Universidade do Minho
Escola de Direito

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Corporations and Sustainability: An International Panorama of Corporate Law and Corporate Governance

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STATEMENT OF INTEGRITY

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Abstract

Corporations and Sustainability: An International Panorama of Corporate Law and Corporate Governance.

Recently, business activities are being dramatically affected by financial, social, and environmental crises, and, moreover, the emergence of the new social values of a new "conscious market". In this sense, corporate law and corporate governance need to evolve to encompass rules that meet the concept of sustainable development. Currently, the conduct of business has become extremely globalised; therefore, there is a growing necessity of dealing with corporate sustainability in a more integrated way. In this sense, it is important to understand how governments, international organisations, private institutions, companies, investors, and civil society have been addressing the great challenge of sustainability. Thus, the present work aims to demonstrate the importance of corporate law and corporate governance for the sustainable development of companies and how these instruments have been developing in different jurisdictions to encompass sustainability. Furthermore, we demonstrate how market-based regulatory innovations may conduct companies to sustainability practices, showing that capital can drive companies towards sustainable development. Nevertheless, we concluded that without further changes in corporate law, corporate governance, corporate conduct, and, more importantly, in human consciousness, no greater future can be expected.

Keywords: Corporate Law – Corporate Governance – Sustainability –Corporate Social Responsibility – Sustainable Development

Resumo

Empresas e Sustentabilidade: Um Panorama Internacional do Direito Societário e Governança Corporativa.

Recentemente, as atividades empresariais estão sendo dramaticamente afetadas por crises financeiras, sociais e ambientais e, além disso, pelo surgimento de novos valores sociais de um novo "mercado consciente". Nesse sentido, o direito corporativo e a governança corporativa precisam evoluir para abranger regras que atendam ao conceito de desenvolvimento sustentável. Atualmente, a conduta dos negócios se tornou extremamente globalizada, portanto, há uma necessidade crescente de lidar com a sustentabilidade corporativa de forma mais integrada. Nesse sentido, é importante entender como governos, organizações internacionais, instituições privadas, empresas, investidores e a sociedade civil estão enfrentando o grande desafio da sustentabilidade. Assim, o presente trabalho tem como objetivo demonstrar a importância do direito corporativo e da governança corporativa para o desenvolvimento sustentável das empresas e como esses instrumentos vêm se desenvolvendo em diferentes jurisdições para abranger a sustentabilidade. Além disso, demonstramos como as inovações regulatórias baseadas no mercado conduzem as empresas a práticas de sustentabilidade, mostrando que o capital pode levar as empresas ao desenvolvimento sustentável. No entanto, concluímos que, sem mudanças adicionais nas leis corporativas, governança corporativa, conduta corporativa e, mais importante, na consciência humana, não se pode esperar um futuro melhor.

Palavras-chave: Direito Societário - Governança Corporativa - Sustentabilidade - Responsabilidade Social Corporativa - Desenvolvimento Sustentável

Table of Contents

Acknowledgments iii

Abstract v

Resumo vi

Abbreviations viii

Introduction 1

Chapter I – General Aspects of Global Business and Sustainability 3

1.1 A Parallel Between Corporate Law, Corporate Governance and Sustainability 4

1.2 Practical Aspects of Transnational Business Responsibility 6

Chapter II – Global Solutions for Corporate Sustainability 9

2.1 Business and Sustainability in America 10

2.1.1 The United States (US) 10

2.1.2 Canada 15

2.1.3 Brazil 19

2.2 Business and Sustainability in Europe 29

2.2.1 The European Union 29

2.2.2 The United Kingdom 35

2.2.3 Germany 40

2.3 Business and Sustainability in Africa 47

2.3.1 South Africa 47

2.3.2 Nigeria 51

2.4 Business and Sustainability in Asia 58

2.4.1 China 58

2.4.2 Japan 63

2.4.3 India 68

Chapter III – Innovations for Corporate Sustainability 74

3.1 Green Bonds 75

3.2 Certifications 78

Conclusion 80

References..... 82

Abbreviations

ABDE	The Brazilian Development Association
AktG	The German law on public limited companies (the “Aktiengesetz”)
Bacen	The Central Bank of Brazil
BID	The Inter-American Development Bank
BNDS	The Brazilian Development Bank
CAMA	The Companies and Allied Matters Act 1990
CBCA	The Canada Business Corporations Act
CLRSG	The Company Law Review Steering Group
CMN	The Brazilian National Monetary Council
CSR	Corporate Social Responsibility
CVM	The Securities and Exchange Commission of Brazil
ECCHR	The European Centre for Constitutional and Human Rights
EEA	European Economic Area
EGASPIN	Department of Petroleum Resources Environmental Guidelines and Standards for the Petroleum Industry in Nigeria 2001
ESG	Environmental, social, and governance
EU	European Union
FCPA	The United States Foreign Corrupt Practices Act
FEBRABAN	The Brazilian Federation of Banks
FNMC	The National Fund on Climate Change
FRC	The Financial Reporting Council
GPIF	Japan´s Government Pension Investment Fund
GST	India´s Goods and Services Tax
HCB	The Petroleum Host and Impacted Communities Development Bill
Ibama	The Brazilian Institute for the Environment and Renewable Natural Resources
ICMbio	The Chico Mendes Institute for Biodiversity Conservation
ILO	International Labour
Incaap	The Internal Capital Adequacy Assessment Process
INDC	Nigeria’s Intended Nationally Determined Contribution
IPSF	The International Platform on Sustainable Finance
ISA	The Investments and Securities Act 2007
ISE	Corporate Sustainability Index

LAB	The Financial Innovation Laboratory
MS	Member States
NAP	The German National Action Plan on Business and Human Rights
NCCG	The Nigerian Code of Corporate Governance
NCP	The German National Contact Point
NEITI Act	The Nigerian Extractives Industries Transparency Initiative Act 2007
NESREA	National Environmental Standards and Regulations Enforcement Agency
NGOs	Non-governmental Organisations
NGRBC	India´s National Guidelines on Responsible Business Conduct the Securities
ABRRs	The Securities Exchange Board of India Annual Business Responsibility Reports
NSE Guidelines	The Nigerian Stock Exchange Sustainability Disclosure Guidelines 2019
NVGs	India´s National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business
OECD	The Organisation for Economic Co-operation and Development
OFR	Operating and Financial Review
PBC	Public Benefit Corporation
PBoC	The People's Bank of China
PIGB	The Petroleum Industry Governance Bill
PQO	Operational Qualification Program
Rio-92	The United Nations Conference on Environment and Development
SDGs	Sustainable Development Goals
SEC	The Nigerian Security and Exchange Commission
SOEs	State-owned Enterprises
SSE	Shanghai Stock Exchange
SZSE	Shenzhen Stock Exchange
TBL	Triple-bottom Line
TEU	Treaty on European Union
UK	The United Kingdom
UN	United Nations
UN PRI	The United Nations Principles for Responsible Investment
UNFCCC	The United Nations Framework Convention on Climate Change
US	The United States

Introduction

At the end of the eighteenth century, the technological advances of the so-called Industrial Revolution led to the exploitation of natural resources on a scale never seen before. In the nineteenth century, the environmental degradation was aggravated due to the combustion engine invention and the electricity domain. This technological development created great economic growth, but it also caused significant problems arising from the lack of awareness in what sustainable growth concerns.

Nevertheless, at a certain point, human consciousness came upon an astounding realisation: the productive and economic paths the world had taken prescribed a chaotic medium and long-term future for the environment, and, consequently, for the human species. There was a need for a different form of economic development across the planet. It was not enough just to grow economically, but rather to ensure that growth and development came along with social and environmental commitments.

In this context, in the 1960s and 1970s, great reflections on the damages caused to the environment were initiated, generating the first efforts for a more active ecological conscience. Gradually the issue ceased to be a cause for specific groups and became a global challenge. Proof of that is Rachel Carson's releasing of *Silent Spring* in 1962, which brought an innovative warning signal about the indiscriminate use of pesticides into the discussion. As a result, the book became one of the first bestsellers on the environmental issue.

In this regard, the United Nations (UN) began to incite debate by organising the First World Conference on Man and the Environment of the United Nations in Stockholm, Sweden, in 1972;[1] and the World Commission on Environment and Development in 1983, which generated the Brundtland report of 1987.[2] It was, at least formally, the first appearance of the concept of "sustainable development"—vital for the improvement of the debate.

Since then, the topic has gained notoriety, but, as we know, building a sustainable society is not an easy task; it requires awareness through access to information and environmental education, not overlooking the adoption of more conscious forms of consumption, a more efficient and responsible use of the resources of the planet, as well as guaranteeing the necessary economic and social development

[1] To know more about the United Nations Conference on the Human Environment (Stockholm Conference), see https://sustainabledevelopment.un.org/milestones/humanenvironment

[2] To know more about the Report of the World Commission on Environment and Development: our common future, see https://sustainabledevelopment.un.org/milestones/wced

with the adoption of new paradigms, such as the environmental protection, in order not to compromise the natural resources for future generations.

As society becomes aware, it demands a new approach from existing institutions, so there is not only pressure on political actors to regulate socio-environmental policies, but also pressure on other market players, particularly companies.

Recently, business activities are being dramatically affected by financial, social, and environmental crises, and, moreover, by the emergence of new social values of a new “conscious market”. In this sense, corporate law and corporate governance need to evolve to encompass rules that meet the concept of sustainable development.

Sustainability has been a topic of increasing interest not only at an academic, institutional, and business level, but also in society as a whole, especially among the younger generations, as seen in the several manifestations regarding climate change around the world in 2019.

Therefore, the purpose of this work is to demonstrate how corporate law and corporate governance have been evolving, in different jurisdictions, in order to integrate sustainability. The first chapter provides general aspects of business and sustainability, establishing a parallel between corporate law, corporate governance and sustainability, and addressing practical aspects of transboundary business responsibility. The second chapter examines how several countries have been promoting regulatory responses in order to achieve corporate sustainable development. Finally, the third chapter explores some regulatory innovations that can be used in the pursuit of corporate sustainability.

Chapter I – General Aspects of Global Business and Sustainability

This chapter aims to outline general aspects of global business regarding the wishful sustainable development. Bearing in mind that the conduct of business has become increasingly globalised, we conclude that sustainability issues have become so as well. Therefore, there is a growing necessity of analysing business practices and their transboundary consequences in a more integrated way.

