comprised only 17% of boards of directors across the Fortune 500 companies in 2014.²⁶⁸

Naturally, a prerequisite for developing such sustainability-tracking measures is that the necessary data would be accessible. The above examples are based on data that satisfy this condition. As noted above, climate change is already part of DJSI and FTSE4Good inclusion criteria, and the case of CDP proves that firms are willing to share data regarding their car-

266. See, e.g., Richard A. Bernardi et al., *Does Female Representation on Boards of Directors Associate with the 'Most Ethical Companies' List?*, 12 CORP. REPUTATION REV. 270 (2009); Kate Grosser & Jeremy Moon, *Gender Mainstreaming and Corporate Social Responsibility: Reporting Workplace Issues*, 62 J. BUS. ETHICS 327 (2005); Susan Adams, *The 10 Best Companies for Women in 2014*, FORBES (Feb. 5, 2014, 10:10 AM), <http://www.forbes.com/sites/susanadams/2014/02/05/the-10-best-companies-for-women-in-2014/>; NAT'L ASS'N FOR FEMALE EXECUTIVES, TOP COMPANIES FOR EXECUTIVE WOMEN 2014 (2014), http://www.wmmsurveys.com/NAFE_ExecutiveSummary_2014.pdf; YALE LAW WOMEN, TOP TEN FAMILY FRIENDLY FIRMS LIST, <http://ylw.common.yale.edu/top-ten-list/> (last visited Nov. 20, 2015) (ranking law firms according to important family friendliness indicators such as billable hour requirements, part-time and flex-time options, parental leave policies, and childcare availability). There is also a significant group of studies that examine the linkage between corporate board gender diversity and stock performance. See, e.g., Kevin Campbell & Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435 (2008); Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809 (2010).

267. NAT'L ASS'N FOR FEMALE EXECUTIVES, *supra* note 266, at 7 (showing changes in women representation on boards of the NAFE Top 50 companies from 2010 to 2014).

268. *Id.* at 7–8.

bon emissions.²⁶⁹ Board membership data is easily accessible and verifiable, but carbon emissions data may not be. A potential obstacle, however, is the cost of producing these additional sustainability measures. FTSE4Good and DJSI may argue that they do not have the means to develop and produce these indexes. There is a simple response to such an argument: link up with third parties that can undertake the task.²⁷⁰ Further, because the development of these additional measures serves a public goal there is strong justification for providing some public subsidy for them.

A second way in which FTSE4Good and DJSI could track the sustainability performance of listed firms is by drawing upon their internal scoring frameworks. Consider, for example, the new FTSE4Good scoring system. According to this system, “[e]ach company in the research universe is given a FTSE ESG Rating ranging from 0 to 5.”²⁷¹ Companies with an FTSE ESG Rating of 3.3 and above are added to the index.²⁷² “Constituents of the FTSE4Good Index with an ESG Rating below 2.5 are at risk of deletion from the FTSE4Good Index.”²⁷³ FTSE can produce a parallel index that would track changes in the average scores of the firms that pass the eligibility threshold.²⁷⁴ This could give a good indication of the average sustainability performance of listed firms.

There are several difficulties with this approach, which make it less attractive from a policy perspective. First, this option uses the indexes’ internal scoring system as a kind of super-scale, which can incorporate all the divergent information on the firm’s sustainability performance. This view is inconsistent with a value-pluralistic understanding of sustainability. Second, because this approach is based on the indexes’ internal scoring system, it is highly opaque. External observers will not receive information about the firms’ actual sustainability per-

269. See *supra* notes 255–63 and accompanying text.

270. For example, the Carbon Disclosure Project.

271. FTSE4GOOD INDEX INCLUSION RULES, *supra* note 143, § 3.2.

272. *Id.*

273. *Id.* § 3.4. If a constituent of the Index scores below 2.5 following a 12 month period, it is deleted unless the FTSE4Good Committee approves an extension. *Id.*

274. A similar index can be produced based on the DJSI scoring system, concerning data obtained from the constituent firms of various DJSI indexes. For the DJSI scoring system, see ROBECOSAM, CSA METHODOLOGY, *supra* note 55, at 5–6.

formance in various domains. A final difficulty with this approach is that if the scoring criteria are frequently changed, it will be hard to get a good picture of changes in firms' sustainability performance drawing solely on the indexes internal scoring system.

