

The Emergence of Private Environmental Governance

A Summit on Private Environmental Governance
ASRC & ELI
Washington, DC
June 10, 2013

Michael P. Vandenberg
Professor of Law
Director, Climate Change Research Network
Co-Director, Energy, Environment and Land Use Program
Papers available at: <http://ssrn.com/author=426704>

Private Environmental Governance

Papers available on Social Science Research Network at <http://ssrn.com/author=426704>:

- *Private Environmental Governance*, 99 CORNELL L. REV. (forthcoming 2013)
- *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913-970 (2007)
- *The Private Life of Public Law*, 105 COLUM. L. REV. 2029-2076 (2005)
- *Time to Try Carbon Labelling*, 1 NATURE CLIMATE CHANGE 4-6 (2011)
(M. Vandenberg, T. Dietz & P. Stern)
- *Climate Change Governance: Boundaries and Leakage*, 18 N.Y.U. ENVTL. L.J. 221-292 (2010)(M. Vandenberg & M. Cohen)
- *Climate Change: The China Problem*, 81 S. CAL L. REV. 905 (2008)

“Toward Sustainability: The Roles and Limitations of Certification”

A State-of-Knowledge Assessment of Standards and Certification

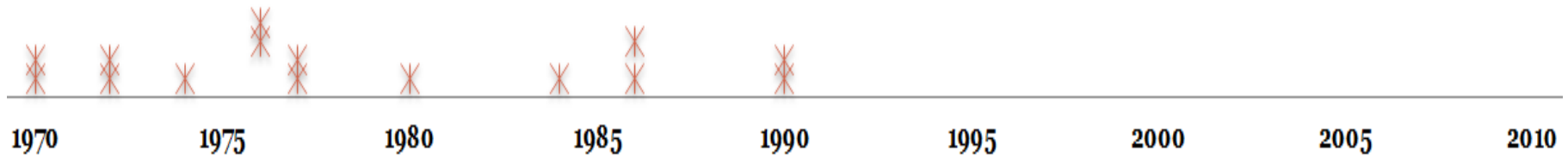
Available at <http://www.resolve.org/site-assessment/towardsustainability/>

Issued June 2012

- Mike Barry – Marks & Spencer
- Ben Cashore – Yale University
- Jason Clay – World Wildlife Fund
- Michael Fernandez – Mars, Inc.
- Louis Lebel – Chiang Mai University
- Tom Lyon – University of Michigan
- Patrick Mallet – ISEAL Alliance
- Kira Matus – London School of Economics
- Peter Melchett – Soil Association
- Michael Vandenberg – Vanderbilt University
- Jan Kees Vis – Unilever
- Tensie Whelan – Rainforest Alliance

Major Pollution Control Statutes 1970-2012

(Vandenbergh, Private Environmental Governance)



Included:

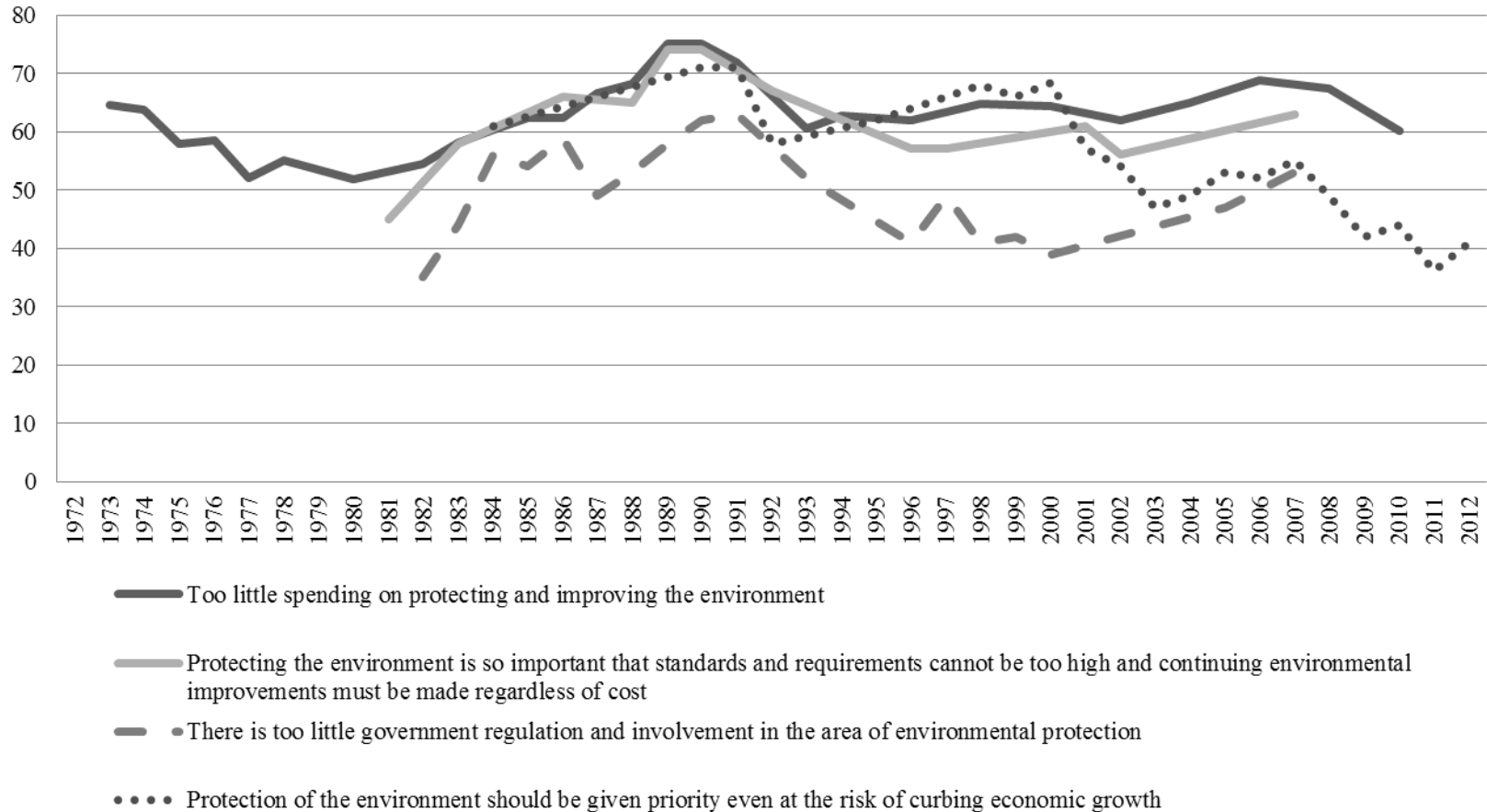
1970	Clean Air Act
	National Environmental Policy Act
1972	Federal Water Pollution Control Act
	Coastal Zone Management Act
1974	Safe Drinking Water Act
1976	Resource Conservation and Recovery Act
	Toxic Substances Control Act
1977	Surface Mining Control and Reclamation Act
	Clean Air Act Amendments
	Clean Water Act
	Comprehensive Environmental Response, Compensation and
1980	Liability Act
1984	Hazardous and Solid Waste Amendments (to RCRA)
1986	Emergency Planning and Community Right-to-Know Act
	SARA Amendments (to CERCLA)
1990	Oil Pollution Act
	Clean Air Act Amendments

Excluded:

1986	SDWA Amendments
1987	Water Quality Act
1988	FIFRA Amendments
1996	FQPA, SDWA Amendments
2002	CERCLA Amendments

Trends in Public Support

(Vandenbergh, Private Environmental Governance)



Source: David P. Daniels et al, *Public Opinion on Environmental Policy in the United States* in THE OXFORD HANDBOOK OF U.S. ENVIRONMENTAL POLICY 21:1-39, 1 (Michael Kraft & Sheldon Kamieniecki, eds., 2012)(drawing on data from (1) General Social Survey studies 1973 to 2010; (2) CBS News/New York Times poll 1981 to 2007; and (3) Cambridge Reports/Research International, 1982 to 1994, Wirthlin Worldwide, 1996 to 2000, and Harris Interactive for 2005 and 2007).

Private Environmental Governance

□ Context

- What is it?
- What types have emerged?
- Why is it not on the radar screen?

□ Significance

- Environmental behavior?
- Environmental quality?
- Counterfactuals and spillover effects?