1.1 A Parallel between Corporate Law, Corporate Governance, and Sustainability

First, we are going to outline a parallel between Corporate Law, Corporate Governance, and Sustainability, and show the current relevance of these topics to our global society, since we are facing serious crises, particularly regarding environmental issues, such as climate change. Corporate Law and Corporate Governance are, simultaneously, cause and solution to environmental concerns. More specifically, poor management of companies and weak legislation regarding corporate responsibilities towards the environment contribute to the environmental crisis, hence the adoption of new corporate governance policies and a more accurate regulation may be the key to a more sustainable future. Therefore, "understanding the impact of the corporation on society and realising its potential for contributing to sustainability is vital for the future of humanity".[3]

Until recently, corporations tended to approach sustainability in their day by day decision making only if it translated into a positive financial performance. However, society is getting to a point where there is an urge for real corporate sustainability practices. Humanity no longer has time to waste and all market players must contribute to the goal of sustainability.

In order to better understand the path that we must take from the current unsustainability of business towards sustainability, we must briefly analyse how the idea of sustainable development was pictured by companies decades ago.

In the past, business sustainability was divided into three pillars: "people, planet, and profit". This theory is known as the "triple-bottom line" (TBL) and was coined by John Elkington in 1994. It recommended that companies commit to focusing on social and environmental issues as much as they did on profit. It so happens that, despite being adopted by many companies, which aimed to meet the idea of corporate social responsibility[4], TBL did not fulfil its objectives, because as John Elkington himself

[3] Sjåfjell, B., & Bruner, C. M. (2019). Corporations and sustainability. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 3). Cambridge University Press.

[4] "Corporate Social Responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders." United Nations Industrial Development Organization. *What is CSR.* https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr

pointed out in 2018 "the triple bottom line has failed to bury the single bottom line paradigm".[5] That is, sustainability was only pursued in order to improve the company's image and thereby bring more financial benefits (i.e., a mere "greenwashing".)[6]

According to Sjåfjell and Bruner, the stakeholder theory is also not the most appropriate approach for real sustainability. They believe that companies must take into account the interests of all stakeholders and not only shareholders, but they must also observe and respect the so-called "planetary boundaries"[7], which are: (i) stratospheric ozone depletion; (ii) loss of biosphere integrity (biodiversity loss and extinctions); (iii) chemical pollution and the release of novel entities; (iv) climate change; (v) ocean acidification; (vi) fresh water consumption and the global hydrological cycle; (vii) land system change; (viii) nitrogen and phosphorus flows to the biosphere and oceans; and (ix) atmospheric aerosol loading.[8]

Sjåfjell and Bruner also state that "planetary boundaries" must be incorporated into corporate law and corporate governance. Thus, companies will understand that there are indeed ecological limits that must be respected, and that the complex interaction of environmental processes goes far beyond climate change. In addition, they emphasise that business decisions must be based on science, which is constantly evolving, and that companies must adopt a "knowledge-based precautionary approach".[9]

In this regard, it is important to highlight that states have an extremely relevant role in promoting sustainability. States must ensure the protection of the environment and human rights, through the creation of regulations, both domestically (through specific legislation) and internationally (through treaties).

Due to the weak regulatory existing framework concerning sustainability, corporate law and corporate governance must engage in supporting the achievement of regulatory goals and facilitate the internalisation of society's sustainability goals. The old mentality of focusing on maximising shareholders' profits can no longer exist. We must replace this false touchstone for a more integrative one and find ways to continue developing within a reinforced framework based on planetary boundaries and engaging in regenerate and preserve the ecosystem on which our human species depends.

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[5] Elkington, J. (2018). *25 years ago I coined the phrase "Triple Bottom Line." Here's why it's time to rethink it.* https://hbr.org/2018/06/25-years-ago-i-coined-the-phrase-triple-bottom-line-heres-why-im-giving-up-on-it

[6] "Greenwashing is the process of conveying a false impression or providing misleading information about how a company's products are more environmentally sound. Greenwashing is considered an unsubstantiated claim to deceive consumers into believing that a company's products are environmentally friendly." Kenton, W. (2019). *Greenwashing*. Investopedia. https://www.investopedia.com/terms/g/greenwashing.asp

[7] Sjåfjell, B., & Bruner, C. M. (2019). Corporations and sustainability. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 6, 7). Cambridge University Press.

[8] See *The nine planetary boundaries*. Stockholm Resilience Centre. https://www.stockholmresilience.org/research/planetary-boundaries/planetary-boundaries/about-the-research/the-nine-planetary-boundaries.html

[9] Sjåfjell, B., & Bruner, C. M. (2019). Corporations and sustainability. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 7). Cambridge University Press.

1.2 Practical Aspects of Transnational Business Responsibility

This topic will focus on practical considerations about the effectiveness of corporate sustainability practices. So far, sustainability has been addressed in the corporate environment in a fragmented way, solely from the perspective of enforcement and through remediation mechanisms, when it should be managed in a precautionary way.

According to Morrow and Cullen, the application of a traditional, legalistic dispute-based model on corporate sustainability infringements shows the tendency of dealing with corporate decisions and actions in a backward-looking way. Instead of that, we must focus on creating a system where sustainability-oriented solutions are previously made, shaping a more cohesive future.[10]

In order to better understand the current dynamic of enforcement mechanisms regarding corporate sustainability, we must classify it. Enforcement can be classified into domestic and international law measures, into soft law and hard law mechanisms, or into victim-driven and external actor-driven measures.

Categorising it into domestic and international law measures is not helpful because, at the domestic level, the law is jurisdictional, whereas business is transnational, leading to enforcement gaps; at the international level, law has a very restricted power, resulting in a lack of effective sanctions, since most of the measures adopted by international bodies rely on enforcement or remedies at domestic level.[11]

Another way of classifying corporate sustainability enforcement mechanisms is to divide it into hard law and soft law mechanisms. Hard law has the advantage of having a binding legal effect and compulsory enforcement mechanisms, but at the domestic level, legislation and judge-made law are affected by jurisdictional fragmentation and, at the international level, treaties are impaired by the fact that they only bind states, not corporations. Soft law has the advantage of circumventing jurisdictional fragmentation and subjecting a broader scope of business legal entities. Moreover, at the international sphere, soft law is the prevailing standard and has a normative influence on several actors. However, the efficacy of soft law is questionable, since they are not binding and, consequently, can be easily evaded.[12]

[10] Morrow, K., & Cullen, H. (2019). Defragmenting transnational business responsibility: principles and process. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 44). Cambridge University Press.

[11] Morrow, K., & Cullen, H. (2019). Defragmenting transnational business responsibility: principles and process. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 45). Cambridge University Press.

[12] Morrow, K., & Cullen, H. (2019). Defragmenting transnational business responsibility: principles and process. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 46–48). Cambridge University Press.

An example of soft law regarding business sustainability is the United Nations Global Compact.[13] It establishes principles for promoting better business strategies and policies. It is not a monitoring tool: on the contrary, it works encouraging self-regulation driven by the desire for greater success on business.

The third way of categorising corporate sustainability enforcement mechanisms is to split them between victim-driven and external actor-driven measures. The victim-driven system has as its primary focus the settlement of disputes. It aims to remediate damages caused to specific victims. They can also interpret and develop rules, and, thus, work as a regulatory entity as well. The external actor-driven measures, in turn, relate to the idea that in order to achieve sustainability there must be a commitment not only from governmental institutions but also from business and other stakeholders, such as civil society, international organisations and non-governmental organisations (NGOs). In practice, these measures are usually reports made by the corporations for international organisations that seek to regulate business behaviour through voluntary commitments. For example, in order to be listed as a participant of the United Nations Global Compact, a company must provide an annual report communicating their progress regarding the integration of the Global Compact principles into their corporate governance practices. The problem is that there are no mechanisms to measure that progress and there is no sanction regarding failures to comply with the standards set out by the organisation. The only sanction available in the system is to remove the company from the list of participants if it does not submit the report in that year.[14] Thus, Behnam and MacLean say that the Global Compact is an example of merely symbolic adoption of accountability standards.[15]

As it is recognised, the influence that companies have on governments and international organisations results in weak regimes of monitoring business. Besides that, although there are domestic mechanisms that enable affected communities and individuals to go after their rights against unlawful business behaviours, the disparity of information, knowledge, and financial resources reveals the power imbalance among transnational corporations and the community actors. Therefore, there are problems with all the extant forms of remedies and enforcement mechanisms, which shows the urge for the replacement of the current soft approach or at least, an urgent supplementing on the system.

In conclusion, in order to achieve real sustainability, there must be a change in the current corporate governance models, which must prioritise good practices and prevention as the norm.

[13] United Nations Global Compact. https://www.unglobalcompact.org/

[14] Morrow, K., & Cullen, H. (2019). Defragmenting transnational business responsibility: principles and process. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 49–52). Cambridge University Press.

[15] Behnam, M., & MacLean, T. L. (2011). Where is the accountability in international accountability standards?: a decoupling perspective. *Business Ethics Quarterly*, *21*(1), 62. Cambridge University Press.

Governing authorities should also pursue sustainability by creating long-term and forward-looking methods of dispute resolution, as well as a system that fosters cooperation among stakeholders. This new and stronger model of sustainability must be developed having communities as the core of the system, to supervise business behaviours and ensure compliance with sustainability norms and proper remedies for injured parties.

These mechanisms can be created in collaboration with other states and international organisations and be grounded in soft law for a flexible approach based on international standards. Later, they can be nationalised and complemented with compulsory sanctions of hard law, in order to be properly enforced. These are the principles that can be the fertile ground for sustainable development fulfilment.

Chapter II – Global Solutions for Corporate Sustainability

Bearing in mind that corporate sustainability issues are global by nature and that countries all over the world frequently face similar challenges, we are now going to analyse case studies, regarding business and sustainability, from a few politically and economically relevant countries in different regions of the globe.[16] It is important to highlight that this chapter's intent is not to make a thorough comparative study on corporate law of these countries, but to raise awareness on common themes that emerge in different jurisdictions and how each of them promotes regulatory responses in order to achieve corporate sustainability.

2.1 Business and Sustainability in America

2.1.1 The United States (US)

Although US corporate law and corporate governance are open to the idea of sustainable development, there are parts of US corporate law that can compromise the adoption of sustainability practices into American businesses. In this topic we are going to examine these bureaucratic hurdles, focusing on sustainability challenges faced by the largest US corporations.