Developing a more complex dashboard that would present quantified sustainability indicators alongside data on share performance is critical for enabling a public debate about the difficult trade-offs underlying a shift into a more sustainable economy. The potential trade-offs between profits and environmental quality, or between profits and potential improvements to the lives of people with disabilities can only be appreciated if we establish a more symmetrical informational setting. Creating a more balanced informational setting does not solve, however, the decision-making challenge created by conflicts between intrinsic values (the incommensurability dilemma).²⁷⁵ The framework I propose explicitly rejects the idea that such conflicts can be resolved through some meta criteria or super-scale. Further, if society continues to discount the non-financial achievements of firms because it does not recognize the alternative values underlying these achievements, disclosing this data in quantified form would not change much. Nonetheless, enabling an informationally balanced debate about these trade-offs is a necessary step in a potential shift to a green economy regime.²⁷⁶

Another implication of this argument is a deeper commitment to transparency, at least with respect to the raw data on

275. Elinor Mason, *Value Pluralism*, STAN. ENCYCLOPEDIA PHIL. (July 29, 2011), <http://plato.stanford.edu/entries/value-pluralism/> (stating incommensurability occurs when there is "no common measure which can be used to compare two different values").

276. A dominant philosophical approach, going back to Aristotle, to resolving conflicts between intrinsic values is practical wisdom. Practical wisdom solves problems of incommensurability without reasoning from general principles, but rather with a faculty of judgment. *See id.* In a short piece from 1994, Isaiah Berlin and Bernard Williams note in this context that there is no mechanical procedure for deciding which conflict between values could be resolved by appeal to general priority rules and which should be left to judgments of importance. In general, they argue "practical decision could not in principle be made completely algorithmic, and that a conception of practical reason which aims at an algorithmic ideal must be mistaken." Isaiah Berlin & Bernard Williams, *Pluralism and Liberalism: A Reply*, 42 POL'Y STUD. 306, 307 (1994).

which the sustainability indicators are based.²⁷⁷ A good example of such an approach is again CDP, which provides free access to all the individual responses provided by the companies, including details on greenhouse gas emissions and water management.²⁷⁸ In contrast, neither DJSI nor FTSE4Good provide free access to their databases. For example, DJSI, which similarly draws on the firms' responses to their specially designed questionnaires, does not provide access to the responses.²⁷⁹

B. THE DEMOCRATIC CHALLENGE: CREATING MORE PARTICIPATORY INDEXES

The second challenge that FTSE4Good and DJSI must deal with concerns their democratic deficit. Both FTSE4Good and DJSI insist that their schemes have significant steering power and that they can positively influence the sustainability performance of companies through their inclusion criteria and their engagement programs.²⁸⁰ They are therefore subject to stricter legitimacy claims. It seems, however, that whereas both institutions are happy to embrace the steering aspect of the equation, they refuse to accept its democratic aspect. In the past four years, there has been no attempt by either organization to develop new models that would grant civic society agents a meaningful voice in their governance structure.²⁸¹ Indeed, some of the mechanisms that were in place a few years

277. For a similar approach to transparency, see *Principles, GLOBAL INITIATIVE FOR SUSTAINABILITY RATINGS*, <http://ratesustainability.org/standards/principles/> (last visited Oct. 12, 2015).

278. See *Search Company & City Responses*, CDP, <https://www.cdp.net/en-US/Results/Pages/responses.aspx> (last visited Nov. 19, 2015). Free access is granted to the raw data through the search agent on the CDP portal. Access to the full database, for more sophisticated statistical analysis, is restricted and requires some fees. This model seems to strike a reasonable balance between the need to provide transparency and the need to protect CDP's property rights on the data.

