

# LECTURE

## The Right To Know: Freedom of Environmental Information in Comparative and International Law

Peter H. Sand\*

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Information—or knowledge (*scientia*), as Francis Bacon put it—is power (*potestas*).<sup>1</sup> Access to knowledge (or A2K,<sup>2</sup> as we now spell it) is about access to power. Denial of access (*a.k.a.* secrecy) is therefore the standard reaction of knowledge-holders, both for government-held information to be withheld from other governments and citizens,<sup>3</sup> and for industry-held information to be withheld from competitors and consumers.<sup>4</sup> Hence, transparency laws mandating the disclosure of

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\* © 2011 Peter H. Sand. Institute of International Law, University of Munich/Germany; formerly Chief, UNEP Environmental Law Unit, and World Bank Legal Adviser for Environmental Affairs.

1. “*Nam et ipsa scientia potestas est*.” SIR FRANCIS BACON, MEDITATIONES SACRAE: DE HAERESIBUS (1597), reprinted in 14 FRANCIS BACON, THE WORKS OF FRANCIS BACON 95 (James Spedding et al. eds., 1892).

2. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 806 (2008).

3. The word “secretary” still reflects the traditional function of keeping a government’s arcane secrets. 2 SHORTER OXFORD ENGLISH DICTIONARY 2730 (6th ed. 2007).

4. Kapczynski, *supra* note 2, at 820. Our entire intellectual property system is based on the industrial monopolization and exclusiveness of information. *Id.* at 843; see also Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. INT’L L. 579, 587-88, 627-28 (2006) (discussing that the evolving concepts of openness and transparency are prerequisites of executive and corporate accountability to civil society); cf. POLITICS OF INTELLECTUAL PROPERTY: CONTESTATION OVER

information, such as the Freedom-of-Information or Right-to-Know Acts, are legitimate instruments of civic governance,<sup>5</sup> the “*Magna Charta* of ecological democracy” (as my green compatriot Joschka Fischer once called it),<sup>6</sup> and a logical sequel to article 19 of the 1948 Universal Declaration of Human Rights.<sup>7</sup> Meanwhile, 400 years after Bacon, today’s anarchists (who tend to lack the patience to bother with laws) have also discovered effective modern alternatives, including the new guerrilla tactics of information disclosure such as *WikiLeaks*.

But do not worry, I will not drag you into the brave new world of cyberpolitics. Instead, I shall stick to the field with which I am reasonably familiar: access to environmental information, and its contemporary repercussions for public international law.

The field is vast enough as it is. Legal obligations to disclose environment-related information already exist at four distinct levels:

1. disclosure to governments by environmental impact statements for the planning or licensing of specified projects,<sup>8</sup> categories of industries (*établissements classés*),<sup>9</sup> environmentally hazardous

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THE OWNERSHIP, USE, AND CONTROL OF KNOWLEDGE AND INFORMATION 5 (Sebastian Haunss & Kenneth C. Shadlen eds., 2009); THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011).

5. See Joseph E. Stiglitz, Oxford Amnesty Lecture: On Liberty, the Right To Know, and Public Discourse: The Role of Transparency in Public Life (Jan. 27, 1999), <http://www.derechasaber.org.mx/documents/pdf0016.pdf>.

6. JOSCHKA FISCHER, DER UMBAU DER INDUSTRIEGESELLSCHAFT: PLÄDOYER WIDER DIE HERRSCHENDE UMWELTLÜGE 152 (1989), reprinted in ECOLOGICAL ENLIGHTENMENT: ESSAYS ON THE POLITICS OF THE RISK SOCIETY (Ulrich Beck ed., Mark A. Ritter trans., 1995).

7. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III) art. 19 (Dec. 10, 1948) (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive, and impart information* and ideas through any media and regardless of frontiers.” (emphasis added)); see also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 178 (art. 19) (Dec. 19, 1966); Martin Bullinger, *Freedom of Expression and Information: An Essential Element of Democracy*, 28 GERMAN Y.B. INT’L L. 88, 105 (1985); Stephen Sedley, *Information as a Human Right*, in FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION: ESSAYS IN HONOUR OF SIR DAVID WILLIAMS 239, 244 (Jack Beatson & Yvonne Cripps eds., 2000).

8. The concept was introduced by the National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852, 853 (codified as amended at 42 U.S.C. § 4332 (2006)), and internationally by Council Directive 85/337/EEC, on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40 (EC), amended by Council Directive 97/11, 1997 O.J. (L 73) 5 (EC).

9. Licensing of environmentally hazardous industries dates back to nineteenth-century French legislation, Prussia’s 1845 Gewerbe-Ordnung, and Britain’s 1900 Alkali and Other Works Regulation Act. See Noga Morag-Levine, *Is Precautionary Regulation a Civil Law Instrument? Lessons from the History of the Alkali Act*, 23 J. ENVTL. L. 1, 9 (2011); Peter H. Sand, *The Precautionary Principle: A European Perspective*, 6 HUM. & ECOLOGICAL RISK ASSESSMENT 445, 452 (2002).

- activities (*miljöfarlig verksamheter*),<sup>10</sup> and for the production, marketing or transport of dangerous goods;<sup>11</sup>
2. disclosure to citizens under “right-to-know” schemes for specified workplace environments or for the benefit of communities adjoining industrial facilities;<sup>12</sup>
  3. disclosure to consumers through a variety of labeling schemes ranging from hazard warnings<sup>13</sup> to certifications of contents or origin;<sup>14</sup> and
  4. disclosure to investors as part of corporate financial accounting schemes.<sup>15</sup>

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10. The concept was introduced by the 1969 Swedish Environment Protection Act. See Staffan Westerlund, *Legal Antipollution Standards in Sweden*, 25 SCANDINAVIAN STUD. IN L. 223, 226 (1981). At the international level, see the activities listed in Appendix I of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309, 30 I.L.M. 802.

11. For example, under the documentation requirements of the 1957 European Agreement Concerning the International Carriage of Dangerous Goods by Road (ADR), ch. 8.1, Sept. 30, 1957, 619 U.N.T.S. 77. Rules for the international exchange of information on environmental risks appear in numerous global treaties dealing with hazardous substances and products. *E.g.*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 6, Mar. 22, 1989, 1673 U.N.T.S. 125 (1989), 28 I.L.M. 657; Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa art. 6, Jan. 30, 1991, 2101 U.N.T.S. 177, 30 I.L.M. 775; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade arts. 12-14, Sept. 10, 1998, 2244 U.N.T.S. 337, 38 I.L.M. 1 (1999); Stockholm Convention on Persistent Organic Pollutants art. 9, May 22, 2001, 2256 U.N.T.S. 119, 40 I.L.M. 532 (2001).

12. On the hazard communication standards of the U.S. Occupational Safety and Health Administration (OSHA), see W. KIP VISCUSI, *RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE* 10-14 (1983); Michael S. Baram, *Risk Communication Law and Implementation Issues in the United States and the European Community*, in *CORPORATE DISCLOSURE OF ENVIRONMENTAL RISKS: U.S. AND EUROPEAN LAW* 65, 78-81 (Michael S. Baram & Daniel G. Partan eds., 1990); see also *infra* notes 41-46. At the international level, see the occupational health and safety conventions adopted since 1960 under the auspices of the International Labour Organization (ILO). *E.g.*, *ILO Convention (No. 155) Concerning Occupational Safety and Health and the Working Environment* art. 12(b), May 22, 1981, 1331 U.N.T.S. 279.

13. See, *e.g.*, Chris Hilson, *Information Disclosure and the Regulation of Traded Product Risks*, 17 J. ENVTL. L. 305, 319 (2005); Thomas O. McGarity & Sidney A. Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 HARV. L. REV. 837, 878 (1980); EUROPEAN COMM’N, *TOBACCO OR HEALTH IN THE EUROPEAN UNION: PAST, PRESENT AND FUTURE* 120-24 (2004) (discussing cigarette labeling).

14. For example, on labeling of genetically modified food products, see Peter H. Sand, *Labelling Genetically Modified Food: The Right To Know*, 15 REV. EUR. COMMUNITY & INT’L ENVTL. L. 185, 185-86 (2006), and Andy Thorpe & Catherine Robinson, *When Goliaths Clash: U.S. and EU Differences over the Labeling of Food Products Derived from Genetically Modified Organisms*, 21 AGRIC. & HUMAN VALUES 287, 287-88 (2004).

15. See *infra* notes 153-168 and accompanying text.

I. PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION IN  
COMPARATIVE PERSPECTIVE

Most environmental policy making and decision making is typically plagued by uncertainty, with regard both to bio-geophysical processes and to socioeconomic costs and benefits.<sup>16</sup> Some of those uncertainties are exogenous, often incalculable, and we simply have to cope with them as risks and unknowns.<sup>17</sup> Other information deficits, however, are manifestly endogenous, homemade “manufactured uncertainties,”<sup>18</sup> “smokescreen uncertainty,”<sup>19</sup> or “strategically manipulated information.”<sup>20</sup> The sad reality is that we are all too often kept in the dark, through neglect or by design, by public officials or private stakeholders and “knowledge brokers.”<sup>21</sup> To reduce that level of uncertainty, “information gap filling”<sup>22</sup> therefore becomes a legitimate and crucial element of institutional design to facilitate precautionary action in the face of

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16. See Kenneth J. Arrow & Anthony C. Fisher, *Environmental Preservation, Uncertainty, and Irreversibility*, 88 Q. J. ECON. 312, 312-13, 318-19 (1974); Ian Clyde, *Ignorance Is Not Bliss: The Importance of Environmental Information*, 2 ASIA-PAC. J. ENVTL. L. 253, 258-60 (1997); Paul B. Thompson, *Uncertainty Arguments in Environmental Issues*, 8 ENVTL. ETHICS 59, 59, 69 (1986); Poul Harremoës, *Scientific Incertitude in Environmental Analysis and Decision Making*, BALATON BULL. (The Balaton Group), July 2002, at 3, 6; RICHARD A. YOUNG, UNCERTAINTY AND THE ENVIRONMENT: IMPLICATIONS FOR DECISION MAKING AND ENVIRONMENTAL POLICY 1 (2001); Richard B. Stewart, *Environmental Regulatory Decision Making Under Uncertainty*, in 20 AN INTRODUCTION TO THE LAW AND ECONOMICS OF ENVIRONMENTAL POLICY: ISSUES IN INSTITUTIONAL DESIGN 71, 74 (Timothy Swanson ed., 2002).

17. FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 4, 19 (Gen. Books LLC, 2010) (1921); see also CARLO C. JAEGER ET AL., RISK, UNCERTAINTY, AND RATIONAL ACTION 9, 13, 204-05 (Ragnar E. Löfstedt ed., 2001); Karl-Heinz Ladeur, *Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law*, in ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY: THE CONCEPT AND PRACTICE OF ECOLOGICAL SELF-ORGANIZATION 299, 303-04 (Gunther Teubner et al. eds., 1994); SCIENCE, POLITICS AND MORALITY: SCIENTIFIC UNCERTAINTY AND DECISION MAKING 2, 7 (René von Schomberg ed., 1993).

18. Ulrich Beck, *World Risk Society as Cosmopolitan Society? Ecological Questions in a Framework of Manufactured Uncertainties*, 13 THEORY, CULTURE & SOC'Y 1-11 (1996).

19. Sanford J. Lewis, *The Precautionary Principle and Corporate Disclosure, in PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT: IMPLEMENTING THE PRECAUTIONARY PRINCIPLE* 241, 242 (Carolyn Raffensperger & Joel Tickner eds., 1999).

20. INT'L RISK GOVERNANCE COUNCIL, RISK GOVERNANCE DEFICITS: AN ANALYSIS AND ILLUSTRATION OF THE MOST COMMON DEFICITS IN RISK GOVERNANCE 22 (John D. Graham et al. eds., 2009).

21. This term was coined by KAREN T. LITFIN, OZONE DISCOURSES: SCIENCE AND POLITICS IN GLOBAL ENVIRONMENTAL COOPERATION 4 (1994). See also ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE 36-39 (2006); TRANSPARENCY INT'L, ACCESS TO INFORMATION: GLOBAL CORRUPTION REPORT 8-9 (P. Eigen ed., 2003).

22. Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 140-41 (2004).

environmental risks, across all sectors, at the national and international level.<sup>23</sup>

Historically, most European countries (including Britain, France, and Germany) had a notorious tradition of secrecy with regard to a broad range of data kept by public authorities,<sup>24</sup> partly out of a legitimate concern with effective governance.<sup>25</sup> The one major exception was Sweden. Starting with the Freedom of the Press Act of 1766,<sup>26</sup> Swedish citizens have had a general right of access to public data that is unmatched in any other legal system.<sup>27</sup> Other Nordic countries followed: Finland (formerly governed by Swedish law) adopted a Publicity of Documents Act in 1951,<sup>28</sup> and Denmark adopted a Public Access to Files Act in 1970.<sup>29</sup> Even so, the open Scandinavian approach to government-held information remained unusual among the prevailing pattern of “arcane administration” in Europe (*arcana imperii*), where access to files

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23. See CTR. FOR INT’L LEGAL STUDIES, ENVIRONMENTAL HAZARDS AND DUTIES OF DISCLOSURE 24, 37, 46 (Dennis Campbell ed., 1994); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 135 (1995); see also Patricia I. Hansen, *Transparency, Standards of Review, and the Use of Trade Measures To Protect the Global Environment*, 39 VA. J. INT’L L. 1017, 1060-61 (1999); Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT’L STUD. Q. 109, 113-14, 126-27 (1998).

24. SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES 114 (1995); Jacques Chevallier, *Le Mythe de la Transparence Administrative*, in INFORMATION ET TRANSPARENCE ADMINISTRATIVES 273 (François Rangeon et al. eds., 1988); Donald C. Rowat, *The Problem of Administrative Secrecy*, 32 INT’L REV. ADMIN. SCIENCES 99-100 (1966); THE RIGHT TO KNOW: ESSAYS ON GOVERNMENTAL PUBLICITY AND PUBLIC ACCESS TO INFORMATION 115, 141 (Donald C. Rowat ed., 2d ed. 1980).

25. See Robert A. Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, 109 POL. SCI. Q. 21-34 (1994); Jeremy Rowan-Robinson et al., *Public Access to Environmental Information: A Means to What End?*, 8 J. ENVTL. 19, 25, 30-31 (1996).

26. Skriv- och Tryckfrihets-Förordningen [Ordinance on the Freedom to Write and Print] (Dec. 2, 1766), translated in THE WORLD’S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS’ LEGACY TODAY 8, 8-17 (Peter Hogg trans., Juna Mustonen ed., 2006); see also Stephen Lambie, *Freedom of Information: A Finnish Clergyman’s Gift to Democracy*, 97 FREEDOM INFO. REV. 2-8 (2002).

27. See Stanley V. Anderson, *Public Access to Government Files in Sweden*, 21 AM. J. COMP. L. 419, 421, 424 (1973); Sigvard Holstad, *Sweden*, in ADMINISTRATIVE SECRECY IN DEVELOPED COUNTRIES 29, 29 (Donald C. Rowat ed., 1979); Inger Österdahl, *Openness versus Secrecy: Public Access to Documents in Sweden and the European Union*, 23 EUR. L. REV. 336, 336 (1998); Gösta Petré, *Access to Government-Held Information in Sweden*, in PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION: A COMPARATIVE SYMPOSIUM 35, 35 (Norman S. Marsh ed., 1987).

28. This Act was superseded in 1999 by an “Act on the Openness of Government Activities.” See Olli Mäenpää, *Openness and Access to Information in Finland*, in THE WORLD’S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS’ LEGACY TODAY, *supra* note 26, at 58, 58.

29. *Offentligheds-Lov*. See Niels Eilschou Holm, *The Danish System of Open Files in Public Administration*, 19 SCANDINAVIAN STUD. IN L. 153, 164 (1975).

by citizens was long viewed as incompatible with the principle of representative—as distinct from “direct”—democracy.<sup>30</sup>

Against that background emerged the U.S. Freedom of Information Act (FOIA) of July 4, 1966.<sup>31</sup> It had already been foreshadowed by the federal Administrative Procedure Act of 1946,<sup>32</sup> and at the state level by California's 1952 “Brown Act.”<sup>33</sup> An avalanche of transparency statutes followed in its wake all over North America and worldwide,<sup>34</sup> if not always welcomed with open arms by the information holders: former British Prime Minister Tony Blair in his memoirs still calls the U.K. Freedom of Information Act “dangerous” and deplores its enactment as the biggest mistake of his Government.<sup>35</sup> Most continental European countries—other than those in Scandinavia at least—were equally reluctant to emulate this legislative “transplant,”<sup>36</sup> with France's Act on Administrative Relations with the Public and the Netherlands' Administrative Transparency Act slowly leading the way in 1978.<sup>37</sup> It took another major new development, in fact a global turning point in

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30. Martin Bullinger, *Western Germany*, in ADMINISTRATIVE SECRECY IN DEVELOPED COUNTRIES, *supra* note 27, at 217, 217.

31. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (Sept. 6, 1966) (codified as amended at 5 U.S.C. § 552 (2006)); see HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 42 (1999); Roscoe Bryant, *History and Background of Public Law 90-23, the Freedom of Information Act*, 3 N.C. CENT. L.J. 193, 193-94, 197 (1972).

32. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as 5 U.S.C. § 500 (2006)); see HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 224-25 (1953).

33. See Michael Jay Singer, *United States*, in ADMINISTRATIVE SECRECY IN DEVELOPED COUNTRIES, *supra* note 27, at 309, 309.

34. See, e.g., Jill Wallace, *The Canadian Access to Information Act 1982*, in PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION: A COMPARATIVE SYMPOSIUM, *supra* note 27, at 122, 123; Maeve McDonagh, *Freedom of Information in Common Law Jurisdictions: The Experience and the Challenge*, 5 MULTIMEDIA UND RECHT 251, 251 (2000); Gerry Smyth, *Freedom of Information: Changing the Culture of Official Secrecy in Ireland*, 31 L. LIBRARIAN 140, 141 (2000); *Volume 10: Public Access to Government-Held Environmental Policy and Practice*, N. AM. ENVTL. L. & POL'Y SERIES (Comm'n for Envtl. Cooperation), Feb. 7, 2003; Eric Heyer, *Latin American State Secrecy and Mexico's Transparency Law*, 38 GEO. WASH. INT'L L. REV. 437, 437-38 (2006); John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 85-86 (2006); TOBY MENDEL, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY 1 (2d ed. 2008).

35. TONY BLAIR, A JOURNEY: MY POLITICAL LIFE 511, 517 (2010).

36. See ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993); THE THEORY AND PRACTICE OF INSTITUTIONAL TRANSPLANTATION: EXPERIENCES WITH TRANSFER OF POLICY INSTITUTIONS (Martin de Jong et al. eds., 2002).

37. On French *Loi 78-753* (July 17, 1978), JOURNAL OFFICIEL [1978] 2851, see Bénédicte Delaunay, *De la loi du 17 juillet 1978 au droit de à l'information en matière de l'environnement*, 25 ACTUALITÉ JURIDIQUE: DROIT ADMINISTRATIF 1316, 1316 (2003); on the Dutch *Openbaarheids-Wet* (Nov. 9, 1978), STAATSBLAD [1978] 581, see Gertrude Luebbe-Wolff, *Das niederländische Gesetz über die Verwaltungs-Öffentlichkeit*, 13 VERWALTUNG 339 (1980).

regulatory history, to ensure universal acceptance of the concept: viz., the so-called “environmental revolution.”<sup>38</sup>

To appreciate this turn of events, we must also look at the regulatory regime for *privately* (corporately) held data, especially information on health-related risks. The crucial date here was the Bhopal accident in December 1984, which occurred at the local affiliate of a U.S. chemical company in India and killed more than 2400 people.<sup>39</sup> In the face of the magnitude of that tragedy, and also because it was followed in 1985 by another, albeit less catastrophic, accident in West Virginia (in a plant owned by the same corporation, illustrating the risk of similar disasters at home),<sup>40</sup> regulatory reaction in the United States was swift and truly innovative.

The Toxics Release Inventory (TRI), established in 1986 by the federal Emergency Planning and Community Right-to-Know Act,<sup>41</sup> requires mandatory reporting of toxic industrial emissions. The information is made publicly available, on-line, via a computerized database operated by the US Environmental Protection Agency (EPA).<sup>42</sup> American NGOs use and publicize information from that database in networks such as the “Chemical Scorecard” kept by Environmental Defense, and the “Right-to-Know Network” operated by OMB Watch.<sup>43</sup> As a result, anybody can download standardized, site-specific, up-to-date, and user-friendly data on specified toxic emissions from all facilities covered by TRI. At the state level, California’s Safe Drinking

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38. Term coined by EDWARD MAX NICHOLSON, *THE ENVIRONMENTAL REVOLUTION: A GUIDE FOR THE NEW MASTERS OF THE WORLD* 15 (1970).

39. See Bharat Desai, *The Bhopal Gas Leak Disaster Litigation: An Overview*, 3 ASIAN Y.B. INT’L L. 163, 163 (1993); DOMINIQUE LAPIERRE & JAVIER MORO, *FIVE PAST MIDNIGHT IN BHOPAL*, at xvii (2002).

40. See Robert Abrams & Douglas H. Ward, *Prospects for Safer Communities: Emergency Response, Community Right-To-Know, and Prevention of Chemical Accidents*, 14 HARV. ENVTL. L. REV. 135, 143 (1990).

41. Enacted as Title III of the Superfund Amendments and Reauthorization Act (1986), 42 U.S.C. § 11001 (2006). See Gary D. Bass & Alair MacLean, *Enhancing the Public’s Right-To-Know About Environmental Issues*, 4 VILL. ENVTL. L.J. 287, 291 (1993); Rebecca S. Weeks, *The Bumpy Road to Community Preparedness: The Emergency Planning and Community Right-To-Know Act*, 4 ENVTL. L. 827, 849-50 (1998); Benjamin A. Goldman, *Community Right To Know: Environmental Information for Citizen Participation*, 12 ENVTL. IMPACT ASSESSMENT REV. 315, 318 (1992); Alexander Volokh, *The Pitfalls of the Environmental Right-To-Know*, UTAH L. REV. 805, 805-06 (2002); see also *infra* notes 59, 62 and accompanying text.

42. See *Toxics Release Inventory (TRI) Program*, EPA, <http://www.epa.gov/tri> (last visited Oct. 27, 2011).

43. See SCORECARD, <http://www.scorecard.org> (last visited Oct. 27, 2011); THE RIGHT-TO-KNOW NETWORK, <http://www.rtknet.org> (last visited Oct. 27, 2011); cf. SUSAN G. HEDDEN, *A CITIZEN’S RIGHT-TO-KNOW: RISK COMMUNICATION AND PUBLIC POLICY* (1989); OMB WATCH, *AN AGENDA TO STRENGTHEN OUR RIGHT TO KNOW: EMPOWERING CITIZENS WITH ENVIRONMENTAL, HEALTH, AND SAFETY INFORMATION* (2011).

Water and Toxic Enforcement Act of 1986 (known as "Proposition 65")<sup>44</sup> imposed additional warning and disclosure requirements for toxic chemicals, unless emitters can show that the level of exposure is low enough to pose "no significant risk."<sup>45</sup>

Even though there had been earlier toxics-emission disclosure laws at the state and local level since the 1970s (mainly in response to demands by labor leaders to alert employees to workplace risks),<sup>46</sup> the near-instant success of TRI and Proposition 65 seems to have taken everyone by surprise.<sup>47</sup> Both statutes began taking effect in 1988. Data for the first ten-year period from 1988 to 1997 showed that atmospheric emissions of some 260 known carcinogens and reproductive toxins from TRI-reporting facilities were reduced by approximately sixty-two percent nationwide and by some eighty-five percent in the state of California.<sup>48</sup>

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44. See *OEHHA Proposition 65*, OFFICE ENVTL. HEALTH HAZARD ASSESSMENT, <http://www.oehha.ca.gov/prop65.html> (last visited Oct. 27, 2011). See generally *People ex rel. Lungren v. Superior Court (Am. Standard, Inc.)*, 926 P.2d 1042 (Cal. 1996).

45. CAL. HEALTH & SAFETY § 25249.10 (1986); see Michael Freund, *Proposition 65 Enforcement: Reducing Lead Emissions in California*, 10 TUL. ENVTL. L.J. 333, 333-34 (1997); Michael W. Graf, *Regulating Pesticide Pollution in California Under the 1986 Safe Drinking Water and Toxic Exposure Act (Proposition 65)*, 28 ECOLOGY L.Q. 663, 667, 671 (2001); Clifford Rechtschaffen, *The Warning Game: Evaluation Warnings Under California's Proposition 65*, 23 ECOLOGY L.Q. 303, 308 (1996). Clifford Rechtschaffen, *How To Reduce Lead Exposure with One Simple Statute: The Experience of Proposition 65*, [1999] *Envtl. L. Rep. (Envtl. Law Inst.)* 10,581, 10,583.

46. See CARON CHESS, *WINNING THE RIGHT TO KNOW: A HANDBOOK FOR TOXICS ACTIVISTS* (1984); Nicholas A. Ashford & Charles C. Caldart, *The "Right-To-Know": Toxics Information Transfer in the Workplace*, 6 ANN. REV. PUB. HEALTH 383, 391 (1985).

