

# Corporate Social Responsibility: Towards a New Market-Embedded Morality?

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*Recent years have seen abundant literature, in law and the social sciences, addressing the significance of "soft law," "self-regulation," and "private law-making" and analyzing the potential implications of "governance" in general for the trajectory of law. This Article is grounded in and oriented towards this broad theoretical and conceptual terrain by pointing at empirical phenomena that mark a shift towards market-embedded forms of social regulation. I specifically discuss the Equator Principles, a self-regulatory blueprint for overseeing the social and environmental performance of project-finance initiatives. I argue for an understanding of the process in terms of a general moralization of markets, in and of itself a product of neo-liberal conceptions of governance. I posit that one implication of this process is that socially-oriented norm-making and norm-enforcement merge with the instrumental and utilitarian logic of markets.*

## INTRODUCTION

The regulation of market actors with respect to the socio-political impact of their practices is not a matter for governments alone (whether at the local, regional, national or international level). There is a rich literature in the social and political sciences that conceptually transcends the tendency to exclusively associate the public sphere with socio-political authority,

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the private sphere with economic exchange.<sup>1</sup> This literature shifts attention from state apparatuses to non-state actors, emphasizing their role in creating, establishing, and spreading various forms of authority that only indirectly, if at all, rely on the enforcement powers of the state. Private authorities are conceptualized as strategic actors (e.g., commercial associations, civic non-profit organizations, corporations and global accountancy agencies, standard setting and rating firms) that adopt, use and activate non-state forms of legality in general and various instruments of regulation in particular. Indeed, non-state, private, and self-regulation of various aspects of production and exchange have always been part of commercial life. It seems, however, that private forms of social regulation — namely regulating the market to act in accordance with socially accepted standards — have been rapidly expanding in recent years, precisely at a time when the economization of social life in general has also reached unprecedented levels.

As the analytical gaze shifts from state to non-state forms of authority, research tells of "the relocation of regulatory functions from public to private authorities."<sup>2</sup> This process of relocation has profound sociological implications. One of its remarkable features is that an intense interest in ethics and morality has mushroomed alongside the triumphant ascendance of market rationality as a general principle for conducting social relations. On the one hand, local, national and transnational authorities increasingly follow the logic of "economic sustainability" and operate in a corporate-like fashion. Public policy is readjusted to fit cost-benefit principles, and both state and non-state institutions in fields such as health, education, security, and welfare are embedded in a competitive environment where the laws of economics reign. Authority itself is being privatized, transforming rules in general and public policies in particular into commodities that are produced, distributed, and consumed by a host of agencies, enterprises, and non-profit organizations.

On the other hand, business schools have brought courses in business ethics back to center-stage, engaging issues such as corporate social responsibility and corporate citizenship; conferences are being held — bringing together academics, business executives and activists — where codes of business conduct are deployed, traded, and adopted; scholarship abounds. Organizational theorists, regulation experts, business management

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- 1 THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002); VIRGINIA HAUFER, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY (2001); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (Claire A. Cutler et al. eds., 1999).
  - 2 SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 91-112 (1996).

researchers, economists, philosophers and legal scholars are all theorizing about the moral agency of corporations and the socio-moral obligations of market entities. And corporations are creating new executive positions to deal with issues of moral responsibility, hiring business-ethics consultants, and installing internal compliance systems to enhance a "value-oriented" culture both within the firm and in relation to its multiple stakeholders. A structural coupling is in the making, an episodic example of which may be found in the catalogue of the Harvard Business School. The school offers a Social Enterprise Initiative program, informing prospective candidates that "today's non profit institutions are more like businesses than ever before," and at the same time its Executive MBA program includes a course entitled "The Moral Leader." The business school, in short, offers studies that extend the corporate form to new institutional domains even as they groom the ethical self which the successful business executive is now required to possess, or so it is assumed.

The moralization of economic action that goes together with the economization of social action has a critical potential. Market players are being called upon to perform tasks that were once considered to reside within the civic domain of moral entrepreneurship and the political domain of the caring welfare state. Commercial enterprises are increasingly expected to proactively prevent harms previously treated (in economic theory and in practice) as "externalities" for which they were not accountable. And corporations are hard-pressed to dispense social goods other than profits to constituencies other than their shareholders. In short, the moralization of markets may compromise a core element of the logic of markets, namely the drive for financial gains.

The purpose of this Article, then, is to explore the relationship between economization and moralization. The guiding question, accordingly, is how and why does the moralization of markets proceed? I shall propose the thesis that the discourse and practice of business and morality is a product of the neo-liberal project of dissolving the epistemological distinction between market and society. The greater the drive to embed society in the market, the more socio-moral questions — traditionally the concerns of civic groups, liberal-democratic parliaments, trade unions and political parties — become reframed from within the market. I shall also argue, however, that the critical potential of this seemingly dialectical process is systematically skewed so as to fit the rationality of the market. In this sense, to use Boa Santos' term, we are dealing here with "a false synthesis" between economy and morality,<sup>3</sup>

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3 LAW AND COUNTER-HEGEMONIC GLOBALIZATION: TOWARDS A COSMOPOLITAN

one that further consolidates, rather than undermines, the neo-liberal social order.

In the first Part of the Article I analyze the notion of "governance" as a product of the neo-liberal matrix of power. I argue that governance allows for a multiplicity of sources of authority that deploy the logic of competitive market relations both intrinsically and in their relations to each other. In the second Part of the Article I discuss the practical disposition that sets the elements of authority in motion. Specifically, I suggest that a process of responsabilization underlies these practices, thereby at once assuming and constructing individual and institutional moral agencies that are able to act responsibly. In the third Part of the Article I discuss the consequences of the dialectical process, whereby the restructuring of authority as a market of authorities also requires market entities to assume the moral duties that were once assigned to civil society and governmental entities. I specifically introduce the Equator Principles, a voluntarily-adopted set of principles and guidelines endorsed by private financial institutions as a means of ensuring both their own social and environmental performance and the performance of their corporate borrowers. I conclude that the moralization of markets has become a constitutive part of the neo-liberal project, one which not only neatly fits the neo-liberal principle of self-regulation but, moreover, essentially grounds the very notion of moral duty within the rationality of the market.