279. DJSI provides access only to a sample questionnaire. *Questionnaire 1, ROBECOSAM*, <http://www.robecosam.com/images/sample-questionnaire-1.pdf> (last visited Oct. 12, 2015); *RobecoSAM Corporate Sustainability Assessment*, ROBECOSAM, <http://www.robecosam.com/en/sustainability-insights/about-sustainability/robecosam-corporate-sustainability-assessment.jsp>.

280. See FTSE, *supra* note 164, at 9 ("FTSE4Good has made a significant and measurable impact on the behavior of companies worldwide."); SAM & PRICEWATERHOUSECOOPERS, *supra* note 171, at 22 ("[O]ur ongoing efforts has been tremendous in terms of improving the sustainability performance of large corporations across the world.").

281. See *supra* notes 210–44 and accompanying text.

ago have been phased out. There is also a significant lack of transparency in the way both DJSI and FTSE4Good operate. Admittedly, when considering the models of civic participation and more extensive disclosure practices, we should take into account the specific features of both schemes and the need to protect the commercial interests of the index owners and of the listed firms alike. However, it is clear that more can be done, even if we consider these constraints. There are various ways in which DJSI and FTSE4Good could provide more significant participation opportunities to civic society players, either by designing more inclusive advisory bodies or by committing to periodic consultation processes.²⁸² Indeed, global environmental organizations, such as the GRI, Social Accountability International, and the newly established Equator Principles Association, have developed progressive consultation and deliberative schemes as well as far-reaching transparency mechanisms.²⁸³ FTSE and DJSI can follow those examples in developing structures that fit their unique needs.

A good example of a sustainability index based on a more inclusive governance structure can be found in the Israeli Maala CSR index.²⁸⁴ Maala is the leading CSR organization in Israel.²⁸⁵ It is an umbrella organization comprising some 130 of the largest companies in the country.²⁸⁶ Since its establishment in 1998, its goal has been to promote CSR in Israel. Maala is

282. My recommendations are consistent with the Global Initiative for Sustainability Ratings (GISR) new Sustainability Ratings Standard which calls for greater inclusiveness in the design and implementation of sustainability rankings. *Principles*, *supra* note 277.

283. See *GRI's Governance Bodies*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/network/network-structure/governance-bodies/Pages/default.aspx> (last visited Oct. 12, 2015); *SA8000:2014 Revision Process*, SOC. ACCT. INT'L, <http://www.saintl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1546> (last visited Oct. 12, 2015); *The Equator Principles Working Groups*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/about-the-equator-principles/52-best-practice-resources-and-links/35> (last visited Oct. 12, 2015). Further examples are discussed in Oren Perez, *Open Government, Technological Innovation and the Politics of Democratic Disillusionment: (E-)Democracy from Soc-rates to Obama*, 9 I/S: J. L. & POL'Y INFO. SOC'Y 61 passim (2013).

284. See *CSR Index 2015*, *supra* note 31.

285. See *id.* I also held a background discussion with Momo Mahadav, President of Maala, the Israeli CSR Index, on October 6, 2014.

286. About us, MAALA, <http://www.maala.org.il/en/%D7%90%D7%95%D7%93%D7%95%D7%AA-%D7%9E%D7%A2%D7%9C%D7%94/> (last visited, Oct. 12, 2015).

part of “a global network of organizations that promote corporate responsibility, including BSR, CSR 360, and the U.N. Global Compact.”²⁸⁷ Since 2003, Maala has produced the annual Maala Index, which ranks both publicly traded and privately held Israeli companies based on CSR criteria.²⁸⁸ Companies are evaluated based on their performance in six principal areas: “environment, business ethics, human rights and work environment, community involvement, corporate governance and social and environmental reporting.”²⁸⁹ The Tel-Aviv Maala SRI index is published on the Tel-Aviv Stock Exchange (TASE) and allows investors with ethical orientation to invest in it through a tracking fund.²⁹⁰