47. See Archon Fung & Dara O'Rourke, *Reinventing Environmental Regulation from the Grassroots Up: Explaining and Expanding the Success of the Toxics Release Inventory*, 25 ENVTL. MGMT. 115, 125 (2000); Shameek Konar & Mark A. Cohen, *Information as Regulation: The Effect of Community Right To Know Laws on Toxic Emissions*, 32 J. ENVTL. ECON. & MGMT. 109 (1997); Mark Stephan, *Environmental Information Disclosure Programs: They Work, but Why?*, 83 SOC. SCI. Q. 190, 196 (2002); Sidney M. Wolf, *Fear and Loathing About the Public Right To Know: The Surprising Success of the Emergency Planning and Community Right-To-Know Act*, 11 J. LAND USE & ENVTL. L. 217, 313 (1996).

48. Data indicates chemicals listed in California as known to cause either cancer or reproductive toxicity are reported as air emissions under TRI. See David Roe, *Toxic Chemical Control Policy: Three Unabsorbed Facts*, [2002] *Envtl. L. Rep. (Envtl. Law Inst.)* 10,232, 10,232-33. Attempts at explaining this "accidental success story" variously emphasize the innovative use made of (1) "eco-information" via the Internet, by TRI and its NGO multipliers; (2) reversal of the burden of proof for exemptions, under Proposition 65; (3) enforcement by citizen suits, under both schemes; (4) data standardization to facilitate comparison and "benchmarking"; and (5) the "reputational" effects of such competitive ranking on the stock market and on a firm's behavior. While it will be important to learn the right lessons from all this, the outcome is unlikely to be attributable to a set of isolated causes, let alone a single cause. A number of external driving forces certainly are plausible, and success more often than not rests on the right combination of information and regulation. For a discussion of these and related points, see Karen Bubna-Litic, *Environmental Reporting as a Communications Tool: A Question of Enforcement?*, 20 J. ENVTL. L. 69, 70-73 (2008); Michael Barsa, Note, *California's Proposition 65 and the Limits of*



“Right-to-know laws” have since been enacted in at least twenty-five U.S. states and in Canada.<sup>49</sup> The North American pilot experience also prompted other countries to set up Pollutant Release and Transfer Registers (PRTRs), in response to recommendations by the 1992 U.N. Rio Conference (UNCED),<sup>50</sup> and by the Organisation for Economic Cooperation and Development (OECD),<sup>51</sup> as well as under technical assistance projects by the World Bank.<sup>52</sup> Further initiatives for worldwide dissemination of the concept have been launched by the U.N. Environment Programme (UNEP);<sup>53</sup> the U.N. Institute for Training and Research (UNITAR),<sup>54</sup> the “Inter-Organization Programme for the Sound Management of Chemicals;”<sup>55</sup> and private-sector networks such as the “International Right-to-Know Campaign.”<sup>56</sup>

Many observers now view the advent of “informational regulation,”<sup>57</sup> “smart regulation,”<sup>58</sup> or “regulation through revelation,”<sup>59</sup> as

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*Information Economics*, 49 STAN. L. REV. 1223, 1241-42 (1997); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking—Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 307-08 (2001).

49. See COMM’N FOR ENVTL. COOPERATION, TAKING STOCK: NORTH AMERICAN POLLUTANT RELEASES AND TRANSFERS 5-7, 35 (13th ed. 2011); Werner Antweiler & Kathryn Harrison, *Toxic Release Inventories and Green Consumerism: Empirical Evidence from Canada*, 36 CAN. J. ECON. 495, 504 (2003); Chilik Yu et al., *Policy Instruments for Reducing Toxic Releases: The Effectiveness of State Information and Enforcement Actions*, 22 EVALUATION REV. 571, 574-75, 578 (1998); Nils Zimmermann, Michael M’Gonigle & Andrew Day, *Community Right To Know: Improving Public Information About Toxic Chemicals*, 5 J. ENVTL. L. & PRAC. 95, 97-98, 124 (1995).

50. See the recommendations in Chapter 19.61(c) of Agenda 21, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. II), at 331 (1993).

51. Org. for Econ. Co-operation & Dev. [OECD], *Recommendation on Implementing Pollutant Release and Transfer Registers*, OECD Doc. C(96)41/FINAL (Feb. 20, 1996), amended by C(2003)87 (May 28, 2003).

52. WORLD BANK, GREENING INDUSTRY: NEW ROLES FOR COMMUNITIES, MARKETS, AND GOVERNMENTS 111, 148-50 (2000).

53. See *Pollutant Release and Transfer Registers*, U.N. ENV’T PROGRAMME, <http://www.chem.unep.ch/prtr> (last updated Sept. 30, 1999).

54. See *Pollutant Release and Transfer Register Capacity Building Library: International, Regional and National Legislation/Policies Relevant to PRTRs, Right-To-Know, etc.*, U.N. INST. FOR TRAINING & RESEARCH, [http://www.2.unitar.org/CWM/publications/cbl/prtr/cat1\\_list.html](http://www.2.unitar.org/CWM/publications/cbl/prtr/cat1_list.html) (last visited Oct. 27, 2011).

55. The IOMC/PRTR Coordinating Group has since been superseded by the “International PRTR Coordinating Group” under the auspices of the U.N. Economic Commission for Europe in Geneva (6th meeting held in Paris, Oct. 6, 2011).

56. See SUSAN CASEY-LEFKOWITZ, INTERNATIONAL RIGHT-TO-KNOW: STRATEGIES TO INCREASE CORPORATE ACCOUNTABILITY IN THE MIDST OF GLOBALIZATION (2001), <http://www.ombwatch.org/files/rtkconference/international.html>.

57. WESLEY A. MAGAT & W. KIP VISCUSI, INFORMATIONAL APPROACHES TO REGULATION 4-5, 133 (1992); W. Kip Viscusi, Wesley A. Magat & Joel Huber, *Informational Regulation of Consumer Health Risks: An Empirical Evaluation of Hazard Warnings*, 17 RAND J. ECON. 351-62 (1986); Paul R. Kleindorfer & Eric W. Orts, *Informational Regulation of Environmental Risks*,

viable alternatives to the stalemate of traditional environmental lawmaking and the kind of regulatory fatigue it seems to have spread.<sup>60</sup> A number of academic analysts thus call for “mutual transparency” as a means of ensuring accountability and legitimacy,<sup>61</sup> and of promoting “environmental democracy in action.”<sup>62</sup> International lawyers and political scientists have identified “sunshine methods” as effective strategies to induce compliance with environmental laws and treaties,<sup>63</sup> pointing in the direction of the “disclosure model” as a new type of self-regulatory “reflexive environmental law”<sup>64</sup> and “informational governance.”<sup>65</sup> Others refer to information provision devices as part of a

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18 RISK ANALYSIS 155, 155-70 (1998); William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1701, 1707-08 (1999); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613 (1999); David W. Case, *The Law and Economics of Environmental Information as Regulation*, [2001] Env'tl. L. Rep. (Env'tl. Law Inst.) 10,773, 10,773; David W. Case, *Corporate Environmental Reporting as Informational Regulation*, 76 U. COLO. L. REV. 379, 381 (2005).

58. NEIL GUNNINGHAM, PETER GRABOSKY & DARREN SINCLAIR, SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 61, 63 (1998); Neil Gunningham & Amanda Cornwall, *Legislating the Right To Know*, 11 ENVTL. & PLAN. L.J. 274, 274-88 (1994).

59. JAMES T. HAMILTON, REGULATION THROUGH REVELATION: THE ORIGIN, POLITICS, AND IMPACTS OF THE TOXICS RELEASE INVENTORY PROGRAM (2005); THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD 339, 341 (Ann Florini ed., 2007); Ann Florini, *The End of Secrecy*, 111 FOREIGN POL'Y 50, 53 (1998).

60. Mark A. Cohen, *Information as a Policy Instrument in Protecting the Environment: What Have We Learned?*, [2001] Env'tl. L. Rep. (Env'tl. Law Inst.) 10,425, 10,425; Jérôme Foulon, Paul Lanoie & Benoît Laplante, *Incentives for Pollution Control: Regulation or Information?*, 44 J. ENVTL. ECON. & MGMT. 169, 169 (2002); William F. Pedersen, *Regulation and Information Disclosure: Parallel Universes and Beyond*, 26 HARV. ENVTL. L. REV. 151, 151 (2001).

61. DAVID BRIN, THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM? 149 (1998).

62. Frances M. Lynn & Jack D. Kartez, *Environmental Democracy in Action: The Toxics Release Inventory*, 18 ENVTL. MGMT. 511, 511-21 (1994); David Sarokin & Jay Schulkin, *Environmentalism and the Right To Know: Expanding the Practice of Democracy*, 4 ECOLOGICAL ECON. 175, 181, 188 (1991).

63. ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 543-44, 548-49 (Edith Brown Weiss & Harold K. Jacobson eds., 1998).

64. Eric W. Orts, *Autopoiesis and the Natural Environment*, in LAW'S NEW BOUNDARIES: THE CONSEQUENCES OF LEGAL AUTOPOIESIS 159, 174-76 (Jiří Přibáň & David Nelken eds., 2001); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1334 (1995); Sanford E. Gaines, *Reflexive Law as a Legal Paradigm for Sustainable Development*, 10 BUFF. ENVTL. L.J. 1, 2-3 (2003).

65. ARTHUR P.J. MOL, ENVIRONMENTAL REFORM IN THE INFORMATION AGE: THE CONTOURS OF INFORMATIONAL GOVERNANCE 3-5 (2008); Vivek Ramkumar & Elena Petkova, *Transparency and Environmental Governance*, in THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD, *supra* note 59, at 279-82.

new generation of “third-way environmentalism.”<sup>66</sup> Along the same lines, proponents of “information economics”<sup>67</sup> have hailed disclosure strategies as the “third wave” in pollution control—after the first generation of command-and-control (e.g., emission standards and fines) and the second generation of market-based approaches (e.g., effluent charges and tradable permits).<sup>68</sup> Critics warn, however, against a risk of “techno-populism,”<sup>69</sup> and note the demonstrable failure of mandatory disclosure schemes in the face of inadequate incentives for disclosers, or—most significantly perhaps—lack of capacity on the side of disclosees to make optimal use of the information available.<sup>70</sup>

## II. ENVIRONMENTAL INFORMATION DISCLOSURE UNDER INTERNATIONAL LAW

So how does all this translate into contemporary public international law?

The traditional place for a discussion of environmental aspects in international law textbooks still is the transfrontier scenario; mainly, the transboundary impacts of environmentally harmful or hazardous activities in neighboring countries or in areas outside national territorial jurisdiction. There, the procedural obligation of states to disclose information on potential environmental risks and to provide early notification and warnings to other states likely to be affected has long been established<sup>71</sup> and is frequently stipulated in bilateral agreements.<sup>72</sup>

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66. Christopher H. Schroeder, *Third Way Environmentalism*, 48 U. KAN. L. REV. 1, 1 (2000); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 26, 60, 151, 182 (2001).

67. See THE ECONOMICS OF INFORMATION AND KNOWLEDGE (D.M. Lambertson ed., 1971); D.M. Lambertson, *The Emergence of Information Economics*, in COMMUNICATION AND INFORMATION ECONOMICS: NEW PERSPECTIVES 7 (Meheroo Jussawalla & Helene Ebenfield eds., 1984).

68. See Tom Tietenberg, *Disclosure Strategies for Pollution Control*, 11 ENVTL. & RESOURCE ECON. 587, 587-88 (1998); Tom Tietenberg & David Wheeler, *Empowering the Community: Information Strategies for Pollution Control*, in FRONTIERS OF ENVIRONMENTAL ECONOMICS 85-86 (Henk Folmer et al. eds., 2001); JAN M. HENKE, INFORMATION AS AN ENVIRONMENTAL POLICY INSTRUMENT: ENVIRONMENTAL PRODUCT INFORMATION SCHEMES (2004).

69. ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 165 (2007); MARY GRAHAM, DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM 137-41 (2002).

70. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 647 (2010).

71. See Daniel G. Partan, *The “Duty To Inform” in International Environmental Law*, 6 B. U. INT’L L.J. 43, 50 (1988).

72. See, e.g., Convention Between Belgium and France on Radiological Protection with Regard to the Installations of the Ardennes Nuclear Power Station, Belg.-Fr., Sept. 23, 1966, 588

In the wake of the Chernobyl disaster in 1986, that duty also entered a number of multilateral treaties,<sup>73</sup> and is increasingly considered as amounting to a general customary obligation,<sup>74</sup> though with a typical focus on inter-governmental relations.