□ Implications

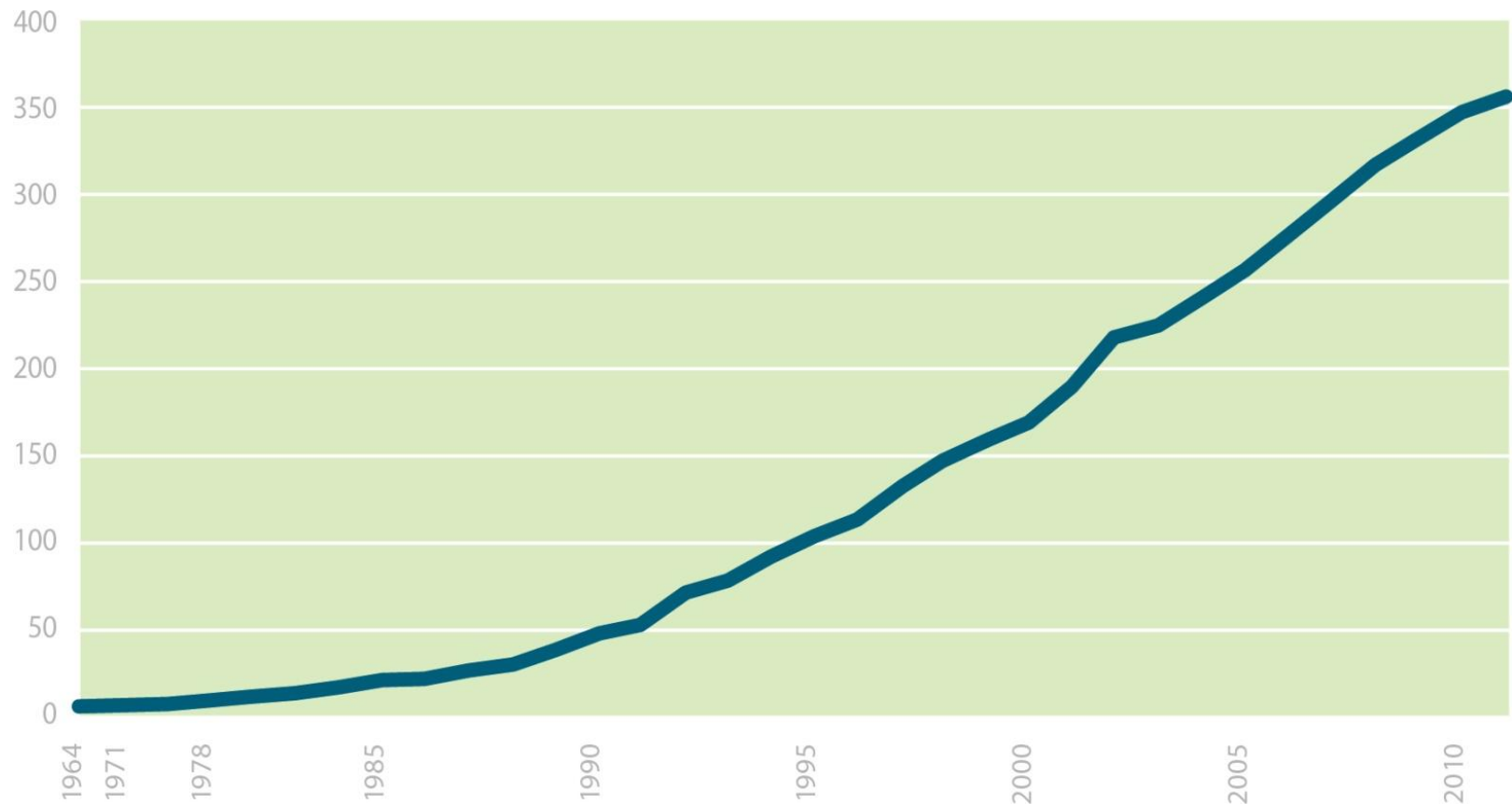
- Open questions?
- New applications?

What Has Filled the Gap?

(STEERING COMMITTEE OF THE STATE-OF-KNOWLEDGE ASSESSMENT OF STANDARDS AND CERTIFICATION, TOWARD SUSTAINABILITY: THE ROLES AND LIMITATIONS OF CERTIFICATION (2012))

Total number of ecolabels by year of launch

Source: Ecolabel Index (www.ecolabelindex.com)



What Has Filled the Gap?

□ Fish --



Marine Stewardship Council

Certified sustainable seafood

McDonald's USA first national restaurant chain to serve MSC certified sustainable fish at all U.S. locations

□ Toxics -- “ ‘The loss of public confidence [means] we’re going to increasingly have retailers that are regulators, like Wal-Mart and Target.’ ” (Inside EPA, 4/1/11)(quoting Ernie Rosenberg of the American Cleaning Institute)

What Do We Mean by Private Governance?