## I. THE EPISTEMOLOGICAL FOUNDATIONS OF GOVERNANCE

Capitalism, in its modern rational-systematic form, was born out of the separation of the business enterprise from the household.<sup>4</sup> This separation, a slow process that only fully matured at the beginning of the 19th century, was at once institutional and epistemological. The very notion of "the market" and the concept of "the economy" as signifiers of distinct spheres of social reality are modern social constructs.<sup>5</sup> The ability to imagine business as a distinct sphere

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LEGALITY (Boaventura de Sousa Santos & Cesar Rodriguez-Garavito eds., 2005).

4 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (Univ. of Cal. Press 1978) (1914).

5 MARIEKE DE GOEDE, *VIRTUE, FORTUNE AND FAITH: A GENEALOGY OF FINANCE* (2005); *THE SOCIOLOGY OF FINANCIAL MARKETS* (Karin Knorr-Cetina & Alex Preda eds., 2006); Peter-Wim Zuidhof, *Dealing with the Market: The Market in the Discourse of Policy Think Tanks in the Netherlands* (Mar. 10, 2006) (paper prepared

of action depended on spatial demarcations, symbolic measures, institution-building, the development of new types of professional expertise and, above all, the establishment of the science of economics. The political economy of Adam Smith, in particular, constructed an economic sphere with its own laws, its own logic of operation, its own conception of the human subject, and an unprecedented freedom to cut itself loose from the complex web of social institutions into which economic relations were heretofore tightly woven.<sup>6</sup> That complex web of social institutions within which economic relations were conducted was also "the effective collective guardian of ethical standards."<sup>7</sup> The invention of the economy as a distinct sphere of human action, therefore, also proclaimed the autonomy of market relations from moral sentiments, most famously articulated in the idea that "it is not on the generosity of the butcher, brewer or baker that we depend for our dinner, but on their self-interest."<sup>8</sup> This does not mean that the market was constituted as devoid of morals. Rather, ethical values such as honesty and moral virtues such as the duty to diligently work at a calling were dis-embedded from their religious and cultural roots and rearticulated in utilitarian terms.<sup>9</sup> Still, the market did gain unprecedented ethical freedom from taking into account socio-moral considerations relating to the generalized harmful consequences of economic action, such as labor exploitation, environmental degradation, social disintegration or cultural decomposition.

However, the political and cultural construction of "the economy" also proclaimed the conceptual affirmation of the "social" as the locus of "non-economic" rationality.<sup>10</sup> Economy and society, market and government, or business and household were all inherently coupled in theory and in action as two distinct yet mutually supportive universes of social action. The business enterprise could claim moral exemption because other social mechanisms, most notably governments, assumed the task of "managing populations and things" according to the logic of welfare and security.<sup>11</sup> It was the "legal/ethical

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for the symposium *Framing the Market: Representations and Evaluations of the Market in the Netherlands*, held in Utrecht).

6 KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944).

7 ZYGMUNT BAUMAN, *SOCIETY UNDER SIEGE* 77 (2002).

8 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 14 (Methuen & Co. 1904) (1776).

9 WEBER, *supra* note 4.

10 JACQUES DONZELOT, *L'INVENTION DU SOCIAL: ESSAI SUR LE DECLIN DES PASSIONS POLITIQUES* (1984).

11 Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87 (Graham Burchell et al. eds., 1991).

wardenship exercised by the nation-state" that secured for the market its social license to operate as an imagined autonomous sphere throughout the second half of the 19th and most of the 20th century.<sup>12</sup> National governments, acting in the name of the public interest and symbolically standing for and representing the collective claims of "society," acted as socio-moral agents by means of market regulation and the direct provision of social services. These means, with varying and often questionable degrees of success, were assumed to somewhat correct, if not balance, the distortions of (ethically) free markets. It was the welfare state, in short, that took on the management, control or elimination of social externalities generated by unregulated and under-regulated economic practices.<sup>13</sup> The political philosophy of liberalism, in its classical form, was concerned with setting limits on the exercise of governmental powers — viewing unwarranted interventions in the market as harmful — yet at the same time affirmed civil society and its political institutions as the realm of moral sentiments.<sup>14</sup>

By contrast, the doctrine and political project advanced by neo-liberalism topples the institutional and epistemological distinction between economy and society.<sup>15</sup> No longer satisfied with conceiving the rationality of the market as a distinct and limited form of social action, it instead posits the rationality of the market as the organizational principle for state and society as a whole. Neo-liberalism, then, actively exports the logic of the market to other social domains, extending a model of economic conduct beyond the economy itself, generalizing it as a principle of action for areas of life hitherto seen as being either outside or even antagonistic to the market.<sup>16</sup> Foucault, in his 1979 lecture on neo-liberal governmentality, concluded that this expansion of the economic form to the social sphere elides any difference between the economic and the social. The economy is no longer imagined as one domain among many but is redefined so as to encode the social sphere as a specific instance of the economic domain.<sup>17</sup>

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12 BAUMAN, *supra* note 7, at 78.

13 POLANYI, *supra* note 6; RONNIE D. LIPSCHUTZ WITH JAMES K. ROWE, GLOBALIZATION, GOVERNMENTALITY AND GLOBAL POLITICS: REGULATION FOR THE REST OF US? (2005).

14 John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order*, 36 INT'L ORG. 379 (1982).

15 DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

16 Graham Burchell, *Liberal Government and Techniques of the Self*, 22 ECON. & SOC'Y 267 (1993).

17 Thomas Lemke, *The Birth of "Bio-Politics": Michel Foucault's Lecture at the Collège de France on Neo-Liberal Governmentality*, 30 ECON. & SOC'Y 190 (2001).