Yet, in July 1988, something approaching a paradigm shift occurred. It typically started out as “soft law,” in the form of a Decision-Recommendation adopted by the OECD, on “Provision of *Information to the Public* and Public Participation in Decision-Making Processes Related to the Prevention of, and Response to, Accidents Involving Hazardous Substances.”<sup>75</sup> In response to an alarming series of industrial disasters (Bhopal 1984 being followed by the transboundary ripples of Chernobyl and the Sandoz Rhine spill in 1986),<sup>76</sup> the focus of international regulatory attention had shifted from inter-governmental reciprocity to broader community interests in environmental protection, an evolution that paralleled—and at times shared—the progress of human rights interests in the context of public international law.<sup>77</sup> Manifestly drawing its inspiration from domestic law (in particular, the model role of the U.S. Freedom of Information Act and its following abroad),<sup>78</sup> it culminated in a 1990 European Union (EU) enactment that

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U.N.T.S. 229, 231, 235; Memorandum Concerning Transboundary Air Pollution, U.S.-Can., Aug. 5, 1980, 20 I.L.M. 690, 692.

73. In particular, International Atomic Energy Agency: Conventions on Nuclear Accidents, 1439 U.N.T.S. 275, 1457 U.N.T.S. 133, 25 I.L.M. 1369, 1371 (1986); see CHERNOBYL: LAW AND COMMUNICATION: TRANSBOUNDARY NUCLEAR AIR POLLUTION—THE LEGAL MATERIALS 235, 235 (Philippe J. Sands ed., 1988); see also Basel Convention, *supra* note 11; treaties cited *infra* notes 88-94.

74. See Günther Handl, *Environmental Security and Global Change: The Challenge to International Law*, in ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW 59, 76 (W. Lang et al. eds., 1991); Günther Handl, *Transboundary Impacts*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 532, 542-43 (Daniel Bodansky et al. eds., 2007); see also Rep. of the Int'l Law Comm'n, 53rd sess., Apr. 23-June 1, July 2-Aug. 10, 2001, at 406-07, U.N. Doc A/56/10 (May 9, 2001).

75. Organisation of Econ. Co-operation & Dev. [OECD], *Decision-Recommendation of the Council*, Doc. C(88)85/Final (July 8, 1988) (emphasis added); see Henri Smets, *The Right to Information on the Risks Created by Hazardous Installations at the National and International Levels*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 449, 449-51 (Francesco Francioni & Tullio Scovazzi eds., 1991).

76. See sources cited *supra* notes 39 and 73; see also Andrew H. Darrell, *Killing the Rhine: Immoral, but Is It Illegal?*, 29 VA. J. INT'L L. 421 (1989) (discussing the Sandoz spill at Basel); Alfred Rest, *The Sandoz Conflagration and the Rhine Pollution: Liability Issues*, 30 GERMAN Y.B. INT'L L. 160 (1987).

77. See generally Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 HAGUE ACAD. INT'L L.: RECUEIL DES COURS 217, 238 (1994); cf. Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 79-89 (U. Fastenrath et al. eds., 2011).

78. See sources cited *supra* notes 31-38.

may be described as a “vertical legal transplant” (i.e., upwards from national to international law).<sup>79</sup> Directive 90/313/EEC on Freedom of Access to Information on the Environment, mandates the enactment of national transparency legislation in all member countries of the EU.<sup>80</sup>

Initially, reactions at the governmental level were anything but enthusiastic. Several EU Member States missed the prescribed deadline for the new statutory enactments and administrative reforms required,<sup>81</sup> and the Commission had to resort to the Court of Justice to make Germany comply.<sup>82</sup> National implementation of the 1990 Directive, superseded in 2005 by Directive 2003/4/EC,<sup>83</sup> was far from perfect,<sup>84</sup> with state courts and even the European Court of Justice interpreting it restrictively.<sup>85</sup> Old administrative habits, especially the entrenched reluctance of civil service departments to conduct their business in the open, quite obviously are hard to break everywhere.<sup>86</sup>

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79. See Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 *ECOLOGY L.Q.* 1295, 1302 (2001).

80. Council Directive 90/313/EEC, 1990 O.J. (L 158) 56 (EC); see HET RECHT OP INFORMATIE INZAKE LEEFMILIEU / LE DROIT À L'INFORMATION EN MATIÈRE D'ENVIRONNEMENT / THE RIGHT TO ENVIRONMENTAL INFORMATION (M. Pallemarts ed., 1991); LE DROIT À L'INFORMATION EN MATIÈRE D'ENVIRONNEMENT DANS LES PAYS DE L'UNION EUROPÉENNE (M. Prieur ed., 1997).

81. See HERKE KRANENBORG & WIM VOERMANS, *ACCESS TO INFORMATION IN THE EUROPEAN UNION: A COMPARATIVE ANALYSIS OF EC AND MEMBER STATE LEGISLATION* (2005).

82. See Case C-217/97, *Comm'n of the Eur. Cmty. v. Germany*, 1999 E.C.R. I-5087; Case C-408/00, *Comm'n of the Eur. Cmty. v. Germany*, 2001 E.C.R. I-2218.

83. Council Directive 2003/4/EC, 2003 O.J. (L 041) 26 (EC); see Ludwig Krämer, *Access to Environmental Information in an Open Society-Directive 2003/4 EC*, 4 *Y.B. EUR. ENVTL. L.* 1, 5 (2004).

84. See ACCESS TO ENVIRONMENTAL INFORMATION IN EUROPE: THE IMPLEMENTATION AND IMPLICATIONS OF DIRECTIVE 90/313/EEC 426 (Ralph E. Hallo ed., 1996); OPENNESS AND TRANSPARENCY IN THE EUROPEAN UNION 1, 3, 7 (Veerle Deckmyn & Ian Thomson eds., 1997); TONY BUNYAN, *SECRECY AND OPENNESS IN THE EU* 2 (1999); Daniel Wilsher, *Freedom of Environmental Information: Recent Developments and Future Prospects*, 7 *EUR. PUB. L.* 671, 677 (2001); TEN YEARS OF ACCESS TO ENVIRONMENTAL INFORMATION IN INTERNATIONAL, EUROPEAN AND BELGIAN LAW (C. Larssen ed., 2003).

85. Case C-316/01, *Glawischnig v. Bundesminister für Soziale Sicherheit und Generationen*, 2003 E.C.R. I-6009 (refusing to disclose the names of manufacturers not in compliance with EU regulations on the labeling of genetically modified foodstuffs); *Reports from International Courts and Tribunals*, 14 *Y.B. INT'L ENVTL. L.* 606, 624 (2003); Geert van Calster & Maria Lee, *European Case Law Report*, 13 *REV. EUR. CMT'Y & INT'L ENVTL. L.* 104, 107 (2001); see also Agustín García Ureta & Iñigo Lazcano Brotóns, *Access to Information on the Environment and Failure of a Public Authority To Respond Within the Time-Limit for Reply*, 13 *ENVTL. LIABILITY* 60-64 (2005); Sofia de Abreu Ferreira, *The Fundamental Right of Access to Environmental Information in the EC: A Critical Analysis of WWF-EPO v. Council*, 19 *J. ENVTL. L.* 399, 400 (2007).

86. For transatlantic comparisons, see William A. Wilcox Jr., *Access to Environmental Information in the United States and the United Kingdom*, 23 *LOY. L.A. INT'L & COMP. L. REV.* 121, 122 (2001); Amanda Frost, *Restoring Faith in Government: Transparency Reform in the United States and the European Union*, 9 *EUR. PUB. L.* 87, 88 (2003).

Things began to change, however, in the run-up to the U.N. (Rio de Janeiro) Conference on Environment and Development. Between 1990 and 1992, no less than seven multilateral environmental treaties expressly opened public access to government-held information (reiterated in Principle 10 of the Rio Declaration):<sup>87</sup> viz., the conventions on Transboundary Environmental Impact Assessment (article 3(8)),<sup>88</sup> on Transboundary Watercourses (article 16);<sup>89</sup> on Transboundary Effects of Industrial Accidents (article 9(1));<sup>90</sup> on Protection of the Alps (article 4(4));<sup>91</sup> of the Baltic Sea Marine Environment (article 17);<sup>92</sup> of the North-East Atlantic Marine Environment (article 9(2));<sup>93</sup> and the Climate Change Convention (article 6(a)(ii)).<sup>94</sup>

It is no coincidence that the first three of these treaties were adopted under the auspices of the U.N. Economic Commission for Europe (U.N./ECE), which includes all of Central and Eastern Europe, plus the United States and Canada. Freedom of access to environmental information, under the catchword of *glasnost* (transparency), had long been one

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87. *Rio Declaration on Environment and Development*, in Report of the United Nations Conference on Environment and Development, *supra* note 50, Annex 1, *reprinted in* 31 I.L.M. 874 (“At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.”). To implement the principle, the Governing Council of the United Nations Environment Programme (UNEP) has since adopted a set of voluntary guidelines for the development of national legislation on access to information, public participation, and access to justice in environmental matters. See Proceedings of the Governing Council/Global Ministerial Environment Forum at Its Eleventh Special Session, Feb. 24-26, 2010, Bali, Indon., Annex to Decision SS XI/SA, U.N. Doc., UNEP/GCSS.XI/4/1/Annex (Feb. 26, 2010). On opposition by the U.S. Department of State, see *infra* notes 136-137 and accompanying text.

88. Espoo Convention on Environmental Impact Assessment in a Transboundary Context, *supra* note 10, art. 3.

89. Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 16, Mar. 17, 1992, 1936 U.N.T.S. 269, 31 I.L.M. 1312.

90. Convention on the Transboundary Effects of Industrial Accidents art. 90, Mar. 17, 1992, 2105 U.N.T.S. 457, 31 I.L.M. 1330.

91. Convention on the Protection of the Alps art. 4, Nov. 7, 1991, 1917 U.N.T.S. 135, 31 I.L.M. 767.

92. Convention on the Protection of the Marine Environment of the Baltic Sea art. 17, Apr. 9, 1992, 2099 U.N.T.S. 197.

93. Convention for the Protection of the Marine Environment of the North-East Atlantic art. 9, Sept. 22, 1992, 2354 U.N.T.S. 67, 32 I.L.M. 1069; see PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 856 (2d ed. 2003); Ted L. McDorman, *Access to Information Under Article 9 of the OSPAR Convention* (Ireland v. United Kingdom), 98 AM. J. INT'L L. 330, 330-31 (2004); Nikolaos Lavranos, *The OSPAR Convention, the Aarhus Convention and EC Law: Normative and Institutional Fragmentation on the Right of Access to Environmental Information*, in MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 143, 149 (Tomer Broude & Yuual Shany eds., 2011).

94. United Nations Framework Convention on Climate Change art. 6, May 9, 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849.

of the political demands of civil-society opposition groups in the former socialist countries in particular, preceding and indeed precipitating the fall of the Berlin Wall.<sup>95</sup> Not surprisingly therefore, it was an alliance of Northern and Eastern European NGOs that played a key role in the preparation and negotiation of the 1995 UN/ECE Sofia Guidelines on Access to Information and Public Participation in Environmental Decision-Making.<sup>96</sup> They led to the adoption of the Aarhus Convention (as it is now called) in 1998,<sup>97</sup> one of whose three “pillars” is public access to environmental information, including so-called “passive access” (that is, the right to seek information from public authorities, under article 4) and “active access” (that is, the duty of governments to collect, disclose, and disseminate such information regardless of specific requests, under article 5).<sup>98</sup> The Convention has since been followed by a Protocol on Pollutant Release and Transfer Registers in 2003,<sup>99</sup> largely modeled after the U.S. Toxics Release Inventory,<sup>100</sup> and implemented by a

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95. See Katherine M. Harman-Stokes, Note, *Community Right-To-Know in the Newly Independent States of the Former Soviet Union: Ending the Culture of Secrecy Surrounding the Environmental Crisis*, 15 VA. ENVTL. L.J. 77, 111 (1995); Stephen Stec, *Ecological Rights Advancing the Rule of Law in Eastern Europe*, 13 J. ENVTL. L. & LITIG. 275, 275, 278 (1998); see also *infra* note 105 and accompanying text.

96. See CTR. FOR SCI. AND ENV'T, GLOBAL ENVIRONMENTAL NEGOTIATIONS 2: POLES APART 147-48 (Anil Agarwal et al. eds., 2001); JEREMY WATES, ACCESS TO ENVIRONMENTAL INFORMATION AND PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING: UN/ECE GUIDELINES FROM THEORY TO PRACTICE (1996).

97. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 4, June 25, 1998, 2161 U.N.T.S. 447, 38 I.L.M. 517; see ELENA PETKOVA WITH PETER VEIT, ENVIRONMENTAL ACCOUNTABILITY BEYOND THE NATION STATE: THE IMPLICATIONS OF THE AARHUS CONVENTION (2000); Susan Rose-Ackerman & Achim A. Halpaap, *The Aarhus Convention and the Politics of Process: The Political Economy of Procedural Environmental Rights*, 20 RES. L. & ECON. 27, 28 (2002); Veit Koester, *The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, in MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL 179, 183 (Geir Ulfstein et al. eds., 2007); Michael Mason, *Information Disclosure and Environmental Rights: The Aarhus Convention*, 10 GLOBAL ENVTL. POS. 10, 15 (2010).