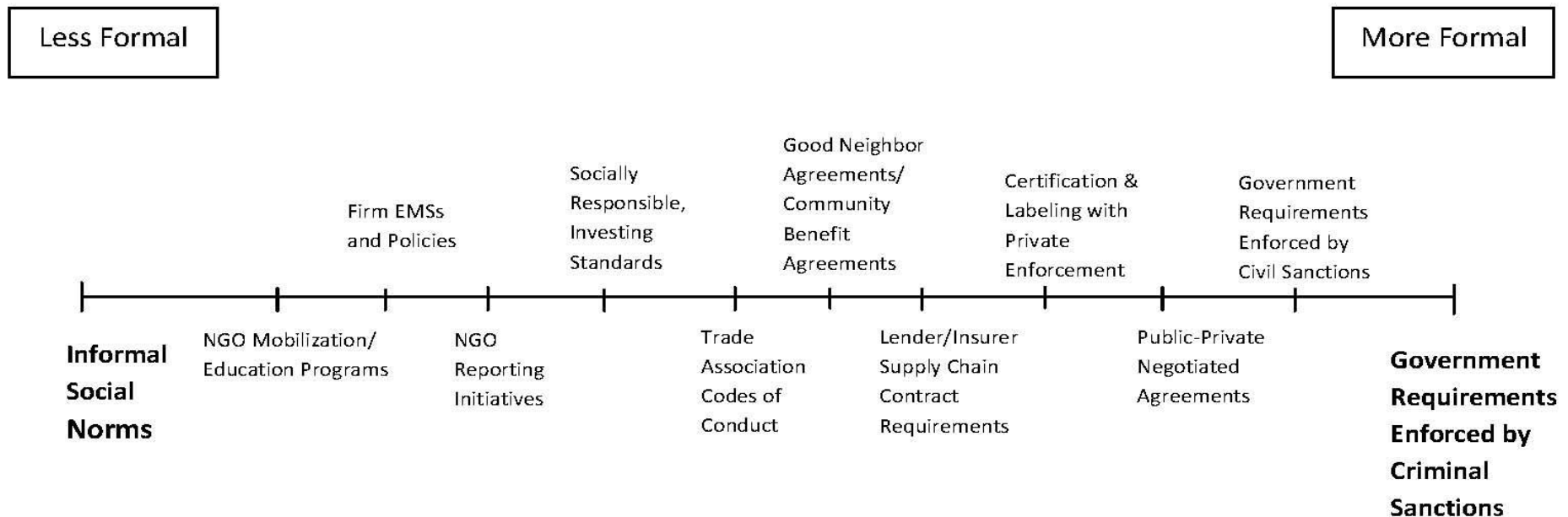
(Vandenbergh 2005, 2007, 2013; Roberts 2010)

- ❑ Private governance occurs when non-governmental actors engage in activities that are designed to achieve traditionally governmental ends
- ❑ These ends include overcoming collective action problems to reduce externalities, provide public goods, manage the exploitation of common pool resources, or shift the distribution of environmental goods
- ❑ Involves traditional regulatory functions:
 - Agenda- and standard-setting (collective and unilateral)
 - Implementation
 - Monitoring
 - Enforcement
 - Funding (Abbott & Snidal 2009)

What Types of Private Governance Have Emerged?

(Vandenbergh 2013; Roberts 2010; Assessment Committee 2012)

Private and Public Governance



What Types of Private Governance Have Emerged?

Standard-Setting

(Vandenbergh 2005, 2007, 2013)

- Collective Standard-Setting
 - ISEAL
 - GRI, ISO, FSC, SFI, MSC, CDP
 - LEED, etc.
 - Responsible Care
 - Equator Principles, Carbon Principles
- Bilateral Standard-Setting
 - Supply Chain Agreements
 - Acquisition Agreements
 - Credit Agreements
 - Insurance Agreements
 - Real Estate Agreements
 - Good Neighbor Agreements

Why is Private Governance Not on the Radar Screen?