The economization of the social has had profound effects on governmental modes of action and on prevailing notions concerning the distribution of authority, evinced most clearly in the widespread discursive and practical use of "governance" as an ordering, policing, and caring rationality. First, governance appears as a substitute for the by now widely discredited top-down command-and-control form of authority that had been previously exercised by centralized governments. Through schemes of governance, governments relinquish some of their privileged authoritative positions and are reconfigured as one source of authority among many, in fact re-conceptualized as if they operate within a horizontal "*market of authorities*," placing governments on a par with private sources of authority and changing their function from regulators to "facilitators." Accordingly, governance is premised on facilitating "private" forms of authority: corporations, trade and technical-professional associations, accountancy and credit rating agencies, and standard-setting organizations are all increasingly assuming regulatory roles and intensively experimenting with novel forms of legality.<sup>18</sup>

Second, the economization of authority works by adapting the underlying organizing principle of "public" authorities (i.e., governments) to an imagined field of *competitive market relations*. In this configuration "government itself becomes a sort of enterprise whose task it is to universalize competition and invent market-shaped systems of action for individuals, groups and institutions."<sup>19</sup> Privatization, franchising, outsourcing and deregulation can all be conceived as governmental drives to distribute authority to numerous state and non-state units that assume the economic enterprise form, follow the principles of economic sustainability and cost-benefit risk-management, and adhere to standards of performance that fulfil the market criteria of competitiveness.<sup>20</sup> Consequently, both state and non-state institutions in fields such as health, education, security, and welfare are

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18 Dan Danielsen, *Corporate Power and Global Order*, in INTERNATIONAL LAW AND ITS OTHERS 85 (Anne Orford ed., 2006); SASSEN, *supra* note 2; LAW AND COUNTER-HEGEMONIC GLOBALIZATION: TOWARDS A COSMOPOLITAN LEGALITY, *supra* note 3.

19 Lemke, *supra* note 17, at 197.

20 Burchell, *supra* note 16; David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. CRIMINOLOGY 445 (1996); Pat O'Malley, *Risk and Responsibility*, in FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALITIES OF GOVERNMENT 189 (Andrew Barry et al. eds., 1996).

transfigured and made to act as if embedded in a competitive environment where the laws of economics reign.<sup>21</sup>

Third, the conventional means through which authority is deployed, namely state laws, rules and regulations, are partially replaced by a variety of "guidelines," "principles," "codes of conduct" and "standards" that do not necessarily enjoy the coercive backing of the state. Rather, the means of authority, as well as the means of producing these means, are treated as commodities that are produced, distributed, exchanged, negotiated, and ultimately consumed by the host of state and inter-state agencies, commercial enterprises, and non-profit organizations that comprise the "market of authorities." Law becomes a shared problem-solving process — coded by notions such as "multi-party cooperation," "constructive dialogue," "multi-stakeholder consultation," "task sharing," and "democratic participation" — rather than a coercive ordering activity. Consequently, governance facilitates creative, flexible and efficient "best practice" solutions that leave "the greatest possible amount of control in the hands of those closest to the problems."<sup>22</sup> The governance mode thus expansively allows for private and self-regulative practices that are based on principles of "diversification" and "increased competition" as an alternative to the old model of top-down, one-size-fits-all, coercive regulation. At the same time, state regulation increasingly relies on notions of reflexive regulation and meta-regulation whereby coercive law becomes, at best, a means of last resort.<sup>23</sup>

Yet governance is not only about multiplying and diversifying sources of authority so as to simulate a "market." The economization of political authority also entails an element of moralization in that it relies on predisposing all social actors to assume responsibility for their actions. This process of responsabilization, in turn, is the focus of the next Part of this Article.

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21 SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996); MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1997).

22 Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 362 (2004).

23 Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility?*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* (Doreen McBarnet et al. eds., 2007).



## II. THE PRAXIS OF GOVERNANCE: RESPONSIBILIZATION

Responsibilization — namely expecting and assuming various social actors to have reflexive moral capacities — is the practical link that connects the ideal-typical scheme of governance with actual practices on the ground. The language of responsibility has become a pervasive element of our culture, flowing in many directions and addressing a variety of subjects. Examples abound. In her study of non-governmental organizations that train women to become self-employed hairdressers or pastry-makers, Lucy Taylor shows that such NGOs must assume an enterprise form (i.e., a business) in relation to external actors such as funding bodies and state units, demonstrating their efficiency, probity, and financial soundness, and fulfilling the market criteria of competitiveness by tendering for projects or funds.<sup>24</sup> Once responsabilized by such external actors, these NGOs in turn are in the business of responsabilizing their "customers" by preparing them to adjust to the harsh realities of the free market. Such NGOs, in other words, have both been responsabilized and in turn have responsabilized their customers to adopt entrepreneurial dispositions.<sup>25</sup>

In another context, sociologist Luc Boltanski has identified the responsabilization drive in the workplace. Studying managerial texts, Boltanski traces the construction of employees as autonomous entrepreneurs who are fully responsible for the further perfection of their human capital and its appropriate investment. Consequently, a successful career awaits the creative and innovative person who has been responsabilized to nurture his or her own "employability" on the basis of his or her entrepreneurial and networking skills.<sup>26</sup>

Welfare programs in various countries, adopting the American model known as the "Wisconsin Plan," are also based on a logic that links welfare entitlements to a demonstration of recipients' responsibility. Thus for example the experimental Israeli welfare plan stipulates that the purpose of the plan is to promote the integration of welfare recipients into the labor market by enhancing their earning capabilities, expecting them to share responsibility for said enhancement, in order to facilitate their transition from dependency to social and economic independence.

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24 Lucy Taylor, *Globalization and Civil Society — Continuities, Ambiguities and Realities in Latin America*, 7 *IND. J. GLOBAL LEGAL STUD.* 269, 288 (1999).

25 Akhil Gupta & James Ferguson, *Spatializing States: Governmentality in Africa and India*, 29 *AM. ETHNOLOGIST* 981 (2002).

26 LUC BOLTANSKI & EVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM* (2006).

Criminologist David Garland has noted responsabilizing tendencies in the contemporary governance of crime. The responsabilization strategy involves a governmental policy of dealing with crime not through state agencies (e.g., police, courts, prisons, and social work) but by responsabilizing non-state actors to act "appropriately." Using notions such as "partnerships," the government seeks to "activate communities" and to create "active citizens" to whom responsibility for the prevention of crime may be devolved.<sup>27</sup> Shifts of responsibility from the state to the private sector are also taking place in areas such as pensions, welfare, and healthcare.<sup>28</sup>

Noting and analyzing these shifts, Lemke gives a lucid account of the Foucauldian analysis of neo-liberal governmentality as a new governmental technique for controlling individuals by responsabilizing them to self-manage and self-regulate social risks (e.g., illness, unemployment, poverty).<sup>29</sup> However this governmental technique is being applied not only towards individuals but also towards those associations, institutions and other "stakeholders" that comprise the terrain of governance. Both at the individual and institutional levels, responsabilization is fundamentally premised on the construction of moral agency as a necessary ontological condition for shifting the regulatory capacities of government to individuals and non-state entities. Responsibility in general — in contrast to mere compliance with and willing observance of rules and norms — presupposes one's care for one's duties and one's non-coercive application of certain values as a root motivation for action.<sup>30</sup> Neo-liberal responsabilization, directed at both individuals and institutions, is unique in that it assumes a moral agency which is congruent with the attributed traits of economic-rational actors as autonomous, self-determined, self-sustained, entrepreneurial subjects

whose moral quality is based on the fact that they rationally assess the costs and benefits of a certain act as opposed to other alternative acts. As the choice of options for action is, or so the neo-liberal notion of rationality would have it, the expression of free will on the basis of a self-determined decision, the consequences of the action are borne by the subject alone, who is also solely responsible for them.<sup>31</sup>

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27 Garland, *supra* note 20, at 452.