98. U.N. ECON. COMM'N FOR EUR., THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 6 (Stephen Stec et al. eds., 2000); DANIEL R. KLEIN, UMWELTINFORMATION IM VÖLKER-UND EUROPARECHT 6 (2011) (also distinguishing “active” and “reactive” information duties). An amendment adopted on May 27, 2005 (new Art. 6 *bis*) expressly extends application of the Convention to public information and participation in decision-making relating to genetically modified organisms (GMOs). See Decision II/1 of the Parties to the Aarhus Convention, Rep. of the 2d. Meeting of the Parties, add., U.N. Doc. ECE/MP.PP/2005/2/Add.2 (June 20, 2003).

99. Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, May 21, 2003, U.N. Doc. ECE/MP.PP/2003/1.

100. See Goldman, *supra* note 41, at 318.

European Pollutant Release and Transfer Register,<sup>101</sup> which collects and annually updates pollutant emission data from over 25,000 industrial facilities in the twenty-seven EU Member States plus Iceland, Liechtenstein, Norway, and Switzerland.<sup>102</sup>

Most importantly perhaps, the Aarhus Convention is institutionally enforced through a new international Compliance Committee, established in 2002.<sup>103</sup> Composed of nine elected members (including nongovernmental experts), the Committee has already dealt with a number of complaints for denial of access to environmental information (article 4).<sup>104</sup> In a typical case, involving the import and disposal of foreign radioactive waste by a government agency in Kazakhstan, a local NGO successfully challenged the government's refusal to disclose the results of a technical/environmental feasibility study and eventually had its rights confirmed by the national supreme court in 2008.<sup>105</sup>

Meanwhile, the Council of Europe, whose 1993 Lugano Convention on Environmental Liability had already provided for access to environmental information held by governments and "bodies with public responsibilities for the environment and under the control of a

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101. See Commission Regulation (EC) 166/2006, Concerning the Establishment of a European Pollutant Release and Transfer Register and Amending Council Directives 91/689/EEC and 96/61/IEC, 2006 O.J. (L 33) 1 (EC).

102. THE EUROPEAN POLLUTANT RELEASE AND TRANSFER REGISTER, <http://petr.cc.europa.eu> (last visited Nov. 6, 2011). The Register (E-PRTR) is operated by the European Environment Agency (EEA) in Copenhagen. See Karen E. MacDonald, *The European Pollutant Release and Transfer Register*, 10 EUR. J.L. REFORM 21, 21 (2008); DIRK BÜNGER, DEFICITS IN EU AND US MANDATORY ENVIRONMENTAL INFORMATION DISCLOSURE; LEGAL, COMPARATIVE LEGAL AND ECONOMIC FACETS OF POLLUTANT RELEASE INVENTORIES 57 (2011).

103. Decision I/7 of the Parties to the Aarhus Convention, Rep. of the First Meeting of the Parties, U.N. Doc. ECE/MP.PP/2/Add. 8 (Apr. 2, 2004); see U.N. ECON. COMM'N FOR EUR., GUIDANCE DOCUMENT ON AARHUS COMPLIANCE MECHANISM 4 (2008); Veit Koester, *Review of Compliance Under the Aarhus Convention: A Rather Unique Compliance Mechanism*, 2 J. EUR. ENVTL. & PLAN. L. 31, 35 (2005).

104. See, e.g., Michael Delroy, *Implementation of the Aarhus Convention in Belgium*, in THE AARHUS CONVENTION AT TEN: INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND EU ENVIRONMENTAL LAW 347, 347 (Marc Pallemarts ed., 2011); Veit Koester, *The Compliance Committee of the Aarhus Convention: An Overview of Procedures and Jurisprudence*, 37 ENVTL. POL'Y & L. 83, 83-84, 95-96 (2007).

105. Aarhus Convention Compliance Committee, Rep. on the 7th Meeting, add., U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.1 (Mar. 11, 2005); see SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND ENVIRONMENT: CASES, LAW, AND POLICY 228-31 (2008). Other cases of noncompliance with article 4 on access to information involved Armenia (2006), Moldova (2009), Spain (2010) and Belarus (pending). Cf. Tatiana R. Zaharchenko & Gretta Goldenman, *Accountability in Governance: The Challenge of Implementing the Aarhus Convention in Eastern Europe and Central Asia*, 4 INT'L ENVTL. AGREEMENTS: POL., L. & ECON. 229, 242 (2004); Stephen Stec, "Aarhus Environmental Rights" in Eastern Europe, 5 Y.B. EUR. ENVTL. L. 1, 1, 19 (2005).



public authority,<sup>106</sup> has adopted a far-reaching new Convention on Access to Official Documents, signed at Tromsø, Norway, in 2009.<sup>107</sup> It introduces a number of innovative provisions, including the principle that standard secrecy exceptions such as national security or privacy rights must also be balanced against requirements of environment protection. Future implementation of the Tromsø Convention is to be monitored by an elected permanent “group of specialists” on access to official documents, not unlike the Aarhus Compliance Committee. Simultaneously, the European Court of Human Rights in Strasbourg has begun to recognize public access to government-held documents as a fundamental right protected under article 10 of the European Human Rights Convention,<sup>108</sup> a kind of judicial “Scandinavization,”<sup>109</sup> promptly emulated by the Inter-American Court of Human Rights in a landmark environmental case (*Reyes v. Chile*, 2006), under an identical provision of the 1969 American Convention.<sup>110</sup> The Inter-American Court in turn

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106. Council of Eur., Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment art. 15, E.T.S. 150, 32 I.L.M. 1228 (June 21, 1993); see Jonas Ebbesson, *The Notion of Public Participation in International Environmental Law*, 8 Y.B. INT’L ENVTL. L. 51, 90 (1997).

107. Council of Eur., Convention on Access to Official Documents art. 2, June 18, 2009, 18 C.E.T.S. 205; see Adrienne Komanovics, *Transparent Europe? The Council of Europe Convention on Access to Official Documents*, 8 JADO: BOLETÍN DE LA ACADEMIA VASCA DE DERECHO 141, 147 (2010).

108. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221; KRAVCHENKO & BONINE, *supra* note 105, at 251-53; cf. Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 185 (2006); Ellen Desmet, *Balancing Conflicting Goods: The European Human Rights Jurisprudence on Environmental Protection*, 7 J. EUR. ENVTL. & PLAN. L. 303, 304 (2010); Maria Gavouneli, *Access to Environmental Information: Delimitation of a Right*, 13 TUL. ENVTL. L.J. 303, 303-27 (2000); Wouter Hins & Dirk Voorhoof, *Access to State-Held Information as a Fundamental Right Under the European Convention on Human Rights*, 3 EUR. CONST. L. REV. 114, 114 (2007); Christopher Miller, *The European Convention on Human Rights: Another Weapon in the Environmentalist’s Armoury*, 11 J. ENVTL. L. 170, 171 (1999); Ole W. Pedersen, *The Ties That Bind: The Environment, the European Convention on Human Rights, and the Rule of Law*, 16 EUR. PUB. L. 571, 571 (2010). On the Court’s earlier, less bold interpretation of article 10 in the 1998 *Guerra* case, see Stefan Weber, *Environmental Information and the European Convention on Human Rights*, 12 HUM. RTS. L.J. 177, 177 (1991).

109. Peter H. Sand, *Information Disclosure*, in THE REALITY OF PRECAUTION: COMPARING RISK REGULATION IN THE UNITED STATES AND EUROPE 323, 327 (Jonathan B. Wiener et al. eds., 2010).

110. American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 17,955; see Claude Reyes *et al.* v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 151, para. 174 (Sept. 19, 2006); Thomas S. Blanton, *The Global Openness Movement in 2006: 240 Years After the First Freedom of Information Law, Access to Government Information Now Seen as a Human Right*, in THE WORLD’S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS’ LEGACY TODAY, *supra* note 26, at 80; Lucas Lixinsky, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT’L L. 585, 595 (2010). A similar provision can be found in the Organisation of African Unity: Banjul

cited the Aarhus Convention, which seems well on its way to becoming a universal memetic reference base (“memes” are to social psychologists what “legal transplants” are to comparative lawyers).<sup>111</sup>

Whether or not these rights-based regional initiatives will eventually lead to “a global Aarhus-type convention on access to environmental information, decision-making and justice” as proposed both by the Parliament of the European Union and by Brazil in current preparations for the 2012 U.N. Conference on Sustainable Development (Rio+20)<sup>112</sup> remains to be seen. For the time being, “context-oriented” instruments for information rights and duties are still far from mainstream in international environmental governance.<sup>113</sup> One of the most difficult sub-tasks in the EU was to persuade the bureaucracy in Brussels that it, too, had a problem with information disclosure: It took years of litigation to establish public access to EU Parliament, Council, and Commission documents.<sup>114</sup> Today, access is guaranteed, on the basis of article 15(3) of the Treaty of Lisbon,<sup>115</sup> by the Transparency Regulation (1049/2001),<sup>116</sup>

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Charter on Human and People’s Rights art. 9, June 20, 1981, 21 I.L.M. 58, but has yet to be applied in practice.

111. See SUSAN BLACKMORE, *THE MEME MACHINE* 4 (1999); see also Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, [2002] *Envtl. L. Rep. (Envtl. Law Inst.)* 10,428, 10,428; WATSON, *supra* note 36, at 21.

112. European Parliament, Resolution of Sept. 29, 2011, on Developing a Common EU Position Ahead of the United Nations Conference on Sustainable Development (Rio+20), provisional edition B7-0522/2011, para. 82 (“global convention”); and Submission by Brazil to the Preparatory Process, Rio+20 Conference, Brasilia, Nov. 1, 2011, para. 33 (“launch of negotiations on a global convention”). See also the declaration adopted by the International Conference on the Right to Public Information (Atlanta, Georgia, Feb. 28-29, 2008): CARTER CTR., *ATLANTA DECLARATION AND PLAN OF ACTION FOR THE ADVANCEMENT OF THE RIGHT OF ACCESS TO INFORMATION* (2008), [http://www.cartercenter.org/peace/Americas/ati-conference/declaration\\_print.html](http://www.cartercenter.org/peace/Americas/ati-conference/declaration_print.html).

113. Katharina Holzinger et al., *Steuerungswechsel in der europäischen Umweltpolitik?, in POLITISCHE STEUERUNG IM WANDEL: DER EINFLUSS VON IDEEN UND PROBLEMSTRUKTUREN* 103, 126 (K. Holzinger et al. eds., 2003).

114. See Peter Kunzlik, *Access to the Commission’s Documents in Environmental Cases: Confidentiality and Public Confidence*, 9 J. ENVTL. L. 321, 333-35 (1997); Micheal O’Neill, *The Right of Access to Community-Held Documentation as a General Principle of EC Law*, 4 EUR. PUB. L. 403, 403 (1998); Morten Broberg, *Access to Documents: A General Principle of Community Law?*, 27 EUR. L. REV. 194, 196, 203 (2002); Alasdair Roberts, *Multilateral Institutions and the Right to Information: Experience in the European Union*, 8 EUR. PUB. L. 255, 256 (2002); Tony Bunyan, *Access to Documents: Freedom of Information “Could Fuel Public Discussion,” in THE WORLD’S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS’ LEGACY TODAY*, *supra* note 26, at 74, 78-79.

115. Consolidated Version of the Treaty on the Functioning of the European Union art. 15, Mar. 3, 2010, 2010 O.J. (L 83) 54 (EC); see also Charter of Fundamental Rights of the European Union art. 11, Mar. 3, 2010, 2010 O.J. (L 83) 394 (EC).

116. Parliament & Council Regulation 1049/2001, Regarding Public Access to European Parliament, Council and Commission Documents, May 30, 2001, 2001 O.J. (L 145) 43 (EC); see

albeit interpreted rather narrowly by the European Court in Luxembourg,<sup>117</sup> and currently under revision.<sup>118</sup> In global context, an important “role model” for hard-fought public access rights to information held by international organizations was the World Bank, which has gradually moved from initial restrictive disclosure policies issued in the 1980s to its current “transparency policy,” now followed by similar procedures in most other multilateral development banks.<sup>119</sup>

### III. NEW CHALLENGES

In retrospect, the postulate of “freedom” of (environmental) information certainly has come a long way from its eighteenth century Nordic beginnings. Regardless of whether it will eventually be canonized as a new “principle” of international environmental law,<sup>120</sup> there is no doubt that it is here to stay. In conclusion, then, let me take a quick look at some of its contemporary problems and future prospects.