Maala has established an elaborate process of public consultation that is significantly more inclusive than the governance structures of both FTSE4Good and DJSI. First, the criteria by which firms are evaluated must be approved by a public advisory committee that includes thirty-one members.²⁹¹ Eleven members come from the firms participating in the ranking process, and the remaining twenty from diverse backgrounds, including academia, non-government organizations, investment firms, and TASE.²⁹² In addition to this permanent body, Maala has developed a structured consultation process for the revision of the evaluation criteria, which takes place bi-annually.²⁹³ The process consists of the following key steps:²⁹⁴

- A public discussion of the Maala CSR ranking;

287. *Id.*

288. *Id.*

289. *About Maala Index*, MAALA, <http://www.maala.org.il/en/about-maala-index/> (last visited Oct. 23, 2015).

290. *See Additional Indices*, TEL-AVIV STOCK EXCHANGE, <http://www.tase.co.il/Eng/MarketData/Indices/Additional/Pages/IndexMainDataAdditional.aspx> (last visited Oct. 23, 2015).

291. I have been a member of the public committee almost since its establishment.

292. *The Public Committee*, MAALA, <http://www.maala.org.il/en/the-public-committee/> (last visited Oct. 23, 2015) (giving the full list of committee members).

293. *Changes in the 2012 Questionnaire*, MAALA, <http://www.maala.org.il/en/changes-in-the-2012-questionnaire/> (last visited Oct. 23, 2015).

294. The reference here is to the first revision cycle, which took place in 2012–2013.

- Publication of a call for comments on the ranking and the evaluation criteria (the full criteria are available on the Maala website²⁹⁵);
- Meeting of all the sub-committees of the public advisory committee to discuss the criteria and examine the public comments received;
- Publication of a draft of the revised criteria, to elicit comments;
- Concluding discussion in the public advisory committee and final approval of the new criteria.

IV. CONCLUSIONS: SUSTAINABILITY INDEXES – GREEN ECONOMY OR GREENWASH?

The main challenge of green economy is not necessarily to identify an optimal middle way between the demands of sustainability and economic growth. Rather, it is to provide a framework in which the difficult trade-offs that must be addressed—if the global society adopts a genuine strategy of sustainable growth—can be openly discussed and given an equal normative standing. Achieving such informational symmetry would be a first step in the path toward sustainable development.

This general challenge has practical consequences for FTSE4Good and DJSI. They need to decide whether they are willing to challenge some of the traditional practices of the financial system by experimenting with new ESG metrics and novel models of participation. But given the systemic constraints imposed on sustainability indexes by the global economic system, such radical steps would require regulatory courage that is quite rare in the current political-economic environment.²⁹⁶

295. See *2014 Maala Index*, MAALA, <http://www.maala.org.il/wp-content/uploads/2014/06/new-qri-14151.pdf> (last visited, Oct. 12, 2015).

296. See Oren Perez, *Courage, Regulatory Responsibility, and the Challenge of Higher-Order Reflexivity*, 8 REG. & GOVERNANCE 203, 205 (2014).

APPENDIX

Table 2: Top 10 Constituents - FTSE4Good Environmental Leaders Europe 40 Index (October 30 2015)²⁹⁷

Constituent	ICB Sector	Country
Nestle	Food Producers	Switzerland
Novartis (REGD)	Pharmaceuticals & Biotechnology	Switzerland
Roche Hldgs (GENUS)	Pharmaceuticals & Biotechnology	Switzerland
HSBC Hldgs	Banks	UK
Sanofi	Pharmaceuticals & Biotechnology	France
Bayer AG	Chemicals	Germany
GlaxoSmithKline	Pharmaceuticals & Biotechnology	UK
Royal Dutch Shell A	Oil & Gas Producers	UK
Vodafone Group	Mobile Telecommunications	UK
AstraZeneca	Pharmaceuticals & Biotechnology	UK

297. *FTSE4Good Environmental Leaders Europe 40 Index Factsheet*, *supra* note 191.