The analysis of US sustainability matters will be done mostly based on Delaware law, resorting to US federal law and corporate laws of other states when necessary, since US courts, when dealing with corporate governance, apply the law of the companies' state of incorporation and a huge part of the largest US companies chooses Delaware as its state of incorporation due to the comprehensiveness of Delaware law and also the expertise and responsiveness of its courts, among other historic factors.[17]

In order to better understand how sustainability is addressed in US businesses, we must first analyse some fundamentals of US corporate law. It is very important to know that limited liability is the key element of US corporate law. Shareholders' risks are limited to the amount invested, they are not liable for the companies' debts and obligations. Limited liability clearly fosters capital formation and business growth.[18]

Shareholders, when protected by the shield of limited liability, delegate the responsibility of management to directors and officers (i.e., managers become corporate fiduciaries, so shareholders can centre their attention and resources on other matters, including the impact that the corporation has on

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[16] Despite not being a country, the European Union was chosen as a case study due to its political and economic relevance and its influence on its member states. Nigeria was chosen to represent several oil-rich African countries that suffer with severe environmental degradation and social issues.

[17] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 131, 132). Cambridge University Press.

[18] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 132). Cambridge University Press.

the community). Although enjoying latitude in managing the company, directors and officers are bound by duties of care and loyalty. Despite that, this centralised management can lead to the managers' abuse of power. However, both US federal and state laws provide tools to protect shareholders from these abuses, providing access to litigation, and informational and voting rights.[19]

In the past, the idea that shareholders should agree with the managers' strategies and vote in their favour or sell their shares prevailed; these were the "Wall Street rules".[20] At that time, shareholders could only resort to litigation to fight agency costs.[21] More recently, the intensification of shareholder activism[22] completely changed the scenario: nowadays, shareholders have much more influence on the company's decision-making processes.[23]

Regarding sustainability, the most basic challenge that American companies encounter when seeking it pertains to the companies' objectives. Delaware and other US corporate laws do not address the issue of the corporations' ultimate goals, enabling any lawful purpose. Despite that, only in a few courts the concern of ultimate corporate objectives was contested. In Michigan, for example, the Michigan Supreme Court concluded that "a business corporation is organised and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[24] In contrast, the U.S. Supreme Court stated that "[w]hile it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so".[25]

Besides that, many US states have "constituency statutes" that provide that corporations can pursue purposes other than shareholder value maximisation, which could, in the long-term, damage business sustainability. Thus, the directors' management powers towards sustainability can be significantly strengthened according to their company's state of incorporation, if there is a constituency statute and depending on its specific terms.[26]

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[19] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 132). Cambridge University Press.
[20] Kang, M. S. (2013). Shareholder voting veto. *Indiana Law Journal, 88*, 1299–1308.
[21] See more about agency costs in *What are Agency Costs?* Corporate Finance Institute. https://corporatefinanceinstitute.com/resources/knowledge/finance/agency-costs/
[22] See more about shareholder activism in Breitinger, D. (2017, August 18). *What is shareholder activism and how should businesses respond?* World Economic Forum. https://www.weforum.org/agenda/2017/08/shareholder-activism-business-response-explainer/
[23] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 133). Cambridge University Press.
[24] See *Dodge v. Ford Motor Co.* 170 N. W. 668 (Mich. 1919) at 684. https://h2o.law.harvard.edu/cases/3965
[25] See *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014) at 2771. https://casetext.com/case/burwell-v-hobby-lobby-stores-inc-1
[26] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 134, 137). Cambridge University Press.

Moreover, observing the business judgment rule[27], US courts usually decline claims against fiduciaries. Unless the director and officers refrain from deciding or make decisions in an extremely negligent way, disregarding good faith or under a conflict of interest, they will virtually face no risk for their decisions. Business judgment rule is deep-rooted in US corporate law; in Delaware, it is even applied as a presumption. The main rationale behind this is that directors and officers must be encouraged to take calculated risks in order to improve business.[28]

Therefore, despite the absence in US corporate law of explicit norms that could promote sustainability, the wide discretion given to directors and officers shows that those inclined to pursue sustainability face almost no legal risks for doing so. The companies' supply chain can be replaced, and production processes and other corporate practices can be enhanced in the pursuit of sustainable development. Corporate fiduciaries can make these changes without breaching their fiduciary duty of care if such changes are carefully planned and there are no conflicts of interest.[29]

Furthermore, there are non-legal aspects that can interfere in the sustainable development of business—for instance, the equity market per se. The extremely competitive US stock market makes directors and executives always concerned about share prices, particularly the ones working on corporations in which shareholders are focusing on wealth maximisation and short-term profits. Certainly, sustainability does not fit this kind of approach.

Nowadays many investors invest through mutual funds, retirement plans, banks, and other pooled investments. These institutional investors can have a huge influence on corporate governance. If a powerful institutional investor requires sustainability endeavours from their companies, most likely directors will take some action on doing so. According to Reiser, "[p]ublic pension funds and socially-responsible investment funds have been at the forefront in demanding sustainability and broader environmental, social and governance (ESG) efforts from their corporations."[30] Unfortunately, it is still usual that this engagement is attached to the desire for profitability and business expansion. Even though it is not a wholehearted commitment to sustainable development, it is already a step in the right path. In

[27] See more about the business judgment rule in *Business judgement rule.* Legal Information Institute, Cornell Law School. https://www.law.cornell.edu/wex/business_judgment_rule

[28] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 137). Cambridge University Press.

[29] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 138). Cambridge University Press.

[30] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 139). Cambridge University Press.

short, if investors require the corporations' engagement with sustainability as a condition to providing funds, corporate governance will consequently embrace it.[31]

Gladly, changes in US corporate law are being implemented in order to strengthen sustainability in corporate governance. One of the most relevant initiatives undertaken so far is the enactment of legislation which creates new corporate forms in which sustainable development is one of the main purposes (i.e., a dual-purpose company, committed to profitability and to the pursuit of social good).[32]

Until now, the most popular corporate form created is the benefit corporation.[33] The benefit corporation form changes traditional fiduciary standards since it allows the corporate director to consider the interest of various stakeholders besides shareholders when making business decisions. Besides that, the benefit corporation introduces the concept of "general public benefit" which means "[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard".[34] Therefore, the benefit corporation must work in compliance with a qualifying third-party standard, which must be developed by a transparent entity, independent of the benefit corporation. Furthermore, this corporate form requires a supermajority of shareholders in order to be created, altered, or terminated. Another characteristic of the benefit corporation is that it demands disclosure (i.e., corporations adopting this form must deliver an annual report specifying their public benefit accomplishments, which is released to the shareholders and publicly).[35]

Many US states now offer some type of alternative corporate form for undertakings seeking sustainability. Even Delaware has developed its own version, the public benefit corporation (PBC)[36], which presents some peculiarities. First, rather than engaging with a general public benefit, each PBC commits to one or more specific public benefits. PBC managers have the task to balance economic interests and social interests related to the public benefit they have chosen. Another difference is that the Delaware

[31] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 139, 140). Cambridge University Press.

[32] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 140). Cambridge University Press.

[33] See more about benefit corporation in *What is a benefit corporation?* Benefit Corporation. https://benefitcorp.net/

[34] General public benefit definition in Benefit Corporations. (2017). *Model benefit corporation legislation* (p. 3). https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf

[35] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 141). Cambridge University Press.

[36] See more about Delaware public benefit corporation (PBC) in *Delaware general corporation law.* The Delaware Code Online. https://delcode.delaware.gov/title8/c001/sc15/

model does not follow the third-party standard approach. Finally, PBC is less committed to discloser; reports are made less often (every two years) and they are delivered only to shareholders.[37]

These legislative innovations are contributing to the legitimation of sustainably driven corporations, fortifying the idea of a dual-purpose business. However, they are still underused, since only a few numbers of organisations have adopted these new statutory corporate models. Unfortunately, the most powerful corporations in the market are extremely unlikely to adopt these modalities. Yet, they can be quite suitable for small and medium-sized businesses. In fact, these are not yet the best solutions to push sustainability globally and influence a wider range of businesses towards a social-responsible paradigm.

Finally, we should mention that there are ongoing projects to improve reporting on sustainability and other non-financial matters. In the US, public corporations must disclose a great amount of information to the market and the securities regulators. Usually, these mandatory disclosures are focused on financial information, but very often they include general matters on sustainability as well, depending on their relevance.[38]

In the US, there are many entities devoted to standardising sustainability and non-financial information and encouraging voluntary disclosures. For example, the Global Reporting Initiative[39] establishes standards to evaluate the companies' environmental, social and economic impacts. Another example is the Sustainability Accounting Standards Board[40] which aims to make sustainability disclosures comparable. It is certain that the development of reliable standards is not an easy task and there are lots of room for improvement. Meanwhile, the equally challenging implementation of trustworthy auditing processes and enforcement mechanisms remains on hold.[41]

As we could see, there is huge importance in tracking progress and evaluating the outcomes and impacts of sustainability programmes. In order to foster sustainability, we need honest information and comparable disclosure mechanisms. In addition, we need the investors' engagement, since disclosure alone is not enough. In other words, capital holders have the power to stimulate sustainable development in large US corporations, and enhanced disclosure policies can be very useful to do so.

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[37] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 142). Cambridge University Press.
[38] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 143). Cambridge University Press.
[39] See more about the Global Reporting Initiative in *About GRI*. https://www.globalreporting.org/Information/about-gri/Pages/default.aspx
[40] See more about the Sustainability Accounting Standards Board in *SASB Mission*. https://www.sasb.org/governance/
[41] Reiser, D. B. (2019). Progress is possible: sustainability in US corporate law and corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 144). Cambridge University Press.

In conclusion, the US legal framework is quite propitious for entrepreneurs that pursue sustainability (i.e., hard law should not be the main concern). The main challenge endures in the market: since the business environment in the US is shareholder-oriented, we must rely on a shift of investors' mentality in order to obtain actual sustainable development.

2.1.2 Canada

In this topic, we will analyse some recent developments in Canadian corporate law and securities regulation regarding sustainable development and how public companies, shareholders, authorities, and stakeholders are promoting or discouraging sustainability.

First, we should contextualise the Canadian business framework. The strongest industries in Canada are composed of public companies in the mining, oil and gas, and financial sectors. Corporate law in Canada is composed of a federal statute, the Canada Business Corporations Act (CBCA), and 13 provincial and territorial statutes; Canadian companies can select the statute under which they want to incorporate. These statutes are quite similar. The only exception to the rule is the Québec statute, which lies under a civil law system, unlike the other provinces and territories, which operate under the common law.[42]

In addition, it is important to say that Canadian corporations usually address sustainability through the framework of corporate social responsibility (CSR), that is, sustainability measures are taken into consideration in what effective business financial performance concerns—a feature we may name as "weak sustainability".[43] [44]

Nevertheless, in Canada, there are some ongoing efforts towards sustainability, mostly environmental-related. Securities regulators have been fostering sustainability practices by requiring public companies to release climate-related reports including information that may affect share price or shareholders' decisions regarding share negotiation. Besides that, investors of public companies have been submitting shareholder proposals requiring climate sustainability measures in order to safeguard the company's long-term economic feasibility.[45]

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[42] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 147, 148). Cambridge University Press.
[43] Kulman, T., & Ferrington J. (2010). What is Sustainability? *Sustainability*, *2*(11), 3443.
[44] Puri, P. (2019). Green but not enough - Sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 146). Cambridge University Press.
[45] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 146, 147). Cambridge University Press.