#### A. Security Post-9/11

Possibly the most serious new challenge to the right of access to environmental information was triggered by the tragic events of

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Steve Peers, *The New Regulation on Access to Documents: A Critical Analysis*, 21 Y.B. EUR. L. 385, 385 (2002); Ludwig Krämer, *Access to Letters of Formal Notice and Reasoned Opinions in Environmental Law Matters*, 12 EUR. ENVTL. L. REV. 197, 198 (2003); Frankie Schram, *Public Access to EU Environmental Documents: Regulation (EC) No. 1049/2001*, 5 Y.B. EUR. ENVTL. L. 23, 23 (2005).

117. See Case T-168/02, IFAW Internationaler Tierschutz-Fonds GmbH v. Comm’n, 2005 O.J. (C 31) 19 (EC).

118. See Commission Proposal for a Regulation of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Documents, COM (2008) 229 final (Apr. 30, 2008); see also Report from the Commission on the Application in 2010 of Regulation (EC) No. 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents, COM (2011) 492 final (Aug. 12, 2011).

119. See WORLD BANK, TOWARD GREATER TRANSPARENCY THROUGH ACCESS TO INFORMATION: THE WORLD BANK’S DISCLOSURE POLICY (2009). For comparison on the historical development of the policy, see Lori Udall, *The World Bank and Public Accountability: Has Anything Changed?*, in THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS 391-404 (Jonathan A. Fox & L. David Brown eds., 1998). See also GÜNTHER HANDL, MULTILATERAL DEVELOPMENT BANKING: ENVIRONMENTAL PRINCIPLES AND CONCEPTS REFLECTING GENERAL INTERNATIONAL LAW AND PUBLIC POLICY 47, 87 (2001); Paul J. Nelson, *Transparency Mechanisms at the Multilateral Development Banks*, 29 WORLD DEV. 1835, 1835 (2001); Graham Saul, *Transparency and Accountability in International Financial Institutions*, in THE RIGHT TO KNOW, THE RIGHT TO LIVE: ACCESS TO INFORMATION AND SOCIO-ECONOMIC JUSTICE 127, 127-37 (Richard Calland & Alison Tilley eds., 2002); cf. TRANSPARENCY INT’L, COMMENTS ON THE EUROPEAN INVESTMENT BANK’S PUBLIC DISCLOSURE POLICY DATED MAY 2009 (2008); Reza Moghadam, *Freedom of IMFormation*, International Monetary Fund (Sept. 17, 2009), <http://blog-Imfdirect.imf.org/2009/09/17/Freedom-of-Information/>.

120. See SANDS, *supra* note 93, at 852.

September 11, 2001. In the face of terrorist bombing threats against the most vulnerable “soft” targets, for example, major chemical factories, a large part of industrial risk data in the United States was promptly reclassified as “critical infrastructure information.”<sup>121</sup> Not surprisingly, economic pressure groups, which had always resisted the disclosure of environmental risks to the public, lent enthusiastic support to the Bush administration’s efforts to restrict access to such information.<sup>122</sup> They scored a first tactical victory with the “data quality rider” attached to the U.S. Treasury’s appropriation bill in December 2001, labeled Information Quality Act,<sup>123</sup> which directed the U.S. Office of Management and Budget (OMB) to develop new restrictive rules, entitled, in a priceless piece of Bush-Orwell newspeak, “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies.”<sup>124</sup>

Substantive and procedural restrictions on environmental information disclosure have since been imposed under the Homeland Security Act of 2002.<sup>125</sup> Procedures for public access to chemical risk

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121. See Brian Costner, *Access Denied*, 58 BULL. ATOMIC SCIENTISTS 59, 59-60 (2002); Michael J. Penders & William L. Thomas, *Ecoterror: Rethinking Environmental Security After September 11*, 16 NAT. RESOURCES & ENV'T 159, 207 (2002); Joseph A. Siegel, *Terrorism and Environmental Law: Chemical Facility Site Security vs. Right-to-Know*, 9 WIDENER L. SYMP. J. 339, 339-40 (2003); Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 3 (2005); JOHN D. MOTEFF, CONG. RES. SERV. RL30153, CRITICAL INFRASTRUCTURES: BACKGROUND, POLICY, AND IMPLEMENTATION (2011).

122. See MARK GREENWOOD, WHITE PAPER FROM INDUSTRY COALITION TO EPA ON CONCERNS OVER INFORMATION PROGRAM (1999), reprinted in DAILY ENVTL. REP., May 4, 1999, at 1; ROBERT F. KENNEDY JR., CRIMES AGAINST NATURE: HOW GEORGE W. BUSH AND HIS CORPORATE PALS ARE PLUNDERING THE COUNTRY AND HIJACKING OUR DEMOCRACY 156, 158-59 (2004); AMERICAN CHEMISTRY COUNCIL (ACC, formerly the Chemical Manufacturers Association), <http://www.americanchemistry.com/media/pressreleasestranscripts/acc-news-releases/> (last visited Sept. 6, 2011); OFFICE OF MGMT. & BUDGET, COALITION FOR EFFECTIVE ENVIRONMENTAL INFORMATION (CEEI), <http://www.georgewbush-whitehouse.archives.gov/omb/inforeg/good-guid/c-eei.pdf> (last visited Oct. 31, 2001); CTR. FOR REGULATORY EFFECTIVENESS (CRE), <http://www.thecre.com/about.html> (last visited Sept. 6, 2011).

123. Information Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000). See James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J. L. & PUB. POL'Y 521, 522 (2002); Kirk T. O'Reilly, *Science, Policy, and Politics: The Impact of the Information Quality Act on Risk-Based Regulatory Activity at the EPA*, 14 BUFF. ENVTL. L.J. 249, 251 (2006); Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 339, 339 (2004).

124. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002); see Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 LEWIS & CLARK ENVTL. L. 1083, 1091 (2007).

125. 6 U.S.C. § 131 (2006); Homeland Security Information Sharing, 68 Fed. Reg. 45,149 (July 31, 2003) (instructing the Department of Homeland Security (DHS) also to develop

information had already been curtailed before.<sup>126</sup> The risk management database was quietly removed from the EPA Web site, with the stated intent of withholding the information also from NGO networks.<sup>127</sup> In 2006, the EPA substantially reduced toxics release reporting requirements for industry.<sup>128</sup> Moreover, pursuant to the Department of Homeland Security's Chemical Facility Anti-Terrorism Standards, effective 2007, "notwithstanding the Freedom of Information Act, the Privacy Act and other laws, records containing chemical—terrorism vulnerability information (CVI) are not available for public inspection or copying, nor does the Department release such records without a need to know."<sup>129</sup> In the face of new security threats, the U.S. government thus sounded the retreat from a "right-to-know" approach towards a kind of "soft paternalism," with a benevolent "avuncular State" to determine what citizens do or do not *need* to know.<sup>130</sup>

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procedures for identifying and safeguarding "sensitive but unclassified" information held by federal agencies); see John D. Echeverria & Julie B. Kaplan, *Poisonous Procedural "Reform": In Defense of Environmental Right-To-Know*, KAN. J.L. PUB. POL'Y, at 579, 579-80 (2002); Stephen Gidiere & Jason Forrester, *Balancing Homeland Security and Freedom of Information*, 16 NAT. RESOURCES & ENV'T 139, 140 (2002); Joseph D. Jacobson, *Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level*, 9 ENVTL. LAW. 327, 329, 372 (2003); Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, KAN. J.L. PUB. POL'Y 671-73; James T. O'Reilly, "Access to Records" versus "Access to Evil: Should Disclosure Laws Consider Motives as a Barrier to Records Release?", 12 KAN. J.L. & PUB. POL'Y 559, 566 (2002); Bradley Pack, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 ARIZ. L. REV. 815-19 (2004); Patricia E. Salkin, *GIS in an Age of Homeland Security: Accessing Public Information To Ensure a Sustainable Environment*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 55-69 (2005); Rena Steinzor, "Democracies Die Behind Closed Doors": *The Homeland Security Act and Corporate Accountability*, KAN. J.L. & PUB. POL'Y, at 641, 642 (2002); Kristen D. Wheeler, *Homeland Security and Environmental Regulation: Balancing Long-Term Environmental Goals with Immediate Security Needs*, 45 WASHBURN L.J. 437, 446 (2006).

126. In particular, access to risk management plans (RMPs) and off-site consequences analysis (OCA) for certain chemical facilities pursuant to section 112(r) of the Clean Air Act, 42 U.S.C. § 7412(r)(7)(H) (2006). The Department of Justice supported changes that would "prohibit general, public access to OCA information in facility RMPs." Letter from John Stephenson, U.S. Gov't Accountability Office, to W.J. Tauzin & John Shimkus, Members of Congress, U.S. House of Representative (Mar. 11, 2003), available at <http://www.gao.gov/new.items/do3509r.pdf>.

127. See Letter from John Stephenson to W.J. Tauzin and John Shimkus, *supra* note 126.

128. Toxics Release Inventory Burden Reduction Final Rule, 71 Fed. Reg. 76,932 (Dec. 22, 2006) (to be codified at 40 C.F.R. § 372); see David C. Vladeck, *Information Access: Surveying the Current Legal Landscape of Federal Right-To-Know Laws*, 86 TEX. L. REV. 1787, 1791 (2008).

129. 6 C.F.R. § 27.400(g)(1) (2011). For background, see DANA A. SHEA, CONG. RES. SERV., RL33043, LEGISLATIVE APPROACHES TO CHEMICAL FACILITY SECURITY (2005). See also John Podesta, *Need To Know: Governing in Secret, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 220, 223 (Richard C. Leone & Greg Anrig, Jr., eds., 2003).

130. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1160 (2003); Richard H. Thaler & Cass R. Sunstein,

It had taken decades to establish procedures for mandatory information disclosure (public and private) to ensure transparency and thereby to reduce the range of uncertainties which often make precautionary action necessary. Ironically, precaution against the new risk of terrorism was now being invoked to reduce that very transparency. Ultimately, of course, it is for each society to determine which risks it can afford to trade off against which countervailing risks.<sup>131</sup> Yet, in the course of this particular trade-off, the public's hard-won environmental "right to know" suddenly confronted the ugly claw of a zombie, resurrected from the dark ages of European administrative law: Government's "hiding hand."<sup>132</sup>

At the international level, the U.S. Department of State under the Bush administration began to systematically boycott all efforts at expanding public access to government-held or industry-held environmental information. The Aarhus Convention, which entered into force in October 2001 and which currently has forty-three member states, was never submitted for ratification to the U.S. Senate; and in November 2001, the U.S. delegation withdrew from follow-up

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*Libertarian Paternalism*, 93 AM. ECON. REV. 175, 175 (2003); CHRISTINE JOLLS & CASS R. SUNSTEIN, DEBIASING THROUGH LAW 61 (2004); Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 149 (2006); *The New Paternalism: The Avuncular State*, ECONOMIST, Apr. 8, 2006, at 67. Considering, though, that the *avunculus* in Roman law was the maternal rather than the paternal uncle (i.e., *patruus*; I owe this clarification to Anne Petitpierre), it would perhaps be more accurate for "soft paternalism" to be relabeled maternalism, or "Big Mother Syndrome."

131. John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in RISK VS. RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham & Jonathan Baert Wiener eds., 1995); cf. Jessica Stern & Jonathan Baert Wiener, *Terrorism and Weapons of Mass Destruction*, in THE REALITY OF PRECAUTION: COMPARING RISK REGULATION IN THE UNITED STATES AND EUROPE, *supra* note 109, at 310. For historical overviews of the security exception in the United States and Europe, see Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 906 (1990); Sandra Coliver, *Commentary on the Johannesburg Principles on National Security: Freedom of Expression and Access to Information*, in SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION, AND ACCESS TO INFORMATION (Sandra Coliver et al. eds., 1999). For contemporary attempts at balancing environmental and security risks, see Stephen M. Johnson, *Terrorism, Security, and Environmental Protection*, 29 WM. & MARY ENVTL. L. POL'Y 107-09 (2004); Katherine Chekouras, *Balancing National Security with a Community's Right-To-Know: Maintaining Public Access to Environmental Information Through EPCRA's Non-Preemption Clause*, 34 B. COLL. ENVTL. AFF. L. REV. 107, 107-08 (2007); Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 261-63 (2003); Laura A. White, Note, *The Need for Governmental Secrecy: Why the U.S. Government Must Be Able To Withhold Information in the Interest of National Security*, 43 VA. J. INT'L L. 1071, 1071-72 (2003).