28 O'Malley, *supra* note 20; Peter Miller & Nikolas Rose, *Governing Economic Life*, 19 *ECON. & SOC'Y* 131 (1990); Jacques Donzelot, *The Mobilization of Society*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY*, *supra* note 11, at 169.

29 Lemke, *supra* note 17.

30 PHILIP SELZNICK, *THE COMMUNITARIAN PERSUASION* (2002).

31 Lemke, *supra* note 17, at 201.

The moral agency assumed by neo-liberal rationality thus retains the distinctive liberal tendency to be concerned with the means of securing individual (or institutional) autonomy, typically represented by the language of "self-care" and "sustainability," and manifested in the political sphere through the idea of "no rights without responsibilities."<sup>32</sup> Moral agency, therefore, does not simply disappear from the neo-liberal landscape. Rather, it becomes embedded in the logic of the market and *deus ex machina* emerges as a foundational element that both enables and legitimizes the neo-liberal matrix of governance.

The central point I wish to make here, however, is that a curious inversion takes place once responsabilization and its underlying project of constructing moral agencies begin to flow in all directions. The very same moral agency that neo-liberalism attributes to and constructs in relation to individuals and civic groups applies, by the very same logic, to market entities as well. Moreover corporations — through the neo-liberal scheme of governance itself — are put on a par with governments. The cumulative effect of these two tendencies is to facilitate both the notion and concrete expectation that market entities will also dispense governmental responsibilities. The shift is further facilitated by the already extant conception of both the body-human and the body-corporate as extensions of the legal subject. Capitalism, therefore, may be humanized, and the dynamism of the market can become a means for the realization of public interests.<sup>33</sup>

The practical results can be seen all around us. Because the generalized socio-moral tasks of government are conceived through the logic of the market as packages of "consumer goods," which must be dispensed by governments according to cost-benefit, risk-management and sustainability principles, the ensuing governmental disposition is to responsabilize market entities to assume some of these tasks. Consumer groups, human-rights advocacy organizations, and poverty-fighting non-governmental organizations have also begun to expect the responsabilization of corporations and to address these powerful market entities with a political vigor once reserved for governments.<sup>34</sup> Theory and research have followed suit, exploring "stakeholder" approaches as a substitute for heretofore hegemonic shareholder-based legal and economic conceptions of the corporation. Ideas about "the moral corporation" and the "market for virtue" are spreading fast,

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32 ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* (1998).

33 *Id.*

34 Rebecca De Winter, *The Anti-Sweatshop Movement: Constructing Corporate Moral Agency in the Global Apparel Industry*, 15 *ETHICS & INT'L AFF.* 99 (2001).

facilitating an active search for a means of securing a "corporate conscience." Selznick's formulation is instructive here:

A corporate conscience is created when values that transcend narrow self-interest are built into the practice and structure of the enterprise. This can be done in several ways; by clarifying policies and making them public; by practicing sensitive recruitment of staff; by inculcating appropriate attitudes and habits; by establishing special units to implement policies affecting the well-being of employees, or environmental and consumer protection; and by cooperating with relevant outside groups, such as trade unions and public agencies. All this becomes an "organisational culture," a framework within which the main goals of the enterprise are pursued. Although self-interest is by no means rejected, the realities of interdependence are accepted, the benefits of belonging acknowledged. Self-interest is moderated and redirected, not forgotten or extinguished.<sup>35</sup>

Searching for ways to construct and sustain a corporate conscience, new theories of regulation explicitly rely on the very same logic that underlies the neo-liberal matrix of governance, in order to allow the state to responsabilize corporations to operate within normatively accepted moral and ethical boundaries. Government "meta-regulation" is one such technique of responsabilization, whereby law becomes a guiding principle rather than a definitive command. Meta-regulatory law works by responsabilizing corporations to internalize social values and make sure these values are "built into the practice and structure of the enterprise."<sup>36</sup>

The set of socio-moral expectations addressed to market entities has globally come to be known, and organized, under the rubric of "corporate social responsibility." The term itself is not new. Rather, it is a formal construct embedded in an institutional specificity. The concept of "corporate social responsibility" was developed in the "libraries and laboratories" of American business schools at least since the 1940s,<sup>37</sup> where it lurked patiently in the wings until the mid-1990s to make its grand entrance, when the language and logic of responsabilization, moral agency, and governance could be invoked in order to address the socio-moral tasks of market entities.

It seems, then, that we have come full circle. The dialectical implication of

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<sup>35</sup> SELZNICK, *supra* note 30, at 101.

<sup>36</sup> Parker, *supra* note 23.

<sup>37</sup> Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268 (1999).

governance-through-responsibilization is that the restructuring of authority as a market of authorities also facilitates the responsabilization of market entities to assume the moral duties of caring and welfare that were once assigned to civil society and governmental entities.<sup>38</sup> In the next Part, I consider one such instance in closer detail.

### III. THE EQUATOR PRINCIPLES: PRIVATE LAW FROM ABOVE

In 2003, a group of banks and investment banks adopted the Equator Principles (hereinafter EP), a set of guidelines, procedures and directives that are designed to assess and manage potential social and environmental risks in the field of "project finance." In 2006, the principles were revised in order to address the concerns of civic organizations and to better adapt to the changing institutional environment. Signatories to the EP declare that they seek

to ensure that the projects we finance are developed in a manner that is socially responsible and reflect sound environmental management practices. . . . We will not provide loans to projects where the borrower will not or is unable to comply with our respective social and environmental policies and procedures that implement the Equator Principles.<sup>39</sup>

Apart from banks and other private financial institutions, two other major institutional actors play a crucial role in the development and revision of the principles: The International Finance Corporation, which is the private investment arm of the World Bank, and Bank Track, an umbrella organization of several NGOs that pressures financial institutions to incorporate social and environmental policies into their core business practices. To date, fifty-one banks — including some of the world's largest — have adopted the principles. Our purpose here is not to analyze the struggles, negotiations, the so-called "collective learning," and the general enabling circumstances that led to their adoption, but to introduce the background logic of the principles and to consider their significance for understanding the trajectory of finance capitalism in general and that of social regulation in particular.