Regarding the duty of care, the Canada Business Corporations Act states that directors and officers have the statutory duty to "act honestly and in good faith with a view to the best interests of the corporation; and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."[46] Under the business judgment rule, Canadian courts interpret the duty of care more openly. They focus on the reasonableness of a decision at the time it was made, rather than in the consequences of it.[47]

Historically, the best interests of the corporation were always interpreted as being the shareholders' wealth-maximisation. In contrast, stakeholder theory advocates that corporations must consider the impact of their business practices on all stakeholders.

In the most recent case in which the Canadian Supreme Court dealt with conflict interests, BCE Inc. v. 1976 Debentureholders,[48] the Court sustained that "in considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions"[49] adding that "directors, acting in the best interests of the corporation, *may be obliged* to consider the impact of their decisions on corporate stakeholders".[50] There are different interpretations of the BCE decision: some say that directors are not obliged to consider non-shareholders' interests, but they can do it. Others say that directors are required to—at least—evaluate the interests of other stakeholders, even if in the end they are not favoured by the decision. Nonetheless, directors should be responsible corporate citizens and should perceive the corporation as having some sense of social responsibility towards the community.[51]

One of the Canadian legal tools that can be used to "force" companies to be more sustainable is the "oppression remedy", which allows a complainant to apply to a court an application against a corporation's or director's conduct that has been oppressive, unfairly prejudicial, or that unfairly disregards the complainant's interests. Puri says that "the oppression remedy is based on the idea that corporations have a responsibility to refrain from acting in a way that unfairly impacts stakeholders."[52] However, there are some obstacles to pursuing sustainability through the oppression remedy. First, this

[46] Canada Business Corporations Act, RSC 1985, c C-44 [CBCA], s.122
[47] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 148). Cambridge University Press.
[48] BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, 2008 SCC 69 (BCE)
[49] BCE at paragraph 40.
[50] BCE at paragraph 66 (emphasis added).
[51] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 150). Cambridge University Press.
[52] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 153). Cambridge University Press.

legal tool is mostly used by shareholders;[53] second, the majority of cases relate to closely-held corporations;[54] and third, in order to apply for an oppression claim, a stakeholder that is not a shareholder, a director, or an officer, must obtain a court's leave.[55] Therefore, the jurisprudence shows that the oppression remedy has not been useful to shift corporate's unsustainable behaviours.[56]

As mentioned before, shareholder proposals on environmental issues have grown lately. In the last years, investors submitted a large number of requests on business sustainability measures and have become active proponents of climate change matters.

In this regard, the Canadian corporate law states that shareholders holding at least one percent of the total number of the outstanding voting shares of the corporation, or shares whose fair market value is at least $2.000,[57] are entitled to submit proposals to convey their position about concerns affecting the company.

It is important to highlight that shareholder proposals are advisory instruments; therefore, directors are not obliged to implement its recommendations—even if the proposals receive majority approval from the shareholders. However, even when the recommendations are not adopted, shareholder proposals can influence the corporations towards sustainable practices, since they can draw public attention to the environmental matter.[58]

Usually shareholder proposals adopt a weak sustainability approach. A good example of that was the NEI Investments' shareholder proposal submitted in 2016 which requested reports from Suncor Energy in order to better understand the company's future in a low-carbon economy. NEI Investments required information about Suncor Energy's emission reduction targets, energy diversification strategies, and stress-testing against low-carbon scenarios.[59] The shareholders realised that this acquaintance would be important to assess if Suncor Energy could remain competitive since global economies are transitioning away from carbon fuels.[60] In other words, the shareholders are concerned about financial issues rather than worried about environmental damages.

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[53] Ben-Ishai S., & Puri P. (2004). The Canadian Oppression Remedy Judicially Considered: 1995–2001, *Queen's Law Journal, 30,* 102.
[54] Ben-Ishai S., & Puri P. (2004). The Canadian Oppression Remedy Judicially Considered: 1995–2001, *Queen's Law Journal, 30*, 92.
[55] Canada Business Corporations Act, RSC 1985, c C-44 [CBCA], s. 238
[56] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 152, 153). Cambridge University Press.
[57] *Canada Business Corporations Regulations*, 2001, SOR/2001-512, s. 46
[58] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 154). Cambridge University Press.
[59] The Suncor Energy shareholder proposal. https://www.eenews.net/assets/2016/04/19/document_cw_03.pdf
[60] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 154). Cambridge University Press.

Although most of the shareholder proposals to improve sustainability standards aim towards monetary gains—which reinforces a framework of weak sustainability—they still demonstrate how powerful shareholders can be on driving corporate decisions towards sustainable policies and practices.

Another tool of Canadian corporate law that can be used to pursue sustainability is the corporate veil piercing. The value of the concept of separate corporate personality is undeniable; it has contributed to the growth of the greatest global economies and is a key element of efficient capital markets. However, this concept is often used by sophisticated corporation groups with complex structures to avoid the parent companies' liabilities for the environmental and humanitarian violations of their subsidiaries. Therefore, if the subsidiary is acting as an agent for the parent company, or if the corporate structure is being used for an improper and fraudulent purpose, one can attempt to pierce the veil in order to hold the parent company liable for the actions of the subsidiary.[61]

As outlined above, securities regulation also has an important role in Canada's ongoing efforts towards sustainability. Securities regulation has three main objectives: (i) protecting the investing public; (ii) ensuring the efficient operation of capital markets; and (iii) maintaining public confidence in the capital markets and in the persons operating in them. To achieve these objectives, securities regulators require public corporations to disclose material information to investors.[62]

It is relevant to emphasise that, under this principle-based regulatory framework, material information means any information that may affect share price or the shareholders' decisions regarding share negotiation. Thus, it is clear that securities regulations are built on a weak sustainability foundation.[63]

Particularly in the context of climate-related disclosure, the principles-based regulatory approach is not working very efficiently, since it does not provide precise guidance to the corporations about what kind of information should be disclosed. Recently, a study conducted by the Chartered Professional Accountants of Canada was released showing that climate-related disclosures were inadequate since they did not provide enough context for the understanding of the financial implications of climate change, the companies' and industry goals on that matters, and the companies' strategies on climate change issues.[64]

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[61] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 155). Cambridge University Press.

[62] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 156). Cambridge University Press.

[63] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 157). Cambridge University Press.

[64] Chartered Professional Accountants of Canada. *State of Play: study of climate-related disclosures by Canadian public companies*. https://www.cpacanada.ca/en/business-and-accounting-resources/financial-and-non-financial-reporting/sustainability-environmental-and-social-reporting/publications/climate-related-disclosure-study

In that respect, Canadian securities regulators are attempting to address the existing flaws in climate-related disclosure by establishing more detailed, rule-based guidance. In 2018, the Canadian Securities Administrators, an institution which is coordinating the provincial and territorial regulators and promoting policy harmonisation across jurisdictions, published a report identifying a list of information that may be material on climate-related disclosures, including environmental risk factors and the impact that these risks may have on health and safety.[65]

Securities regulators have taken a proactive role in demanding action from Canadian corporations regarding climate change issues. However, due to their jurisdictional limitations, these initiatives are usually premised on a weak sustainability approach, improving sustainability only to the extent that it brings financial gains.[66]

In conclusion, Canadian corporate law and securities regulations currently sustain a weak sustainability framework. Between them, securities regulation seems to be more effective in modifying corporations' behaviours, making them act in a more sustainable way, even if it is only to enhance their market value. Unfortunately, environmental issues are not a core priority in Canadian corporate law and securities regulation. The environment itself does not have an intrinsic value, it is only an aspect, among others, that may be relevant to financial performance.[67]

2.1.3 Brazil

Approaching the issue of sustainable development and relating it with Brazilian corporate law and corporate governance is quite hard. This is due to the way that these subjects have evolved in Brazil. Sustainability unfolded in parallel with corporate law and corporate governance, with almost no connections between them. Only recently sustainability concerns were taken into consideration in corporate governance debates, and even more recent is the cooperation among corporations and non-governmental organisations.[68]

Unfortunately, we cannot expect great progress in this area for the near future, since the agro-exporting sector—a very strong sector of Brazil's economy—sees sustainability as an obstacle to economic growth. The influence of this sector on environmental legislation becomes very evident when we analyse

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[65] Canadian Securities Administrators. (2018, April 5). *CSA Staff Notice 51–354: report on climate change-related disclosure project*. Ontario Securities Commission. https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20180405_51-354_disclosure-project.htm

[66] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 159). Cambridge University Press.

[67] Puri, P. (2019). Green but not enough: sustainability in Canadian corporate governance. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 160). Cambridge University Press.

[68] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 345). Cambridge University Press.

the Brazilian political context. There is a large and powerful group of Brazilian parliament members representing agribusiness interests, the so-called "rural caucus", whose votes are always contrary to the implementation of laws intended to strengthen the commitment to environmental protection.[69]

Besides that, the actual—far-right—President Jair Bolsonaro and his environment minister, Ricardo Salles, advocate for the deregulation and simplification of environmental norms in Brazil.[70]

The short period of Bolsonaro's government has already been confirmed as the one with the greatest deconstruction of the Brazilian environmental protection policy. For example, two of the several environmental violations during this period were the destructing of the Brazilian Institute for the Environment and Renewable Natural Resources (Ibama) and the Chico Mendes Institute for Biodiversity Conservation (ICMbio), with loss of technical autonomy and safety conditions for environment inspectors, as well as the flexibilisation and reduction of fines for environmental crimes.[71] This anti-environmental policy of Bolsonaro has already caused some serious environmental damages. MapBiomas[72] found that in one year the country lost 12.000 km^2 of forest and that 99% of the deforestation was illegal.[73]

Despite that, this work will approach a series of initiatives and regulations regarding sustainability and corporate governance in Brazil, particularly in the securities market and banking sector, where most progress in this subject is found. Despite the apparent advancements, these issues continue to be approached through the weak sustainability framework, given that the primary aim is to mitigate socio-environmental-related financial and reputational risks and attract investors.[74]

Before we go further into the actual scenario of sustainability in Brazil, we should understand how environmentalism as a social value was developed there. The political discussions on social and environmental issues in Brazil have their starting point in the Federal Constitution of 1988. Between the 1920s and the 1980s, the only purpose of Brazilian political bodies was to integrate the country into the global capitalist economy. Therefore, social and environmental concerns were considered hurdles to the country's development.[75]

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[69] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 345). Cambridge University Press.