132. Peter H. Sand, *Information Disclosure as an Instrument of Environmental Governance*, 63 HEIDELBERG J. INT'L L. 487-502 (2003); cf. Nicholas A. Robinson, *Terrorism's Unintended Casualties: Implications for Environmental Law in the USA and Abroad*, 37 ENVTL. POL'Y & L. 125, 125-26 (2007).

negotiations for the subsequent PRTR protocol.<sup>133</sup> It is worth recalling that right up to the Johannesburg World Summit on Sustainable Development in September 2002, the United States—no matter how much fault critics may have found with its environmental record in other areas—had remained the undisputed champion of citizen access to environmental data, public or private. Indeed, in his message to the summit, then-Secretary of State Colin Powell highlighted the “access initiative” by twenty-six civil society organizations in nine countries to assess how well governments are providing access to risk information.<sup>134</sup> Starting from Principle 10 of the Rio Declaration, the “Plan of Implementation” adopted by the Johannesburg summit reaffirmed the need “to ensure access, at the national level, to environmental information,” and in particular, “to encourage development of coherent and integrated information on chemicals, such as through national pollutant release and transfer registers.”<sup>135</sup> Yet, at the Nairobi session of the UNEP Governing Council in February 2003, a follow-up proposal for global guidelines on the application of Rio Principle 10—including more specific rules on information access—now ran into opposition from the United States in coalition with the Group of Seventy-Seven (developing countries) and China. As a result, it was shelved for the next six years, and only reached the UNEP Governing Council again for adoption under the next U.S. administration in 2009.<sup>136</sup> And when the World

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133. *Supra* note 99 and accompanying text; see U.N. Economic Comm’n of Europe, Report of the 1st Meeting of the Parties to the Aarhus Convention, May 21-23, annex, U.N. Doc. ECE/MP.PP/2; U.S. Statement on the Establishment of a Compliance Mechanism, *reprinted in* 33 ENVTL. POL’Y & L. 172, 178-79 (2003); Koester, *supra* note 103, at 95-96.

134. Colin L. Powell, *Only One Earth*, in 13 OUR PLANET 8-10 (2002), available at <http://www.ourplanet.com/ingrersn/132/powell.html/>; see also ELENA PETKOVA ET AL., WORLD RESOURCES INSTITUTE, CLOSING THE GAP: INFORMATION, PARTICIPATION, AND JUSTICE IN DECISION-MAKING FOR THE ENVIRONMENT 34 (Bob Livernash ed., 2002); *Partnership for Principle 10*, WORLD RESOURCES INST., <http://www.wri.org/project/principle-10> (last visited Oct. 29, 2011).

135. U.N. Rep. of the World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, paras. 23(f), 128, U.N. doc. A/CONF.199/20 (2002); Johannesburg Declaration on Sustainable Development art. 29, *reprinted in* 32 ENVTL. POL’Y & L. 234 (2003) (calling on private sector corporations “to enforce corporate accountability, which should take place within a transparent and stable regulatory environment”); see Kevin Gray, *World Summit on Sustainable Development: Accomplishments and New Directions?*, 52 INT’L & COMP. L.Q. 256, 256 (2003); see also Johannesburg Principles on the Role of Law and Sustainable Development, Adopted by the Global Judges Symposium on Aug. 20, 2002 (calling for “public access to relevant information”), *reprinted in* 32 ENVTL. POL’Y & L. 236, 236-37 (2003).

136. Enhancing the Application of Principle 10 of the Rio Declaration on Environment and Development, U.N. Doc. UNEP/GC.22/3/Add.2/B (2002), and decision UNEP/GC.22/L.3/Add.1 (2003) (directing the Executive Director to submit a report for review in 2005); see *Summary of the 22nd Session of the UNEP Governing Council and Fourth Global Ministerial Environment Forum 3-7 Feb. 2003*, EARTH NEGOTIATIONS BULL., Feb. 10, 2003, at 9, available at

Conservation Congress of the International Union for Conservation of Nature and Natural Resources (IUCN) at Bangkok in November 2004 unanimously adopted a recommendation for the implementation of Principle 10, the U.S. delegation alone abstained, upon instructions from the State Department.<sup>137</sup>

There are signs, however, of a reversal of this ominous exceptionalist trend. President Obama's memoranda on transparency and freedom of information, issued on the first day of his administration on January 21, 2009, thus call for "an unprecedented level of openness in government."<sup>138</sup> They were followed by comprehensive guidelines from the Attorney General, establishing a "presumption of openness" and rescinding the earlier administration's more restrictive guidelines dating back to October 2001.<sup>139</sup> Even so, independent audits of agency-wide practice in 2010 and 2011 still show rather uneven responses to these initiatives and conclude that "much more pressure and leadership will be necessary."<sup>140</sup>

### *B. Corporate Accountability for Environmental Information*

Regarding industry-held environmental risk data, there have been a number of initiatives for voluntary reporting schemes worldwide.<sup>141</sup> These now include the Global Reporting Initiative launched by the U.N. Environment Programme (UNEP) and the U.S.-based Coalition for

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<http://www.iisd.ca/linkages/unepe/22gc/>; *cf.* Rio Declaration on Environment and Development, *supra* note 87.

137. See International Union for Conservation of Nature and Natural Resources, Implementation of Principle 10 by Building Comprehensive Good Governance, Resolution REC/WCC3.081, *in* WORLD CONSERVATION CONGRESS, RESOLUTIONS AND RECOMMENDATIONS 95-96 (2005) (noting the U.S. State Department's statement on abstention).

138. Transparency and Open Government, 74 Fed. Reg. 4685 (2009); Freedom of Information Act, 74 Fed. Reg. 4683 (2009).

139. Memorandum from Eric Holder, U.S. Att'y Gen., Office of the Attorney General, to the Heads of Exec. Dep'ts & Agencies (Mar. 19, 2009).

140. NATE JONES ET AL., NAT'L SEC. ARCHIVE, SUNSHINE AND SHADOWS: THE CLEAR OBAMA MESSAGE FOR FREEDOM OF INFORMATION MEETS MIXED RESULTS (Tom Blanton et al. eds., 2010); MARC JONES ET AL., NAT'L SEC. ARCHIVE, GLASS HALF FULL: BUT MANY AGENCIES LOG IN FOLLOWING OBAMA'S OPENNESS ORDER, *exec. summ.* (Tom Blanton et al. eds., 2011) (reporting that only forty-nine of ninety federal agencies had complied so far).

141. See GERMAN FED. ENVTL. AGENCY, GLOBAL VOLUNTARY CORPORATE ENVIRONMENTAL REPORTING: THE CORPORATE REGISTER DIRECTORY (2002); *cf.* Nike A. Gozali et al., *The Economic Consequences of Voluntary Environmental Disclosure*, *in* 2 INTEGRATED ASSESSMENT AND DECISION SUPPORT: PROCEEDINGS OF THE EMS FIRST BIENNIAL MEETING, INTERNATIONAL CONGRESS ON ENVIRONMENTAL MODELLING & SOFTWARE 484-89 (A.E. Rizzoli & A.J. Jakeman eds., 2002); Sylvie Berthelot et al., *Environmental Disclosure Research: Review and Synthesis*, 22 J. ACCOUNTING LITERATURE 1, 1 (2003).



Environmentally Responsible Economies (CERES) in 1997;<sup>142</sup> the Greenhouse Gas Protocol Initiative, promoted since 1998 by the World Resources Institute (WRI) and the World Business Council for Sustainable Development (WBCSD);<sup>143</sup> the Carbon Disclosure Project launched in 2000 in London;<sup>144</sup> and the Greenhouse Gas Standards issued by the International Organization for Standardization (ISO) in Geneva since 2006.<sup>145</sup> Disclosure of environmental risk information may thus be said to have become part of a global code of business ethics;<sup>146</sup> and even though that code is not binding, the theory is that, through a transparent

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142. See Allen L. White, *Why We Need Global Standards for Corporate Disclosure*, 69 LAW & CONTEMP. PROBS. 167, 167-79 (2006); HALINA SZEJNWALD BROWN ET AL., THE RISE OF THE GLOBAL REPORTING INITIATIVE (GRI) AS A CASE OF INSTITUTIONAL ENTREPRENEURSHIP (2007); GLOBAL REPORTING INITIATIVE, SUSTAINABILITY REPORTING GUIDELINES 3 (2010) (updated version). For initiatives towards mandatory reporting, see GLOBAL REPORTING INITIATIVE, BEYOND VOLUNTARY LAISSEZ-FAIRE REPORTING: TOWARDS A EUROPEAN ESG DISCLOSURE FRAMEWORK (2010); see also Cherie Metcalf, *Corporate Social Responsibility as Global Public Law: Third Party Rankings as Regulation by Information*, 28 PACE ENVTL. L. REV. 145, 145-99 (2010).

143. See WORLD RESOURCES INST., THE GREENHOUSE GAS PROTOCOL: A CORPORATE ACCOUNTING AND REPORTING STANDARD 42 (2004); WORLD RESOURCES INST., THE GREENHOUSE GAS PROTOCOL: THE GHG PROTOCOL FOR PROJECT ACCOUNTING 4 (2005); WORLD RESOURCES INST., THE GREENHOUSE GAS PROTOCOL FOR THE U.S. PUBLIC SECTOR: INTERPRETING THE CORPORATE STANDARD FOR U.S. PUBLIC SECTOR ORGANIZATIONS 2, 3 (2010).

144. See ALLEN MCGILL ET AL., CARBON DISCLOSURE PROJECT 2010: GLOBAL 500 REPORT (2010); Eun-Hee Kim & Thomas P. Lyon, *Carbon Disclosure Project*, in HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS (Thomas N. Hale & David Held eds., 2011).

145. INT'L ORG. FOR STANDARDIZATION, TECH. COMM. 207 ON ENVTL. MATTERS, GREENHOUSE GASES—SPECIFICATIONS WITH GUIDANCE AT THE ORGANIZATION LEVEL FOR QUANTIFICATION AND REPORTING OF GREENHOUSE GAS EMISSIONS AND REMOVALS: ISO STANDARD 14064-1:2006 (2006); INT'L ORG. FOR STANDARDIZATION, TECH. COMM. 207 ON ENVTL. MATTERS, GREENHOUSE GASES—REQUIREMENTS FOR GREENHOUSE GAS VALIDATION AND VERIFICATION FOR USE IN ACCREDITATION OR OTHER FORMS OF RECOGNITION: ISO STANDARD 14065:2007 (2007).

146. We will disclose to our employees and to the public incidents relating to our operations that cause environmental harm or pose health or safety hazards. We will disclose potential environmental, health or safety hazards posed by our operations, and we will not take any action against employees who report any condition that creates a danger to the environment or poses health or safety hazards.

Coalition for Environmentally Responsible Economies (CERES), *The Valdez Principles*, in THE GREENING OF AMERICAN BUSINESS: MAKING BOTTOM-LINE SENSE OF ENVIRONMENTAL RESPONSIBILITY 49, 50 (Thomas F.P. Sulliven ed., 1992); see Rajib N. Sanyal & Joao S. Neves, *The Valdez Principles: Implications for Corporate Social Responsibility*, 10 J. BUS. ETHICS 883, 883 (1991). See generally David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 262 (2008).

system of benchmarking and “reputational accountability,”<sup>147</sup> it will eventually be sanctioned by the stock market.

At the national level, mandatory reporting of fuel and emissions data was already required under U.S. state legislation for the electric utility industry;<sup>148</sup> and reporting of greenhouse gas emissions is now mandatory for all large sources and suppliers (including manufacturers of vehicles and engines, and for all facilities emitting 25,000 metric tons or more annually) under rules finalized by the EPA in 2009.<sup>149</sup> Moreover, innovative judicial lawmaking such as the 1998 Minnesota settlement,<sup>150</sup> which forced the U.S. tobacco industry to disclose financial data on its covert intervention in the EU legislative process,<sup>151</sup> may well serve as precedent for future action targeting public disclosure of the oil industry’s massive financial investments in climate disinformation worldwide.

The net effect of all these developments has been to bring important environmental data held by the private/corporate sector into the public domain and thus “to render information less a private good (for enterprise) than a public one.”<sup>152</sup> Among the most effective “multiplier” instruments for this purpose, because they affect all public companies listed on the stock market, are environmental disclosure requirements in

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147. Kevin Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 *BROOK. J. INT’L L.* 41-88 (2010); see also MICHAEL E. KRAFT ET AL., *COMING CLEAN: INFORMATION DISCLOSURE AND ENVIRONMENTAL PERFORMANCE* 160-61 (2011).

148. CERES ET AL., *BENCHMARKING AIR EMISSIONS OF THE 100 LARGEST ELECTRIC POWER PRODUCTIONS IN THE UNITED STATES* (2010).

149. *Mandatory Reporting of Greenhouse Gases*, 74 *Fed. Reg.* 56,260 (Oct. 30, 2009); see Joshua K. Stolaroff et al., *Design Issues in a Mandatory Greenhouse Gas Emissions Registry for the United States*, 37 *ENERGY POL’Y* 3463, 3463 (2009).