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38 John Roberts, *The Manufacture of Corporate Social Responsibility: Constructing Moral Sensibility*, 10 ORGANIZATION 249 (2003).

39 The "Equator Principles" (July 2006), [http://www.equator-principles.com/documents/Equator\\_Principles.pdf](http://www.equator-principles.com/documents/Equator_Principles.pdf).

In general, the EP are an industry-specific code of conduct which is open to voluntary adoption by financial institutions that wish to do so, typically under actual or potential pressure from consumers, investors, local communities or human rights and environmental NGOs. In this sense, the EP are first and foremost a "reputation risk-management" device, designed to anticipate and prevent social and environmental scandals, public shaming campaigns and damaging lawsuits. However, the EP do not aspire to cover all the financial activities of banks (e.g., loans, investment, underwriting, etc.). Rather, they single out and target one particular area, namely "project finance."

Project finance is the specialty of large international banks, involving loans to large-scale capital-intensive infrastructure projects with high-revenue projections in areas such as telecommunications, transportation, mining, heavy industry, dams, power stations, and the like. Such projects are rarely assumed by single contractors. The typical method for investing in and executing such infrastructure projects is by establishing a separate project company that consists of a consortium of other independent corporations. While banks are involved in many types of lending and financing, project finance is unique in that the lenders base their credit evaluations on the projected revenues of the project rather than on the general assets or the credit of the borrower, as is the case with conventional corporate loans. In other words, project finance is a type of loan which is closely tied to the fortunes of a particular project because the returns on the loan are based on the projected revenues that the investment is expected to yield.

Project finance is considered to be particularly vulnerable to public outcries because it bears directly on social and environmental issues. First, project finance involves infrastructure projects that tend to have a wide-ranging scope of long-term, potentially adverse effects on people and the environment. Second, project finance is widely used in developing countries where regulatory frameworks are often missing or poorly enforced, indigenous and other politically marginalized groups abound, and rapid development is often a prime target of the national government. Consequently, the decision-making process by the corporations involved — either as members of a consortium or as individual contractors — concerning the construction and operation of such projects is crucial. In light of the fact that such projects are significantly and almost exclusively funded through debt, financial institutions are in a particularly authoritative position vis-à-vis such decision-makers.

Indeed, the adoption of the EP is more significant than the adoption of other codes of conduct by other industries and corporations because of the extraordinary regulative capacities of banks in the area of project finance.

The fifty-one current signatories to the EP jointly oversee more than 80% of the global project-finance market for projects involving an investment of U.S. \$50 million or more.<sup>40</sup> This figure speaks of a highly centralized financial industry at the core of global capitalism. And the situation is compounded by the fact that the Equator Principles are based on the "performance standards" of the IFC: a highly technical and complex manual of specific industry standards that corporate lenders are expected to follow.

As aforementioned, the IFC is the private arm of the World Bank. While the World Bank is in charge of public-sector and publicly funded development projects, the IFC is in charge of private investments that are deemed relevant to economic development. Typically, commercial enterprises that seek funding for large-scale projects also apply to the IFC for financing. The willingness of the IFC to finance a certain project serves as a strong market-signal to other private banks, which may then also finance the project. All in all, then, the EP are part of a broader socio-moral private and global regulatory framework that by and large covers most activities and investments concerning large-scale development projects.

The EP were formulated and adopted as a risk-management instrument. Yet unlike other corporate codes of conduct through which corporations self-regulate, the EP are unique because their adoption is at the same time both a marker of self-regulation (as far as the adopting banks are concerned) and a comprehensive regulatory framework for policing the commercial activities of numerous other corporations that seek financing for their projects. Due to the unique position this accords financial institutions, the Equator Principles deserve special analytical attention.

In general, the principles apply to financing of projects with total capital costs of U.S. \$10 million or more. They also include a preliminary stage of "project finance advisory activities" whereby signatories are committed to make clients aware of the EP and require them to adhere to the principles when seeking financing. The core of the EP consists of ten principles that outline procedural and substantive steps that both lenders and borrowers must follow. The process starts when the financing institution screens an application and categorizes it according to the magnitude of its potential social and environmental risks. Projects are also classified according to their planned location. The basic distinction is between OECD countries

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<sup>40</sup> *Carbon, Clean-Tech and Sustainable Markets Set to Attract Trillions*, ENV'T NEWS SERVICE, Nov. 29, 2005, <http://www.ens-newswire.com/ens/nov2005/2005-11-29-01.asp>. The revised EP expanded so as to cover all project-finance loans above U.S. \$10 million, a notable change from the previously establish \$50 million benchmark.

and non-OECD countries.<sup>41</sup> The rationale behind the classification is that the regulatory frameworks of high-income OECD countries typically set high or at least satisfactory social and environmental standards that may thus be considered an acceptable substitute for the performance standards required by the EP. For projects classified above a certain level, the borrower must carry out a Social and Environmental Assessment to determine all impacts and risks. Based on the initial screening and the impact report, borrowers must prepare an Action Plan that includes corrective actions and monitoring measures to manage the impacts and risks identified in the Assessment. The Action Plan serves as a basis for the creation and maintenance of a Social and Environmental Management System.

Borrowers must also undertake a structured process of consultation while preparing for projects with "significant adverse impacts on affected communities." The Equator Principles demand that the consultation be free of external manipulation and coercion and based on timely disclosure of relevant information. This demand is detailed to the level of regulatory requirements such as the duty to ensure that the consultation process is tailored to the language preferences of potentially affected communities and the duty to take account of cultural sensitivities and differences. Along these lines, the EP pays specific attention to consultation with indigenous groups (relying on "performance standard 7" of the IFC). For example, borrowers are required to ensure that such consultation involves appropriate representative bodies of such communities and provides sufficient time for collective decision-making processes.<sup>42</sup> Borrowers are also required to establish an ongoing Grievance Mechanism as part of the management system in order to facilitate, process and determine disputes with affected groups.