[70] Phillips, D. (2020, May 28). *Studies add to alarm over deforestation in Brazil under Bolsonaro*. The Guardian. https://www.theguardian.com/environment/2020/may/28/studies-add-to-alarm-over-deforestation-in-brazil-under-bolsonaro-covid-19

[71] Silva, R. D. (2020, February 11). *As 26 principais violações ao meio ambiente feitas por Jair Bolsonaro*. Carta Capital. https://www.cartacapital.com.br/blogs/brasil-debate/as-26-principais-violacoes-ao-meio-ambiente-feitas-por-jair-bolsonaro/

[72] "MapBiomas is a multi-institutional project involving universities, NGOs and technology companies that promotes the annual mapping of land cover and land use in Brazil over the last three decades and provides data and maps in an open and free way." To know more, see http://mapbiomas.org

[73] MapBiomas. (2019). *Brazil's Annual Deforestation Report – 2019*. http://alerta.mapbiomas.org/en/relatorios?cama_set_language=en

[74] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 345). Cambridge University Press.

[75] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 348). Cambridge University Press.

In 1964, there was a military coup and a dictatorial regime was established. The military government lasted for more than twenty years and, during that period, violent repression prevented civil society from organising itself to claim rights and defend values other than the ones defended by the government. This situation of civil fragmentation changed only after the enactment of the 1988 Constitution, which is the cornerstone of democracy in Brazil.[76]

The 1988 Constitution addresses socio-environmental issues in several of its articles. For example, article 225 states that "everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations."[77]

In the 1990s many social movements and non-governmental organisations engaged in socio-environmental concerns were created, especially after the United Nations Conference on Environment and Development (Rio-92) held in Rio de Janeiro in 1992. The Rio de Janeiro Earth Summit drew attention to the discussion of environmental protection for a part of the population that was not aware of its importance. The UN event also warned Brazilians of the importance of preservation of its biomes such as the Atlantic Rainforest and the Amazon Rainforest, which are some of the country's richnesses.[78]

Now, we are going to analyse how corporate governance developed in Brazil in the last twenty years and how Brazilian companies are dealing with the issue of sustainable development in this context.

In 2000, the Brazilian Stock Exchange created the New Market a special listing segment for companies willing to enhance the value of their shares by compromising with corporate governance standards higher than those required by Brazilian Corporate Law.[79] Santana says that "the basic premise guiding the creation of the New Market was that a reduction in investor perceptions of risk would improve share values and liquidity."[80]

The New Market has two corporate governance levels that help investors select the companies according to their level of transparency: the ones that provide more comprehensive disclosures, balance the asymmetry of access to information existent between controlling shareholders/company

[76] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 348-349). Cambridge University Press.

[77] The Constitution of the Federative Republic of Brazil, 1988, article 225.

[78] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 349). Cambridge University Press.

[79] Law no. 6,404/1976.

[80] Santana, M. H. (2008). The Novo Mercado. In Santana, M. H., Ararat, M., Alexandru, P., Yurtoglu, B. B. & Cunha, M. R. *Novo Mercado and its followers: case studies in corporate governance reform* (p. 11). Focus 5. Global Corporate Governance Forum; IFC.

management and market participants; and their engagement in ensuring to minority shareholders a more balanced treatment, by expanding shareholder rights and guarantees.[81]

The New Market was created in the context of the decline of the Brazilian capital market—between 1997 and 2000. In the hope that enhanced corporate governance would make the Brazilian market more attractive for investors, the stock exchange drafted its own rules for voluntary compliance, mostly because the Brazilian legal system was failing to provide investors with appropriate protection and guarantees, and solving this issue would require legislative changes, but there was not enough support in Congress to do so.[82]

The implementation of the New Market was considered a success and now Brazil is internationally known as an example of a country in which self-regulation has been able to foster the evolution of corporate governance practices. Certainly, there were other factors that contributed to the New Market success, particularly the Brazilian economic stability and growth from the second half of the 1990s to 2009. However, this economic growth would probably have never happened through the capital market if investors had not been encouraged by the existence of clear corporate governance rules and a better investor protection system.[83]

The New Market is subjected to periodic reviews, and the proposed changes must be submitted for the listed companies' approval. Sustainability issues were not included in the original proposal and neither in the 2006 and 2011 reviews. For the 2017 reform, the stock exchange proposed that corporations should disclosure reports containing social and environmental information, in compliance with international standards such as the Global Reporting Initiative (GRI) or the International Integrated Reporting Council (IIRC), but the proposal was rejected.[84]

In the current regulation, New Market does a single reference to sustainability. Companies must prepare and disclose a Code of Conduct applicable to all of their employees, including managers, listing their duties towards civil society, encompassing socio-environmental responsibilities, respect for human rights, and respect for labour relations.[85]

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[81] Santana, M. H. (2008). The Novo Mercado. In Santana, M. H., Ararat, M., Alexandru, P., Yurtoglu, B. B. & Cunha, M. R. *Novo Mercado and its followers: case studies in corporate governance reform* (p. 1). Focus 5. Global Corporate Governance Forum; IFC.

[82] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 350). Cambridge University Press.

[83] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 349-350). Cambridge University Press.

[84] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 351). Cambridge University Press.

[85] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 351). Cambridge University Press.

As noticed above, sustainability still faces strong resistance in the Brazilian corporate environment, even among companies that adopt corporate governance rules stricter than those determined by law or its sector's regulation in order to be more appealing to investors.

In regard to State regulation of corporations and the matter of sustainability, we must clarify that general legislation does not specifically address this issue, but there are some specific norms that mention it.

The corporate legislation applicable to most of the Brazilian companies is: the Brazilian Civil Code,[86] which regulates limited liability firms; and the Brazilian Corporate Act[87] that regulates corporations. If listed, corporations are also subjected to the Brazilian Securities Act.[88]

The Brazilian Corporate Act establishes in its article 154 that "an officer shall use the powers conferred upon him by law and the bylaws to achieve the corporation's purposes and to support the corporation's best interests, including the requirements of the public at large and of the social role of the corporation."

Similarly, the sole paragraph of article 116 of the same law states that "a controlling shareholder shall use its controlling power in order to make the corporation accomplish its purpose and perform its social role and shall have duties and responsibilities towards the other shareholders of the corporation, those who work for the corporation and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed."

The foregoing provisions are general principles that can be related to sustainability but, in practice, it rarely happens.

Dias says that "only in very dramatic cases are corporate law duties interpreted as prescriptions of compliance with sustainability obligations". The author gives the example of the environmental disaster that occurred in 2015 in Mariana, State of Minas Gerais: the collapse of the iron ore tailings dam, owned by the mining company Samarco Mineração S.A. In this case, the government prosecutor expressly referred to the corporate law provisions in order to make the defendants liable. However, Dias points out

[86] Law no. 10,406/2002.
[87] Law no. 6,404/1976.
[88] Law no. 6,385/1976.

that even in this case, article 116 of the Brazilian Corporate Act was used as part of the argument of the public prosecutors, not as the legal basis to make Samarco and its controlling shareholders liable.[89]

The Securities and Exchange Commission of Brazil (CVM)[90] requires Brazilian listed companies to disclose annual reports since 1979; however, socio-environmental information started to be requested only in 2009. CVM Instruction no. 480/2009 created the Reference Form, with the purpose of deepening the information provided by companies. This electronic document must be filled periodically with information about the companies' processes and governance practices.[91]

Besides that, listed companies are requested to submit a description of the relevant effects of State regulations on them, specifically regarding the environmental policies and the cost incurred for compliance with these regulations, among other environmental practices endorsed by the company, including compliance with international environmental protection standards (if adopted). Dias mentions that "this change brought the Brazilian rules and standards much closer to those recommended by international institutions specialized in the securities market."[92]

The Reference Form was updated in 2014 and, among the risks that may influence investors' decisions, there were socio-environmental risks. Moreover, as of said reform, companies are required to inform if they disclose corporate and environmental information; the methodology followed in the assessment of this information; if the information is audited or reviewed by an independent entity; and in which webpage the information can be found.[93]

In addition, CVM adopts the Brazilian Corporate Governance Code—Listed Companies (Código Brasileiro de Governança Corporativa) coordinated by the Brazilian Institute of Corporate Governance. The Code was built according to the "comply or explain" format (i.e., it establishes governance principles, and adherent companies are required to disclose how they are complying with them; otherwise, the company must explain why they are not complying with the provisions of the guideline). CVM is in the process of making the Code mandatory for all listed companies which is very positive for sustainability

[89] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 352). Cambridge University Press.
[90] The Securities and Exchange Commission of Brazil (Comissão de Valores Mobiliários—CVM) is the securities market authority in Brazil. It is an independent agency linked to the Brazilian Ministry of Finance and it regulates the capital markets in Brazil and all of its participants, which include stock exchanges, public companies, financial intermediaries, and investors.
[91] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 353). Cambridge University Press.
[92] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 353). Cambridge University Press.
[93] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 353-354). Cambridge University Press.

improvement since the Code encompasses socio-environmental issues, and addresses the importance of mitigating the negative impact of companies on society and on the environment.[94]

The foregoing shows that CVM has been contributing to the improvement of transparency, and consequently, the betterment of corporate governance practices, particularly aiming at the strengthening of the Brazilian capital market through sustainable development.

In regard to State-Owned Enterprises (SOEs), the State-Owned Enterprise Act[95] enacted in 2016, states in item IX of article 8 that SOEs must observe the requirement of transparency by disclosing annual reports on sustainability. It also establishes in paragraph 2 of article 27 that SOEs "shall adopt environmental sustainability practices and corporate social responsibility policies compatible with the market in which they develop their activities". Besides these provisions, article 45 commands SOEs to analyse environmental sustainability criteria when contracting with third parties. Unfortunately, until now, no relevant changes towards sustainable development were adopted by SOEs.[96]

In 2015, the Brazilian Stock Exchange developed the State-Owned Enterprises Governance Program (Programa Destaque em Governança de Estatais)[97] to encourage public SOEs to improve their corporate governance practices and thereby contribute to the restoration of trust between investors and SOEs, mainly because of corruption scandals involving Brazilian SOEs in the last few years.