150. *State of Minnesota v. Philip Morris, Inc.*, 551 N.W.2d 490, 490-493 (Minn. Ct. App. 1994); *Settlement Agreement and Stipulation for Entry of Consent Judgment, State ex rel. Humphrey v. Phillip Morris Inc.*, No. C1-94-8565 (D. Minn. 1998), available at [http://www.library.ucsf.edu/sites/all/fi/ucsf\\_assets/mnsettlement.pdf](http://www.library.ucsf.edu/sites/all/fi/ucsf_assets/mnsettlement.pdf); see Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 *WM. MITCHELL L. REV.* 478-79 (1999); Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Government’s Tobacco Litigation*, 33 *CONN. L. REV.* 1143, 1143 (2001).

151. See Mark A. Neuman et al., *Tobacco Industry Strategies for Influencing European Community Tobacco Advertising Legislation*, 359 *LANCET* 1323, 1323-24 (2002) (documenting Big Tobacco’s successful sabotage of E.U. Council Directive 98/43/EC, 1998 O.J. (L 213) 9 (EC)); George Tridimas et al., *The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?*, 14 *EUR. J. L. & ECON.* 171-72 (2002). The annulled directive was replaced by Council Directive 2003/33/EC, on the Approximation of the Law Resolutions and Administrative Provisions of the Member States Relating to Advertising and Sponsorship of Tobacco Producers, 2003 O.J. (L 152) 16 (EC); see also D. Douglas Blanke, *Tobacco, in THE REALITY OF PRECAUTION: COMPARING RISK-REGULATION IN THE UNITED STATES AND EUROPE*, *supra* note 109, at 98.

152. Lindsay Farmer & Gunther Teubner, *Ecological Self-Organization, in ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY: THE CONCEPT AND PRACTICE OF ECOLOGICAL SELF-ORGANIZATION* 7 (Gunther Teubner et al. eds., 1994).

corporate financial accounting (stakeholder/shareholder risk disclosure).<sup>153</sup> For example, the U.S. Securities and Exchange Commission (SEC) has since 1971 required filings of environmentally relevant information as part of its regulations concerning mandatory annual reports under Form 10-K.<sup>154</sup>

Appropriate disclosure shall also be made as to the material effects that compliance with federal, state, and local provisions which have been enacted or adopted *regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment*, may have upon the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries.<sup>155</sup>

SEC reporting has led to improved transparency (and hence, comparability of corporate performance), inter alia with regard to greenhouse gas emissions.<sup>156</sup> In January 2010, the SEC clarified that businesses should disclose to investors any serious risks due to climate change or climate change policy.<sup>157</sup>

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153. See Mark D. Abkowitz et al., *Environmental Information Disclosure and Stakeholder Involvement: Searching for Common Ground*, 6 CORP. ENVTL. STRATEGY 415, 415-16 (1999); ROBERT REPETTO & DUNCAN AUSTIN, COMING CLEAN: CORPORATE DISCLOSURE OF FINANCIALLY SIGNIFICANT ENVIRONMENTAL RISKS, at ix (2000).

154. See Elizabeth Anne Glass Geltman, *Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Laws*, 16 HARV. ENVTL. L. REV. 129-30 (1992); Perry E. Wallace, *Disclosure of Environmental Liabilities Under the Securities Laws: The Potential of Securities-Market-Based Incentives for Pollution Control*, 50 WASH. & LEE L. REV. 1093, 1093 (1993); MARK MANSLEY, OPEN DISCLOSURE: SUSTAINABILITY AND THE LISTING REGIME 34 (2003); ROBERT REPETTO ET AL., ENVIRONMENTAL DISCLOSURE REQUIREMENTS IN THE SECURITIES REGULATIONS AND FINANCIAL ACCOUNTING STANDARDS OF CANADA, MEXICO AND THE UNITED STATES, at iv (2002); Robert H. Feller, *Environmental Disclosure and the Securities Laws*, 22 B. COLL. ENVTL. AFF. L. REV. 225, 225-39 (1995).

155. 17 C.F.R. § 229.101(e)(xii) (2010) (emphasis added). See generally Gerard A. Caron, Comment, *SEC Disclosure Requirements for Contingent Environmental Liability*, 14 B. COLL. ENVTL. AFF. L. REV. 729 (1987); Michael A. Nelay *Disclosure of Environmental Liability in SEC Filings, Financial Statements, and Debt Instruments: An Introduction*, 5 VILL. ENVTL. L.J. 315 (1994); Mark A. White, *SEC Disclosure of Environmental Matters*, in THE GREENING OF AMERICAN BUSINESS, *supra* note 146, at 255.

156. See Elizabeth E. Hancock, Note, *Red Dawn, Blue Thunder, Purple Rain: Corporate Risk of Liability for Global Climate Change and the SEC Disclosure Dilemma*, 17 GEO. INT'L ENVTL. L. REV. 233-34 (2005); Jeffrey M. McFarland, *Warming Up to Climate Change Disclosure*, 14 FORDHAM J. CORP. & FIN. L. 281-301 (2009); Perry E. Wallace, *Climate Change, Fiduciary Duty, and Corporate Disclosure: Are Things Heating Up in the Boardroom?*, 26 VA. ENVTL. L. REV. 293-99 (2008).

157. Mary Schapiro, S.E.C. Chairperson, Statement Before the Open Commission Meeting on Disclosure Related to Business or Legislative Events on the Issue of Climate Change (Jan. 27, 2010); Nickolas M. Boecher, *SEC Interpretive Guidance for Climate-Related Disclosures*, 10 SUSTAINABLE DEV. L. & POL'Y 43, 43 (2010); see Jeffrey A. Smith et al., *The SEC's Interpretive Release on Climate Change Disclosure*, 4 CARBON & CLIMATE L. REV. 147, 147 (2010); see also BETH YOUNG ET AL., CLIMATE RISK DISCLOSURE IN SEC FILINGS: AN ANALYSIS OF 10-K REPORTING BY OIL AND GAS, INSURANCE, COAL, TRANSPORTATION AND

At the international level, an Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR, under the auspices of the U.N. Conference on Trade and Development in Geneva) started in 1990 to integrate environmental costs and liabilities into traditional accounting and auditing methods.<sup>158</sup> Regulation of corporate financial reporting in Europe is beginning to follow the SEC lead,<sup>159</sup> with mandatory disclosure of various types of environmental information now required in Denmark, France, the Netherlands, Norway, Spain, Sweden, and the United Kingdom.<sup>160</sup> Paradoxically even, in some instances reporting by European companies listed in the United States (under SEC Form 20-F) resulted in more extensive disclosure than in their respective home countries.<sup>161</sup> Following a recommendation by the EU Commission in 2001,<sup>162</sup> and the EU Accounts Modernisation Directive of 2003,<sup>163</sup> more specific environmental disclosure standards for financial accounting are to be anticipated, especially in the context of future EU emissions trading for greenhouse gases.<sup>164</sup>

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ELECTRIC POWER COMPANIES, at iv (2009); Camden D. Burton, Recent Development, *An Inconvenient Risk: Climate Change Disclosure and the Burden on Corporations*, 62 ADMIN. L. REV. 1287, 1287-89 (2010).

158. See SANDS, *supra* note 93, at 864. Regarding earlier UNEP surveys of environmental auditing practices, see UNEP, 11 INDUSTRY AND ENVIRONMENT 3-21 (1988); PETER H. SAND, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE 33 (1990). On further recent developments, see Andreas Nölke, *International Accounting Standards Board*, in HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS, *supra* note 144, at 66.

159. For a proposal to “globalize” the SEC disclosure rules, see Patricia Romano, *Sustainable Development: A Strategy That Reflects the Effects of Globalization on the International Power Structure*, 23 HOU. J. INT’L L. 91, 108 (2000). For potential recourse to the Aarhus Convention see Nikzad Oraee-Mirzamani & Zen Makuch, *Corporate Environmental Disclosure Law, Fiduciary Duties and the Aarhus Convention*, 20 EUR. ENERGY & ENVTL. L. REV. 18-22 (2010).

160. For comparative overviews, see U.N. Econ. Comm’n for Europe, Supporting Frameworks for Corporate Environmental Reporting, U.N. Doc. ECE/CEP/AC.10/2009/7 (June 19, 2009), and TAREQ EMTAIRAH, INT’L INST. FOR INDUS. ENVTL. ECON., CORPORATE ENVIRONMENTAL REPORTING: REVIEW OF POLICY ACTION IN EUROPE 2 (2002). See also Thomas P. Lyon & John W. Maxwell, *Greenwash: Corporate Environmental Disclosure Under Threat of Audit*, 20 J. ECON. & MGT. STRATEGY 3-4 (2011).

161. See CHRIS HIBBIT, LIMPERY INSTITUUT, EXTERNAL ENVIRONMENTAL DISCLOSURE AND REPORTING BY LARGE EUROPEAN COMPANIES 36 (2004) (citing British Petroleum’s 1998 report to the SEC on potential impacts of the Kyoto Protocol).

162. Commission Recommendation on the Recognition, Measurement, and Disclosure of Environmental Issues in the Annual Accounts and Annual Reports of Companies, 2001 O.J. (L 156) 33 (EC).

163. Council Directive 2003/51/EC, on the Annual and Consolidated Accounts of Certain Types of Companies, Banks and Other Financial Institutions and Insurance Undertakings, 2003 O.J. (L 178) 16 (EC).

164. See AXEL HESSE, DAS KLIMA WANDELT SICH: INTEGRATION VON KLIMACHANCEN UND –RISIKEN IN DIE FINANZ-BERICHTERSTATTUNG 12 (2d ed. 2004).

In a global context, disclosure of environmental risks to the public had become part of the information policies of multilateral development banks since the 1990s.<sup>165</sup> Simultaneously, UNEP's "Finance Initiative" launched a global partnership with the private financial sector to promote best practices related to environmental credit risks,<sup>166</sup> which has since been joined by more than 190 financial institutions (including banks, insurers, and fund managers) worldwide, within the framework of the U.N. Global Compact.<sup>167</sup> Finally, the Basel Committee on Banking Supervision—originally established by the central bank governors of the G-10 countries, currently composed of representatives of twenty-seven central banks—now requires all banks in its member countries to "monitor the risk of environmental liability arising in respect of the collateral, such as the presence of toxic material on a property."<sup>168</sup>

It may be symptomatic that international financial institutions now turn to the legal instrument of information disclosure to anticipate and control environmental risks, inevitably whittling down traditional business secrecy defenses in the process. This is still uncharted territory, in the twilight borderland of global financial and environmental governance, uneasily straddling the fields of comparative and international law. It would indeed be the ultimate irony if some gnomes in Switzerland,<sup>169</sup> in the interest of global investors, were finally to emerge as the new champions of freedom of information, vindicating not

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165. See HANDL, *supra* note 119, at 12; Saul, *supra* note 119, at 5. The World Bank Group's International Finance Corporation (IFC) has since 1998 required public disclosure of investment-related environmental information as part of its Environmental and Social Review Summaries (ESRS). IFC, INTERNATIONAL FINANCIAL CORPORATION'S POLICY ON DISCLOSURE OF INFORMATION 4 (2006).

166. The "Principles for Responsible Investment" (PRI) developed and institutionalized in this context include observance of *Impact Reporting and Investment Standards* (IRIS) for measuring and reporting social and environmental performance. See PRINCIPLES FOR RESPONSIBLE INV., UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS 3 (A. Garfunkel ed., 2010). For criticism, see Surya Deva, *Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107, 107-08 (2006); Evaristus Oshionebe, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT'L L. 1, 13 (2007).

167. See UNEP FINANCIAL INITIATIVE, <http://www.unepfi.org> (last visited Oct. 29, 2011); PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org> (last visited Oct. 29, 2011).

168. BANK FOR INT'L SETTLEMENTS, INTERNATIONAL CONVERGENCE OF CAPITAL MEASURE AND CAPITAL STANDARDS: A REVISED FRAMEWORK 112 (2006), available at <http://www.bis.org/publ/bcbs128.pdf>. On further action by the Basel Committee on Banking Supervision ("Basel III Framework"), see Kevin Young, *Basel Committee on Banking Supervision*, in HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS, *supra* note 144.

169. Moniker attributed to British Prime Minister Harold Wilson, Address to the House of Commons (Nov. 12, 1956); see 560 H.C. Deb. (5th ser.) 579 (1956).

only Sir Francis Bacon's insight ("knowledge is power"),<sup>170</sup> but also a famous prescription by Justice Brandeis, calling for publicity as a remedy for social and industrial diseases: "Sunlight is said to be the best of disinfectants."<sup>171</sup>

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170. See Bacon, *supra* note 1; cf. Michael Mason, *Transparency for Whom? Information Disclosure and Power in Global Environmental Governance*, 8 GLOBAL ENVTL. POL. 8, 8-10 (2008).

171. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT* 92 (1914); cf. Mary Graham, *Is Sunshine the Best Disinfectant? The Promise and Problems of Environmental Disclosure*, 20 BROOKINGS REV. 18-19 (2002).