Another principle stipulates that borrowers must subject their impact reports, action plans and the results of their consultation process to independent review, and yet another principle stipulates that borrowers must provide periodic reports — also subject to independent monitoring — concerning the steps taken towards mitigation or elimination of risks. Finally, the signatories, namely banks, also commit to periodic publication of reports concerning their own implementation of the EP. All in all, then, the EP comprise a comprehensive regulatory system that simultaneously functions

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41 OECD members that are not designated as high-income countries are also classified as non-OECD countries in the classification system of the EP.

42 See International Finance Corporation's Performance Standards on Social & Environmental Sustainability 28-30 (Apr. 30, 2006), *available at* [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_PerformanceStandards2006\\_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf) (Performance Standard 7: Indigenous Peoples).



as a self-regulatory scheme for lenders (banks) and a private-regulation framework for borrowers (operating corporations). It is noteworthy, however, that the Equator Principles include a disclaimer stipulating that "these principles do not create any rights in, or liability to, any person, public or private. Institutions are adopting and implementing these Principles voluntarily and independently, without reliance on or recourse to IFC or the World Bank."<sup>43</sup>

The adoption and implementation of the EP have already stirred considerable debate. The primary civic organization that has taken upon itself to monitor the actual implementation of the EP is Bank Track, an umbrella organization that consists of several rights organizations in various countries. In principle, Bank Track considers the EP to be only a partial and insufficient step in the desirable direction of positioning banks as the authoritative regulators of the corporations they finance. Project finance is only one aspect of the global financing industry, and banks enjoy considerable leverage also through financing in such forms as direct corporate lending or bond underwriting. Another principled critique is that financial institutions do not go far enough, beyond the process outlined in the EP, in defining some categorical prohibitions on financing certain commercial activities or declaring some countries absolute no-go areas.

Another critique points at the selective adoption of the EP. Despite identifying some isomorphic patterns in the adoption of the EP, Wright and Rwabizambuga find that its rate varies considerably according to global region and is highest among West European and North American financial institutions.<sup>44</sup> They also find that projects in Africa and the Middle East are only marginally financed by EP banks and are largely handled by non-signatory banks.

Specifically targeting the EP, Bank Track's main criticism is directed at the

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43 The "Equator Principles," *supra* note 39.

44 Christopher Wright & Alexis Rwabizambuga, *Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct: An Examination of the Equator Principles*, 111 BUS. & SOC'Y REV. 89 (2006). Wright and Rwabizambuga looked at the distribution of the then 32 signatories. There were 51 signatories in May 2007. See The Equator Principles, <http://www.equator-principles.com> (last visited Aug. 1, 2007). Their breakup by location is: 26 Western Europe, 14 U.S./Canada, 5 Brazil, 2 Australia, 1 South Africa, 3 Japan. Notably absent are Chinese banks that are particularly active in Africa. This distribution conforms with and further augments the findings of Wright and Rwabizambuga. For more data on participating banks see the site of Dealogic ProjectWare, a London-based financial data provider, at <http://www.ens-newswire.com/ens/nov2005/2005-11-29-01.asp> (last visited Nov. 1, 2007).

level of implementation. Apart from inconsistent levels of implementation among signatories, Bank Track notes a lack of transparency by endorsing banks which makes it difficult to monitor how the principles are being implemented and to evaluate the actual effectiveness of the EP in ensuring sound project-related social and environmental policies. Accordingly, endorsing banks are under pressure to formalize their information disclosure from the screening stage onwards so as to increase the transparency of their decision-making processes and subsequent results. Other demands are that endorsing banks (1) establish independent accountability mechanisms to ensure compliance with their own stated policies and (2) establish recourse channels for project-affected parties, such as compliance officers, an ombudsman, and other relevant complaint mechanisms.

All in all, the concern of critics is that the EP — voluntarily adopted and lacking in obligatory mechanisms of enforcement — may end up merely reflecting good-will aspirations with regard to public relations or, at best, as a "reputation risk-management" strategy that may stop short of genuine compliance. Yet the point I wish to make here is that regardless of the doubts concerning the efficacy of the Equator Principles, we are witnessing a new paradigm of thinking about socio-moral issues. Namely, concerns about self- and private regulation — of the type discussed above — are voiced from within a rapidly evolving hegemonic governance matrix which is leveraging financial institutions as the new guardians of socio-moral sensibilities. It is on the meaning and potential consequences of this evolving process that I focus in the next and final Part of the Article, discussing the transformation of a critical (or at least corrective) discourse into a constitutive element of the very same structure it potentially subverts.

#### **IV. NEO-LIBERALISM AS A MORALITY PLAY**

Critique and doubts concerning the efficacy of the Equator Principles notwithstanding, it seems that we are witnessing the consolidation of a new paradigm. From within this paradigm, even critics of the EP ground their misgivings in a general theory which posits financial institutions as legitimate sources of political and socio-moral authority with a duty, not simply a capacity, to self-regulate themselves as regulators over other market actors. Accordingly, organizations such as Bank Track invest in developing a comprehensive framework that speaks of the regulatory duties of financial institutions as a necessary response to the expectations of civil society. In this sense, we are now at a stage when even the doubts regarding self- and private regulation are voiced from within a rapidly evolving

hegemonic governance matrix which leverages financial institutions as the new guardians of socio-moral sensibilities.

This is not a trivial development. In fact it collides with heretofore taken for granted assumptions about the trajectory and prospects of economic globalization. Sociologist Sigmund Bauman, for example, argues that world society currently faces a predicament because its political organs cannot match the vitality, intensity, and influence of economic organs and networks anymore.<sup>45</sup> Bauman therefore assigns political sociology the task of imagining the type of political authority that may and should evolve as an effective restraining correction to the forces of the market. However, this imagery retains the basic division between public authority and private interests, albeit at a higher level of institutionalization than the one formerly enshrined in the relationship between national economies and national governments. In contrast, my purpose here has been to show that we are witnessing the emergence of political structures which are not external to, but rather embedded in, the market. It is on the basis of this theoretical premise that we should investigate and probe the consequences and implications of private regulation.