The SOEs Governance Program is voluntary and the enterprises must comply with the corporate governance measures established there to obtain the certification. The Program encourages the adoption of sustainability reports and codes of conduct encompassing socio-environmental responsibilities, but, unfortunately, none of these items are mandatory. To obtain the certification, SOEs must comply with 6 mandatory items and score at least 48 points among a list of corporate governance measures (i.e., failure to comply with some of the governance practices does not prevent the enterprises from obtaining the Program's certification).

Another tool created by the Brazilian stock exchange to analyse the companies' performance regarding sustainability is the Corporate Sustainability Index (Índice de Sustentabilidade Empresarial—

[94] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 354). Cambridge University Press.
[95] Law no. 13,303/2016.
[96] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 353). Cambridge University Press.
[97] To know more about the State-Owned Enterprises Governance Program, see http://www.b3.com.br/en_us/b3/qualificacao-e-governanca/certificacoes/programa-estatais/

ISE).[98] It was created in 2005 with the assistance of, and financial support from, the International Finance Corporation (IFC), a financial arm of the World Bank. ISE intends to provide a comparative analysis of the sustainability performance of public companies, encompassing economic efficiency, environmental equilibrium, social justice, and corporate governance. The ISE draws public attention to companies committed to sustainable development and encourages corporations to be ethically responsible.

In 2017, the Brazilian Development Association (Associação Brasileira de Desenvolvimento—ABDE), the Inter-American Development Bank (Banco Interamericano de Desenvolvimento—BID), and the Securities and Exchange Commission of Brazil (Comissão de Valores Mobiliários—CVM) created the Financial Innovation Laboratory (Laboratório de Inovações Financeiras—LAB)[99] a forum to promote sustainable finances in Brazil. LAB works through intersectoral dialogue organised in working groups on green finance, green bond, social impact assessment, philanthropy venture, socioenvironmental risk management, and many other subjects.

Beyond its main objective of creating innovative solutions for funding, in order to foster private investment on projects that comprise socio-environmental solutions, the LAB also aims to contribute to the fulfilment of Brazilian goals within the Sustainable Development Goals (SDGs) and the Paris Agreement.

Regarding the Brazilian banking system and sustainability, we may first say that the banking system in Brazil is large, sophisticated, and centralised (i.e., it is in the hands of a small number of large institutions). Besides that, there is a significant number of banks owned by federal and state governments, and some of them are very important for agribusiness funding.[100]

The Central Bank of Brazil (Banco Central do Brasil—Bacen) is a federal entity that authorises and supervises the operation of financial institutions in Brazil. Bacen has been assuming a prominent role in international forums on banking regulation and financial stability[101]; in virtue of that, it has been incorporating socio-environmental provisions in financial regulations.[102]

In the past, financial regulations only approached sustainability in provisions on public resources or public banks. For example (i) Bacen's resolution no. 3,545/2008 amended the Rural Credit Manual,

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[98] To know more about the Corporate Sustainability Index, see http://www.b3.com.br/en_us/market-data-and-indices/indices/sustainability-indices/corporate-sustainability-index-ise.htm

[99] To know more about the Financial Innovation Laboratory, see http://www.labinovacaofinanceira.com/lab/

[100] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 355-356). Cambridge University Press.

[101] To know more about Bacen's participation in international forums, see https://www.bcb.gov.br/en/about/globalfingovernance

[102] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 356). Cambridge University Press.

which is a document that regulates rural credit subsidised by the National Treasury trough State Banks, once the Brazilian National Monetary Council (Conselho Monetário Nacional—CMN) decided that in order to obtain financing in the Amazon Biome the beneficiary must present documentation evidencing compliance with environmental regulations; (ii) Bacen's resolution no. 3,813/2009 amended the Rural Credit Manual to prohibit the financing of sugarcane farming in the Amazon and Pantanal Biomes, among other areas; (iii) Bacen's resolution no. 3,896/2010 created a programme to promote the reduction of greenhouse gas emissions from agricultural activities and contribute to the reduction of deforestation using resources from the Brazilian Development Bank (Banco Nacional de Desenvolvimento—BNDS); and (iv) Bacen's resolution no. 4,267/2013 regulates the use of funds of the National Fund on Climate Change (Fundo Nacional sobre Mudança do Clima—FNMC) to finance technological development, machinery purchase, and projects aiming the reduction of greenhouse gas emission and other environmental protection initiatives.[103]

In 2011, Bacen started to address socio-environmental concerns in regulations for private financial institutions. According to Bacen's norms[104] when making the Internal Capital Adequacy Assessment Process (Processo Interno de Avaliação de Adequação de Capital—Incaap) financial institutions must assess the amount of capital needed to cover, beyond other risks, risks resulting from socio-environmental damages. Therefore, initially, Bacen addressed financial and reputational risks to be detected and managed or mitigated by private financial institutions, not exactly sustainability.[105]

In 2014, through the enactment of resolution no. 4,327, Bacen required financial institutions to adopt a Socio-environmental Responsibility Policy (Política de Responsabilidade Socio-ambiental). This policy should provide guidance to socio-environmental actions in business transactions and in the institution's relationship with stakeholders. The resolution states that when preparing and implementing the policy, institutions must take into account the principle of significance, which is verifying the level of exposure of the financial institution to socio-environmental risks, and the principle of proportionality, which is the consistency between the policy and the institution's nature and the complexity of its activities. Bacen determines that the policy must be re-assessed every five years to verify its effectiveness and deficiencies.[106]

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[103] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 356). Cambridge University Press.
[104] Circular no. 3,547/2011, later replaced by Circular no. 3,846/2017.
[105] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 356). Cambridge University Press.
[106] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 357). Cambridge University Press.

As we could see above, Bacen' approach to sustainability in private institutions only encompasses the management of socio-environmental risks associated with commercial practices within the governance structure of the financial institutions.

The self-regulation system of the Brazilian Federation of Banks (Federação Brasileira de Bancos—FEBRABAN) enacted a normative act (SARB 014/2014) which formalises guidelines and procedures to assist private financial institutions in the preparation and implementation of their Socio-environmental Responsibility Policy.

Still regarding the self-regulation of financial institutions, the Brazilian Stock Exchange has an Operational Qualification Program (Programa de Qualificação Operacional—PQO)[107] which operates as a quality certification, assessing banks and brokerage firms' services. In order to be certified, the institution must comply with the market regulation, and with specific strategies for each type of business, which encompass the implementation of a social-environmental policy (mandatory under Bacen's regulation) and the disclosure of socio-environmental information to clients.[108]

The preceding facts show that the self-regulation of financial institutions did not do much to foster sustainability in this sector. The efforts are limited to providing parameters in assisting financial institutions to prepare their socio-environmental policies, and in certifying that financial institutions adopted them in an appropriate manner.

In conclusion, although corporate governance has evolved considerably in Brazil over the past decades, there is still room for improvement. For example, social-environmental policies should be mandatory in State regulation and in self-regulation programmes, and disclosure of socio-environmental information should follow international standards generally adopted for such reports. Even the banking sector, which has advanced a bit further in this regard requesting financial institutions to adopt social-environmental policies, needs some improvement since the current regulation does not establish a minimum content for such policies.[109]

Unfortunately, Brazilian companies are still unaware that the primary purpose of sustainability is to ensure a safe environment for current and future generations. With rare exceptions, the adoption of sustainability practices still aims to minimise socio-environmentally related financial and reputational

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[107] To know more about the Operational Qualification Program, see http://www.b3.com.br/pt_br/antigo/s_regul-antigo/programa-de-qualificacao-operacional-pqo/roteiros/

[108] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 357). Cambridge University Press.

[109] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 357). Cambridge University Press.

risks, to attract investors, especially international investors, and to enhance the company's economic and financial performance.[110]

Wistfully, without social pressure, no further advancements in this area can be expected in the near future since the federal government led by Jair Bolsonaro shows no interest in the matter. On the contrary, his original plan was to merge the Ministry of Environment with the Ministry of Agriculture[111], but due to national and international pressure, Bolsonaro maintained the ministries apart. However, when selecting a minister for the Ministry of Environment, he chose a person "sensitive" to the needs of the Brazilian agribusiness industry (i.e., environmental protection is not in Bolsonaro's agenda; for him, economic growth is the only thing that matters.)

2.2 Business and Sustainability in Europe

2.2.1 The European Union

An increase in cross-border activity made companies become multinationals and, therefore, allowed them to choose their legal forms, applicable laws, and other legal implications based on a variety of domestic legislation. The economic benefit for these companies is undeniable, but this can lead to a series of problems within multiple jurisdictions, such as environmental degradation, human rights violations, and tax evasion. Many countries have proposed and implemented legislation in different areas of the law to try to curb undesirable corporate conducts. However, as multinationals are cross-border entities, domestic legislation alone is not enough to fight unsustainable business practices. This has provided an opportunity for the European Union (EU) to act as a legislator[112] and establish minimum standards to regulate companies that operate within the European Economic Area.[113] Thus, this section aims to present the EU regulations on corporate sustainability, considering the efforts made by the EU to harmonise minimum criteria for sustainable development.[114]

[110] Dias, L. (2019). Social environmentalism and corporate capture: corporate governance and sustainability in Brazil. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 358). Cambridge University Press.

[111] See Watts, J. (2018, November 1). *Fears for Amazon as Bolsonaro plans to merge environment and agriculture ministries.* The Guardian. https://www.theguardian.com/world/2018/nov/01/bolsonaro-environment-agriculture-ministries-amazon

[112] Under the principle of subsidiarity in article 5 of the Treaty on European Union (TEU), the Union shall act only if the objectives of the proposed action cannot be sufficiently achieved by the Member States (MS), but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. In other words, the EU can only act as a legislator if the MS cannot not achieve the same results with domestic legislation.

[113] To know more about the European Economic Area (EEA), see https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:European_Economic_Area_(EEA)

[114] Clarke, B., & Anker-Sørensen, L. (2019). The EU as a potential norm creator for sustainable corporate groups. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 190). Cambridge University Press.

In this regard, article 3(3) of the Treaty on European Union (TEU) establishes that sustainable development is the main long-term goal of the EU internal market and that this must encompass economic, social, and environmental concerns.