(Vandenbergh 2005, 2007; 2013; Roberts 2010)

- ❑ Off the Radar Screen
 - Not in most casebooks
 - Less than ¼ of top law schools
 - Limited environmental law scholarship
 - Policy debates: “what can government do?”
- ❑ Barrier: Public Law Model & Language
 - Actor is Government
 - Action is Statute, Regulation, Enforcement, Adjudication
- ❑ Barrier: Standard Metrics
 - Statutes
 - Major Regulations, Pages in the Federal Register
 - Costs and Benefits of Regulations
 - Enforcement Actions and Reported Decisions

Does Private Governance Matter? Effects on Environmental Behavior

(TOWARD SUSTAINABILITY 2012; Vandenberg 2013)

- ❑ Forests. 9% of global forests are managed to FSC or PEFC standards (14% of temperate forests).
- ❑ Fisheries. 7% of global and roughly 60% of US wild fish landings for human consumption are certified sustainable. 2.6% of global aquaculture is certified, and far more of U.S. aquaculture is certified.
- ❑ Coffee. 8% of global coffee sales were sold as certified in 2010. 17% of global coffee is produced as compliant with these standards. Between 2005 and 2010 global coffee certification grew by 433%.
- ❑ Bananas. 20% of global bananas are sold under a certification scheme.
- ❑ Cocoa. Only 1.2% of the global cocoa trade is compliant with UTZ Certified, Fairtrade, organic, or Rainforest Alliance standards, but certified cocoa expanded by 248% between 2005 and 2010.

Does Private Governance Matter?: Effects on Environmental Behavior

(Vandenbergh 2005, 2007, 2008)

- Widespread Private Monitoring & Enforcement
 - More spent on Phase I's (~\$500 million) than the EPA enforcement budget (~\$400 million)(Gerrard 2005)

- Widespread Impact on Legal Practice
 - 90% of the top 50 law firms by profits per partner

- Proliferation of Private Standards
 - Hundreds of domestic and global labeling systems
 - Private procurement standards common

- Large Potential Cross-Border Impact
 - (e.g., Wal-Mart: ~10,000 Chinese suppliers/~\$18B yr.)

Does Private Governance Matter? Effects on Environmental Behavior The New Wal-Mart Effect

(Vandenberg 2007)

- Public Disclosure in 8 Sectors, 74 Firms
 - Discount & Variety Retail
 - Home Improvement & Hardware
 - Office Products Retail & Dist.
 - Auto Manufacturing
 - Personal Computers
 - Lumber & Wood Production
 - Aluminum Production
 - Industrial Mach. & Equip. Mfring
- Frequency
 - 54% of Firms Impose Requirements (40/74)
 - 76% of Firms by Total Sales (\$2.183/\$2.825)
- Types
 - Environmental Performance (28%)
 - Law Compliance (29%)
 - Environmental Management Systems (15%)

Effects on Environmental Behavior

The Private Life of Public Law

(Vandenbergh 2005)

Table 3

Type of Agreement	Total	Agreements with Environmental Provisions	
Acquisition Agreement	314	227	72%
Credit Agreement	514	357	69%

Table 4

Type of Agreement	Environmental Performance Requirement	Law Compliance Requirement	Environmental Management System Requirement
Acquisition Agreement	1%	2%	1%
Credit Agreement	15%	88%	10%

Does Private Governance Matter? Effects on Environmental Quality

(TOWARD SUSTAINABILITY 2012)

- ❑ Substantial evidence exists of improvement in practices
- ❑ Limited evidence of longer term outcomes or impacts
- ❑ Difficult to attribute outcomes to certification
- ❑ Methodological challenges
 - ❑ Identifying an appropriate counterfactual
 - ❑ Dynamic nature of ecosystems and communities
 - ❑ Financial costs and complexity
- ❑ Challenges not unique to private governance

Does Private Governance Matter? Counterfactuals & Spillover Effects

(Vandenbergh 2005)

- Counterfactual
 - Second-best Options
 - How do the costs and benefits compare with viable alternatives?
- Spillover Effects
 - How does private governance affect the development of other governance options?
 - Gap-filling?
 - Complementary?
 - Competitive?
 - Displacing?

New Applications

(Vandenbergh 2013)

- Private Actors and Actions
 - Fracking
 - Toxics
 - Commodities
- Climate: The Private Governance Wedge
 - Climate Futures
 - Climate Legacy
 - Carbon Labeling

Open Questions

- ❑ What unintended consequences may result (label fatigue, green washing, inconsistent standards, etc.)?
- ❑ Will private funding be adequate without co-opting private governance organizations?
- ❑ Why do individuals, NGOs, and firms participate (consumer demand v. consumer influence and other factors)?
- ❑ Is private governance just a reaction to the threat of government regulation or liability?
- ❑ Should government encourage or discourage private governance (procurement, antitrust, trade, consumer protection)?
- ❑ How do private governance regimes interact with one another and with public governance regimes?