Once all players involved, namely national governments, global institutions, corporations, and civil society organizations, share the private regulation approach within the broader governance matrix, a whole new set of questions arises concerning the conditions for the perception, articulation and creation of socio-moral sensibilities and their translation into concrete political action. The conceptualization that Kanishka Jayasuriya suggests seems to capture the process well<sup>46</sup>: enter the phase of welfare governance, a development that arises out of, but is not reducible to, the neo-liberal framework. The articulation of the concept of welfare governance marks an attempt to theorize new developments that seem to bring about the "socialization" of neo-liberalism. Within this configuration of governance welfare has a distinctive meaning that frames social issues and claims within — rather than in opposition to — the market. In this sense, the notion of welfare governance seems to be perfectly compatible with the neo-liberal epistemological dissolution of the distinction between society and the market, de facto "canceling" any notion of contestation between social interests and economic imperatives.

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<sup>45</sup> BAUMAN, *supra* note 7.

<sup>46</sup> Kanishka Jayasuriya, *Economic Constitutionalism, Liberalism, and the New Welfare Governance* (Asia Research Ctr., Murdoch Univ., Austl., Working Paper No. 121, 2005).

Once welfare governance is firmly embedded in the market, we may witness a fundamental transformation in the way basic concepts and notions such as "class," "politics," "responsibility," "rights," "welfare," "agency" and "moral agency" are perceived and acted upon. In other words, market-embedded welfare governance "reframes the social question within, rather than in contestation with the market."<sup>47</sup> At the next level of abstraction, therefore, we may argue that the "socialization" of the market has to be conceived not as a product of an "external" force bearing on and "correcting" market failures,<sup>48</sup> but rather as a direct product of the currently hegemonic neo-liberal epistemology. This argument begs further clarification.

While the economization of state and civil society institutions has been extensively studied, often in the context of theorizing neo-liberalism,<sup>49</sup> the socialization and moralization of the market have so far received less scholarly attention at the level of social theory.<sup>50</sup> It seems to me

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<sup>47</sup> *Id.* at 12.

<sup>48</sup> FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* (1976).

<sup>49</sup> *E.g.*, GEORGE RITZER, *THE McDONALDIZATION OF SOCIETY* (1996); SASSEN, *supra* note 2; Bob Jessop, *Capitalism and Its Future: Remarks on Regulation, Government and Governance*, 4 REV. INT'L POL. ECON. 561 (1997); GIDDENS, *supra* note 32; Pierre Bourdieu, *The Abdication of the State*, in *THE WEIGHT OF THE WORLD: SOCIAL SUFFERING IN CONTEMPORARY SOCIETY* 181 (Pierre Bourdieu ed., 1999); Richard Erickson et al., *The Moral Hazards of Neo-Liberalism: Lessons From the Private Insurance Industry*, 29 ECON. & SOC'Y 532 (2000); Lemke, *supra* note 17; HARVEY, *supra* note 15; Jayasuriya, *supra* note 46.

<sup>50</sup> *Cf.* MORRELL HEALD, *THE SOCIAL RESPONSIBILITIES OF BUSINESS: COMPANY AND COMMUNITY, 1900-1960* (1970); LIPSCHUTZ WITH ROWE, *supra* note 13; De Winter, *supra* note 34. A crucial distinction is in order here. The question of the relationship between economy and morality may be traced back to Adam Smith and has been a focus of contemplation ever since. *See* James E. Alvey, *A Short History of Economics as a Moral Science*, 2 J. MARKETS & MORALITY 41 (1999). There is a sub-field of journals that also focus on related issues (e.g., *Journal of Markets and Morality*) and, in general, the last two decades have seen what may be described as an explosion in writing about commerce and ethical questions, see Carroll, *supra* note 37; *BUSINESS AND SOCIETY: A READER IN THE HISTORY, SOCIOLOGY AND ETHICS OF BUSINESS* (Barry Castro ed., 1996). Within this general framework, moral questions have often been discussed in terms of virtues such as honesty, punctuality, reliability, as well as charity and philanthropy and other inter-human virtues. At least for analytical purposes, it is useful to distinguish the inquiry into the effect of commercial transactions on moral motivations and perceptions from that which concerns us here, namely moral responsibility in the sense of organized political action by institutionalized market actors (e.g., corporations, trade associations, global financial institutions). Clearly, this is a problematic distinction as there are many crossover approaches (from classic works such as those of POLANYI, *supra* note 6, WEBER, *supra* note 4, HIRSCH, *supra* note 48, and AMARTYA SEN, *ON ETHICS AND*

that the most urgent task is to begin probing into the critical inversion which takes place once commercial entities assume the tasks of socio-moral regulation. Namely, the political and cultural context within which corporations adopt socio-moral practices is recoded as a business opportunity. A whole new vocabulary is deployed to allow this recoding: consumer boycotts and other forms of corporate shaming are reformulated as "novel consumer expectations" and "higher levels of public awareness and investor attitudes"; corporate defenses against being charged with the creation of harms reappear as "reputation risk management" and "strategies for securing investor confidence." "Public expectations" are listed alongside notions such as "internal firm restructuring," "employee motivation," "competitive community relations," "peer positioning," "organizational learning," and "means to enhance reputation and trust" as commercially-driven factors that shape the corporation's moral agency in ways that benefit the public interest.

Embedded within the rationality of the market, corporate morality becomes a managerial tool for "cause-related marketing" and "social branding" and, more generally, a rationale for implementing systems of compliance within firms.<sup>51</sup> Corporate executives are learning to think of "social responsibility" not only as a marketing and corporate reputation device, but also as a tool for keeping a more satisfied and loyal workforce. The merits of displaying moral sensibilities are therefore extended from ensuring customers' brand loyalty and investors' trust to sustaining a normative control apparatus within the corporation.

All in all, market-embedded morality — in the form of privately induced social regulation — is increasingly grounded in notions such as "enlightened self-interest" and, even more concretely, in the practice of "converging values with value creation." In other words, the responsabilization of market entities, which is now reaching a new phase with the assumption of a new role by financial institutions, is driven by and coupled with the notion that doing good is good for business. In organizational and managerial theory, this approach has already been formally articulated as "the business case for corporate social responsibility." The process is one of framing socio-moral issues

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ECONOMICS (1987), to Luís Carvalho & João Rodrigues, *On Markets and Morality: Revisiting Fred Hirsch*, 64 REV. SOC. ECON. 331 (2006) and Roberts, *supra* note 38). However, the distinction is useful in limiting the scope and aspirations of the present study, which focuses on the discursive and practical attribution of moral agency to corporations in the context of theorizing the deployment of social configurations such as governance.