The environmental dimension of sustainability is directly referenced in article 3(3) of the TEU; besides that, the Commission has mentioned it in several of its communications. In 2001, the communication "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development"[115] proposed concrete actions to address issues such as climate change. In 2014, the "2030 Energy and Climate Framework"[116] established a policy for climate and energy for the period from 2020 to 2030, including targets for greenhouse gas emissions, renewable energy, and energy efficiency which were revised in 2018. In 2015, the "Energy Union Framework Strategy"[117] aimed to make energy more secure, affordable, and sustainable for EU consumers; the first "Circular Economy Action Plan"[118] encouraged European businesses and consumers to engage in greater recycling and re-use of products. It was reviewed in March 2020, generating a new Action Plan[119] that addresses the entire life cycle of products, promoting circular economy processes and fostering sustainable consumption; the EU also announced its intention to implement the "UN 2030 Agenda and Sustainable Development Goals"[120] and to ratify the Paris Climate Agreement,[121] which was ratified and entered into force in November 2016.[122]

The social dimension of sustainability is also mentioned in article 3(3) of the TEU and was included in 2010 in the Commission's communication "Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth"[123], which aims to foster a "social market economy" with "high levels of employment, productivity, and social cohesion".[124]

The economic dimension of sustainability is also described in article 3(3) of the TEU. It gained the Commission's attention after the global financial crisis, between mid-2007 and early 2009, and some financial scandals, such as the leaks of the Panama Papers in 2016 and the Paradise Papers in 2017. In 2012, the Commission's "Action Plan to strengthen the fight against tax fraud and tax evasion"[125],

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[115] European Commission. A sustainable Europe for a better world: a European union strategy for sustainable development. COM (2001) 264 final. Also see European Council 10917/06: review of the EU Sustainable Development Strategy.
[116] European Commission. A policy framework for climate and energy in the period from 2020 to 2030. COM (2014) 15 final.
[117] European Commission. A framework strategy for a resilient energy union with a forward-looking climate change policy. COM (2015) 80 final.
[118] European Commission. Closing the loop: an EU action plan for the Circular Economy. COM (2015) 614 final.
[119] European Commission. A new Circular Economy Action Plan: for a cleaner and more competitive Europe. COM (2020) 98 final.
[120] United Nations. General Assembly. Transforming our world: the 2030 Agenda for Sustainable Development. A/RES/70/1.
[121] United Nations. Framework Convention on Climate Change (The Paris Agreement). FCCC/CP/2015/10/Add.1
[122] Clarke, B., & Anker-Sørensen, L. (2019). The EU as a potential norm creator for sustainable corporate groups. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 191, 192). Cambridge University Press.
[123] European Commission. EUROPE 2020: a strategy for smart, sustainable and inclusive growth. COM (2010) 2020 final. Also see European Commission: results of the public consultation on the Europe 2020 strategy for smart, sustainable and inclusive growth. COM (2015) 100 final.
[124] European Commission. EUROPE 2020: strategy for smart, sustainable and inclusive growth. COM (2010) 2020 final (p. 5).
[125] European Commission. An Action Plan to strengthen the fight against tax fraud and tax evasion. COM (2012) 722 final.

established as a priority the adoption of measures against tax avoidance and aggressive tax planning. Relevant EU initiatives in this regard include the "Anti-Tax Avoidance Directive"[126] and the "Proposal for a Council Directive on a Common Corporate Tax Base"[127], among others.[128]

The corporate law's concept of Corporate Social Responsibility (CSR) was also used by the EU to build up the discussion around the social and environmental impacts resulting from companies' activities. In 2001, the Commission presented a communication named "Green Paper, Promoting a European Framework for Corporate Social Responsibility"[129]; it defined CSR as being "a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment".[130] This communication aimed to contribute to the goals established in the Lisbon Strategy which was a special meeting held in March 2000 in Lisbon to agree on a strategic goal for the EU for the following decade, which was "to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion."[131] [132]

In 2011, the CSR definition was updated by the Commission's communication "A Renewed EU strategy 2011–14 for Corporate Social Responsibility"[133]; from then on, CSR was understood as being "the responsibility of enterprises for their impacts on society".[134] Despite not being mandatory, the communication encourages companies to adopt a long-term, strategic approach to CSR and to identify, prevent, and mitigate possible adverse impacts.[135]

Clarke and Anker-Sørensen say that "sustainable governance refers to internal strategic and decision-making structures encompassing the environmental, social, and economic dimensions of sustainability".[136] In order to foster that, the Commission developed in 2012 the "Action Plan on European Company Law and Corporate Governance"[137], which stressed transparency and disclosure as key elements for companies' sustainable development.

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[126] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

[127] European Commission. Proposal for a council directive on a common corporate tax base. COM (2016) 685 final.

[128] Clarke, B. & Anker-Sørensen, L. (2019). The EU as a potential norm creator for sustainable corporate groups. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 192). Cambridge: Cambridge University Press.

[129] European Commission. GREEN PAPER: promoting a European framework for Corporate Social Responsibility. COM (2001) 366 final.

[130] European Commission. GREEN PAPER: promoting a European framework for Corporate Social Responsibility (p. 4). COM (2001) 366 final.

[131] European Parliament. *Lisbon European Council 23 and 24 March 2000: presidency conclusions* (no. 5).

[132] Clarke, B., & Anker-Sørensen, L. (2019). The EU as a potential norm creator for sustainable corporate groups. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 193). Cambridge University Press.

[133] European Commission. A renewed EU strategy 2011-14 for Corporate Social Responsibility. COM (2011) 681 final.

[134] European Commission. A renewed EU strategy 2011-14 for Corporate Social Responsibility. COM (2011) 681 final.

[135] Clarke, B., & Anker-Sørensen, L. (2019). The EU as a potential norm creator for sustainable corporate groups. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 193). Cambridge University Press.

[136] Clarke, B., & Anker-Sørensen, L. (2019). The EU as a potential norm creator for sustainable corporate groups. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 195). Cambridge University Press.

[137] European Commission. Action plan: European company law and corporate governance—a modern legal framework for more engaged shareholders and sustainable companies. COM (2012) 740 final.

On one hand, disclosure enhances awareness of the impact of the companies' operations on society and the environment. Thus, disclosure plays a crucial role in corporate governance mechanisms that seek sustainable development practices. On the other hand, companies might fear that disclosure may yield a competitive advantage to competitors, particularly for the ones that do not disclose relevant information, and this can be a barrier in the increase and improvement of disclosures and, consequently, to sustainability. Besides that, disclosure requirements inevitably represent an ex post approach to sustainability. Therefore, disclosure alone cannot serve as a strong mechanism to achieve sustainability.[138]

Corporate regulations have drawn a distinction between financial and non-financial reporting obligations. This distinction aimed to draw attention to the impacts that companies have on employees, the environment, and society as a whole. However, all aspects of the business end up having a financial impact on the company and can be considered financial risks. For example, a company that is caught polluting can have its reputation damaged, which can lead to a significant impact on its finances. Therefore, socio-environmental concerns should not be considered mere short-term compliance issues, but rather a long-term strategy to pursue corporate goals towards sustainable development.[139]

The "Non-Financial Reporting Directive"[140] also addresses the importance of enhancing transparency in the European business environment, but, unfortunately, its scope is limited to public interest companies and groups employing more than 500 employees. The Directive requires that large companies and parent companies of large groups disclose non-financial information encompassing "environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters".[141]

In order to enhance the quality of the reports and to generate comparable information, the Commission produced Guidelines[142] to assist companies on their disclosure obligations. However, since the harmonisation of the reports is given at a policy level, it may encourage the adoption of a "best practice" but does not guarantee such an outcome. In conclusion, despite their good intentions, the

[138] Clarke, B., & Anker-Sørensen, L. (2019). The EU as a potential norm creator for sustainable corporate groups. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 198). Cambridge University Press.
[139] Clarke, B., & Anker-Sørensen, L. (2019). The EU as a potential norm creator for sustainable corporate groups. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 198). Cambridge University Press.
[140] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
[141] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, article 1.
[142] European Commission. Guidelines on non-financial reporting (methodology for reporting non-financial information), 2017/C 215/01.

limited scope of the Directive and the non-binding character of the Commission Guidelines show that there are regulatory gaps.[143]

Companies and regulatory bodies should have in mind that sustainability is linked to long-term goals rather than to the short-term concerns and that achieving sustainability in all of its dimensions requires large-scale and long-term investments.

The "Shareholder Rights Directive"[144], as amended in 2017, contains a number of measures aimed at reducing short-termism in listed companies and facilitating the exercise of shareholders' rights. It states that "shareholder engagement is one of the cornerstones of corporate governance"[145], and therefore "greater involvement of shareholders in corporate governance is one of the levers that can help improve the financial and non-financial performance of companies, including as regards environmental, social and governance factors."[146]

Regarding the financial sector, the Final Report of the High-Level Expert Group on Sustainable Finance[147] published in January 2018 establishes strategic recommendations for sustainable investments in the EU's financial system. These recommendations were the foundation for the Commission's "Action Plan: Financing Sustainable Growth"[148] published in March 2018, which has three main objectives: (i) reorient capital flows towards sustainable investment, in order to achieve sustainable and inclusive growth; (ii) manage financial risks stemming from climate change, environmental degradation and social issues; and (iii) foster transparency and long-termism in financial and economic activity. The Action Plan is quite ambitious, yet encompasses great proposals, such as (i) establishing an EU classification system for sustainable activities; (ii) creating standards and labels for green financial products; (iii) fostering investment in sustainable projects; and many others.

In May 2018, the Commission adopted a package of measures to start implementing the actions announced in its Action Plan. In December 2019, the Commission presented the "European Green Deal"[149], which is a "growth strategy that aims to transform the EU into a fair and prosperous society, with

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[143] In December 2019, the European Commission has committed to review the Non-Financial Reporting Directive, in order to improve the legislative foundation for sustainable investment. https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en
[144] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.
[145] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (paragraph 14).
[146] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (paragraph 14).
[147] Financing a Sustainable European Economy. Final Report 2018 by the High-Level Expert Group on Sustainable Finance.
[148] European Commission. Action plan: financing sustainable growth. COM (2018) 97 final.
[149] European Commission. The European Green Deal. COM (2019) 640 final.

a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use".[150] In January 2020 the Commission presented the "European Green Deal Investment Plan"[151], designed to facilitate public and private investments needed for the transition to a climate-neutral, green, competitive, and inclusive economy, by mobilising around €1 trillion, over the next decade, for sustainable investments.

Besides that, in October 2019, the EU—together with Argentina, Canada, Chile, China, India, Kenya, and Morocco—launched the International Platform on Sustainable Finance (IPSF). The IPSF is a forum to strengthen international cooperation on sustainable investments. The ultimate objective of the IPSF is to scale up the mobilisation of private capital towards environmentally sustainable investments. In March 2020, Indonesia, Norway and Switzerland joined the IPSF.[152]

In conclusion, the EU has adopted a leadership role in the area of sustainable development, recognising its relevance, and taking some great initiatives to foment it. However, most of the initiatives are at the policy level (i.e., they are not binding). Just a few instruments have a binding effect, such as the Non-Financial Reporting Directive and Shareholder Rights Directive, but they only establish minimum standards, and their scope is limited to large companies, groups of companies, or listed companies. Nevertheless, the disclosure and good governance practices adopted by large entities can be seen as best practices and can be adopted by a wider number of companies, but, unfortunately, this usually happens only when these best practices have the potential to enhance the companies' economic value.