51 CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* (2002).

through the foundational epistemology that dissolves the distinction between market and society and, furthermore, encodes the "social" as a specific instance of the "economic." Moral considerations thus "lose," so to speak, their transcendental attributes or at least their character as liabilities and *deus ex machina* emerge as business opportunities. Accordingly, business schools around the world are now offering programs and classes that are based on the business-case approach to social responsibility, encourage research and theoretical models which explore the economic incentives for moral performance, and measure the business value of being "morally right."<sup>52</sup> The World Business Council for Sustainable Development, a coalition of hundreds of multinational corporations and business associations, similarly explains that its approach reflects a belief that the pursuit of sustainable development "is good for business and business is good for sustainable development." Corporate managements and trade associations pursue this line of reasoning as a basic justification for the claim that the moral duties of corporations may be best realized when they are allowed to operate on the basis of voluntary initiatives rather than through state regulation or international law. Doing the right thing has simply become, as a Nike position paper explains, the commercially wise thing to do, pushing the pursuit of ethical practices from "enlightened management to good management and from moral values to good business."<sup>53</sup>

The utilitarian and instrumental grounding of corporate morality and ethics in theories and practices that are premised on the business-case approach has profound implications. First, morality is increasingly conceived in terms of a preferential "freedom-of-choice" model and this perspective, in turn, facilitates a rejection of morally prescriptive regulation. In other words, the business-case approach neatly fits into the neo-liberal matrix of governance because it serves as a powerful rationalization for responsabilizing corporations to develop moral sensibilities through the mechanisms of the market rather than through adherence to externally imposed — and popularly supported — governmental regulation. The business-case approach essentially stipulates that corporations have their own self-induced commercial incentives to behave morally. The reasoning

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52 Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-Analysis*, 24 *ORG. STUD.* 403 (2003); JOSHUA DANIEL MARGOLIS ET AL., *PEOPLE AND PROFITS? THE SEARCH FOR A LINK BETWEEN A COMPANY'S SOCIAL AND FINANCIAL PERFORMANCE* (2001).

53 However it should be noted that the question whether "socially responsible" corporations fare better on market indices is a contested issue, breeding new lines of research in business schools.

that follows is that given the commercial benefits that moral behavior yields, the most effective way to promote such behavior is by facilitating a competitive environment where corporations strive to perform in a socially responsible way out of their own interests. Hence comes the idea — assertively voiced by corporations and business associations — that the essence of corporate social responsibility lies in being "market-led": socio-moral policies are developed as an element of competitiveness in response to peer group pressure in the relevant business environment. This competition is enabled by a growing market of authorities that offer corporations a multitude of instruments for deploying, implementing, measuring, verifying, and rating socio-moral performance. Corporations are thereby able to pick and choose among a variety of options and to adopt those instruments and methods that best fit their special needs and are most appropriately tailored to the type of activity in which they are engaged, the locations where they operate, and the specific challenges they face.

This approach is remarkably similar to the essential conception of governance discussed earlier in this Article. Driven by the logic of the market, governance claims to facilitate creative, flexible and efficient solutions by leaving "the greatest possible amount of control in the hands of those closest to the problems."<sup>54</sup> Accordingly, market actors argue that in order to be successful, responsible policies

must be developed from within the organization, responding to the concrete situation in which each company finds itself. The development of [responsible policies] is a dynamic process, influenced by market conditions, the local setting, national frameworks, cultural and historical aspects, etc. Each company must therefore be able to choose and define its own approach to corporate responsibility.<sup>55</sup>

The immediate political implication, as aforementioned, is that "moral governance" should replace top-down regulation and juridical accountability. Applied to the moral duties of corporations, the governance-based logic of the market works to diffuse regulatory threats by suggesting that such external intervention would "stifle innovation" and "business enthusiasm for the discipline," push down compliance "to the lowest common denominator," and destroy the moral flexibility which is needed in order to ensure both

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<sup>54</sup> Lobel, *supra* note 22; Parker, *supra* note 23.

<sup>55</sup> Comments of UNICE to the Communication from the European Commission Concerning Corporate Social Responsibility, 2002/109.07/UNICEcomments\_final en (Nov. 28, 2002).

efficiency and sensitivity to "cultural diversity."<sup>56</sup> Thus, the business-case approach not only transforms moral concerns into matters such as "managing the competitive market for reputational status" but, more broadly, acts as a buffer against national and international social regulation.

The second implication of the business-case approach to social responsibility is more far-reaching and can only be singled out here for future research. As argued in this Article, the economization of the political reconfigures entrenched modes of government and relocates politics. One expression of this reconfiguration and relocation is the deployment of governance as a hegemonic form of authority that is premised on the diffusion of authority into multiple and competing sources that simulate and embody the imagery of a competitive market as a blueprint for action. Yet governance — performed through the construction of moral agency and the ensuing imperative of responsabilization — feeds back into the market in the sense that the latter is driven to assume and visibly perform socio-moral tasks.

However, the moralization of commercial actors does not mean that non-economic considerations are "inserted" into economic rationalities or act otherwise as an external add-on to them. Rather, the process is one of framing moral issues through the foundational epistemology that dissolves the distinction between market and society and, furthermore, encodes the "social" as a specific instance of the "economic." Moral considerations thus "lose" their transcendental attributes or at least their character as liabilities and reemerge as business opportunities. Once moral issues or moral sentiments become market-embedded in this way, we may begin analyzing their articulation, affirmation and dissemination qua commodities and commercial instruments. The result is a shift from a deontological to a teleological (consequentialist) ethics that subordinates socio-moral sensibilities to the calculus of possible outcomes, to the tests of cost-benefit analyses, and to the criteria of reputational risk management. The moralization process thus entails a set of practices that contribute to a constantly evolving and adapting neo-liberal imagination and, moreover, to the further economization not only of the political but also of the moral foundations of society.

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<sup>56</sup> The terms and expressions cited above are based on the position papers that multinational corporations submitted as their contribution to a consultation process on corporate social responsibility held by the European Union in 2002. Specifically, the above terms were used by Cadbury, Siemens, Kellogg, General Motors and British Petroleum.