The package of measures adopted by the Commission in May 2018 as a follow-up to its action plan on financing sustainable growth together with an ambitious time schedule for the implementation of such actions demonstrates the Commission's commitment with the challenge and determination to accomplish it. Clarke and Anker-Sørensen refer that the Commission's proposal to introduce such measures "by way of a regulation, a binding legislative act rather than a non-binding recommendation, is significant and evidences a more assertive and intrusive approach to the topic".[153] The Commission itself

[150] European Commission. The European Green Deal (p. 2). COM (2019) 640 final.
[151] European Commission. (2020, January 14). *Financing the green transition: the European green deal investment plan and just transition mechanism* [Press release].
[152] To know more about the International Platform on Sustainable Finance, see https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200325-international-platform-sustainable-finance-factsheet_en.pdf
[153] Clarke, B., & Anker-Sørensen, L. (2019). The EU as a Potential Norm Creator for Sustainable Corporate Groups. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 203). Cambridge University Press.

has said that these “proposals confirm Europe's commitment to be the global leader in fighting climate change and implement the Paris Agreement”.[154]

To sum up, the EU has great potential to be an important driver of cultural, strategic, and political changes towards sustainable development. What remains to be seen is if the Member States will take action to accomplish sustainability, and, ultimately, this is perhaps the real challenge.

2.2.2 The United Kingdom

Despite the growing social pressure for sustainability, particularly regarding environmental concerns, there have been no major changes in the UK’s corporate regulation that could meet these social claims. Since the middle of the twentieth century, the UK’s corporate law and governance system have focused first and foremost on the creation of shareholder value, and, therefore, have relied only on the market to drive companies towards sustainability.[155]

The mechanism adopted by the UK’s corporate law to allow the market to drive companies towards a desirable degree of sustainability was information disclosure. The UK’s corporate law always used information disclosure to make directors accountable for their corporate decisions. Since 2006, disclosure mechanisms have been even more deployed since they allow shareholders to have a wider view of the company’s performance, giving them information far beyond the financial efficiency.[156]

Policymakers expected that disclosure would prevent environmental degradation (since it would draw public attention to the companies’ production processes), foster economic sustainability (since shareholders acting as stewards could “promote the long-term success of companies”[157]), and prevent human rights abuses (since it would enhance transparency and due diligence among companies and their supply chain[158]).

In reality, the UK’s policymakers were envisioning a double accomplishment scenario in which market-driven accountability, encompassing wider concerns, would lead to a better financial performance of companies. Additionally, they advocated that whenever the market did not provide sufficient protection of social interests, the issue could be addressed by regulation[159]—a secondary type of legislation which is

[154] European Commission. (2018, May 24*). Sustainable finance: Making the financial sector a powerful actor in fighting climate change* [Press release]. https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3729
[155] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 204). Cambridge University Press.
[156] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 204). Cambridge University Press.
[157] Financial Reporting Council. (2012). *The UK Stewardship Code 2012*.
[158] Modern Slavery Act 2015, s. 54
[159] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 204). Cambridge University Press.

made by an executive authority under powers delegated by an enactment of primary legislation[160], and that, therefore, can present some limitations.

The premise that the market, with the support of regulations, will ensure sustainable development in the UK's companies allows managers and directors to focus on financial matters and their implication on accountability towards shareholders, rather than splitting their attention into concerns regarding all dimensions of sustainability when managing the company.[161]

This section aims to address the modernisation of the UK's company law that was initiated in 1999 and that lead to the enactment of the Companies Act of 2006, in regard to its thwarted attempt to address sustainability. Nevertheless we can already say that in regard to the environmental dimension of sustainability, the best that can be expected is the weak sustainability approach since the impact of the company's operations on the environment is only considered and managed to avoid compromising the success of the company (i.e., produced capital prevailing over natural capital). Regarding the social dimension, there is a growing concern with transparency. The adoption of voluntary and mandatory disclosure seeks to enhance the due diligence regarding human rights, particularly among transnational supply chains, but, unfortunately, atrocious breaches are still happening. Regarding its economic aspect, despite the widespread concerns about short-termism in UK's business system, shareholders continue to be the only party empowered by law to influence investment policies adopted by managers, and therefore, the problem persists.[162]

In 1999, the UK initiated a reform of its system of company law. In this review, the Company Law Review Steering Group (CLRSG) had a key role, since most aspects of the Companies Act 2006 were determined by its recommendations. Although there were just a few explicit mentions of sustainability in the CLRSG's reports, this concern was strongly implicit in them.[163]

Sustainability in UK's company law reform was mainly discussed within the preliminary question of the "scope" of company law, specifically on how companies' impact on the environment should be dealt with in law. Although acknowledging that the environment should be treated with high priority in the corporate governance processes, the dominant view of the reformers was that the environment should be protected by a specific regulation. In this regard, the CLRSG recognised that whilst specific regulation's

[160] *Understanding legislation.* http://www.legislation.gov.uk/understanding-legislation#Howlegislationworks
[161] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 204). Cambridge University Press.
[162] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 204). Cambridge University Press.
[163] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 208). Cambridge University Press.

advantage is to leave the directors free to focus on profit maximisation, it also presents some limitations with respect to achieving public policy goals. Thus, the CLRSG recommended the adoption of regulations for these wider matters, complemented by market pressure, claiming that the market is expected to drive companies towards sustainability since these issues can interfere in the company's reputation.[164]

The reform stroked the high point of the belief in the self-correcting properties of markets, so it assumed that reputational concerns would constrain managers' bad behaviours. The reformers aimed to foster shareholder value, without disregarding other interests, such as environmental protection. In other words, they preferred the so-called "enlightened shareholder value" (sustainability as a means to achieve the primary goal which is the success of the company)[165] rather than "pluralism" (which addresses sustainability as an end in itself.)[166] So, in its consultation document, the CLRSG suggested that enlightened shareholder value should be embodied in the directors' duties:[167]

> An obligation on directors to achieve the success of the company for the benefit of shareholders by taking proper account of all the relevant considerations for that purpose. These include a proper balanced view of the short and long term; the need to sustain effective ongoing relationships with employees, customers, suppliers and others; and the need to maintain the company's business reputation and to consider the impact of its operations on the community and the environment.[168]

The revised director's duty can be found in section 172 of the Companies Act 2006; this was the first time that shareholder value was explicitly mentioned as a duty of directors. However, in more than a decade since its introduction, the provision has not been used as an argument in litigations in the UK's courts, since the business judgment rule implicit in UK corporate law weakens any attempt to make directors liable for breaching their duties. Besides that, the elevated number of cases where stakeholders' interests were disregarded in benefit of short-term shareholders value shows that the provision has had little influence on the way companies are managed either.[169]

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[164] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 208, 209). Cambridge University Press.
[165] Keay, A. R. (2013). *The enlightened shareholder value principle and corporate governance* (p. 283). Routledge.
[166] Molz, R. (1995). The theory of pluralism in corporate governance: a conceptual framework and empirical test (p. 789). *Journal of Business Ethics*, 14(10).
[167] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 209). Cambridge University Press.
[168] Company Law Review Steering Group. (2000). *Modern company law for a competitive economy: developing the framework* (paragraph 2.19). https://webarchive.nationalarchives.gov.uk/20090609063715/http://www.berr.gov.uk/files/file23248.pdf
[169] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 210). Cambridge University Press.

Beyond that, the reformers also believed that a new disclosure regime would contribute to sustainable development since it would expose the socio-environmental consequences of business decisions. The idea is that the companies' value would increase if the capital market participants had a better understanding of the decision-making processes and, therefore, were aware of the risks and benefits involved in the investment.[170] The CLRSG proposed the adoption of an Operating and Financial Review (OFR), which was a report that should cover the main factors underlying the company performance and which was intended to give a broader view of the company's operations than the purely financial information.[171] The OFR was supported by the government in its "White Paper: Modernising Company Law", the government agreed that companies should provide more qualitative and forward-looking reports that would benefit all stakeholders and could contribute to both corporate social responsibility and sustainable development initiatives.[172]

Despite the general acknowledgment that non-financial reports are extremely important not only for the market but also to corporate accounting, the CLRSG proposal to implement the OFR was rejected for political reasons and replaced by a "business review". The purpose of the business review was to inform shareholders and help them assess how the directors have performed their duty under section 172. The business review should contain a description of the principal risks and uncertainties that the company was facing, including, in the case of listed companies, information about environmental matters, company's employees, and social and community issues. The whole content of the business review was specified in section 417 of the Companies Act 2006. On October 1, 2013, the business review requirement was repealed and was replaced by the requirement for companies to prepare a stand-alone "strategic report" in accordance with sections 414A to 414D of the Companies Act 2006. In the case of unquoted companies, the contents of the strategic report mirror those required for the business review; however, for quoted companies, the strategic report is required to contain more information than previously required for the business review.

The Financial Reporting Council, whose mission is to promote transparency and integrity in UK's businesses, and which sets the UK's Corporate Governance and Stewardship Codes, with the view to encouraging entities to prepare a high-quality strategic report, has established in 2018 the Guidance on the Strategic Report. The guidance sets out principles and serves as a best practice statement and,

[170] Johnston, A. (2019). Market–led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 210). Cambridge University Press.
[171] House of Commons Trade and Industry Committee. *The white paper on modernising company law–sixth report of session 2002–03* (p. 18). https://publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/439/439.pdf
[172] The Secretary of State for Trade and Industry by Command of Her Majesty. (July 2002). *White paper: modernising company law* (p 38). Command Paper CM 5553. https://webarchive.nationalarchives.gov.uk/20021202120437/http://www.dti.gov.uk:80/companiesbill/whitepaper.htm

therefore, has persuasive rather than mandatory force. The guidance recommends that "only information that is material in the context of the strategic report should be included within it"[173], and states that "information is material if its omission or misrepresentation could reasonably be expected to influence the economic decisions shareholders take on the basis of the annual report as a whole".[174] This recommendation reinforces the weak sustainability approach and moves the strategic report ever further away from the original vision of the OFR.

Unfortunately, all the aforementioned reforms represented, in fact, minor developments. There is little evidence that the markets were driving companies towards greater sustainability. The company law reform failure is perhaps best demonstrated by the fact that the Companies Act 2006 has a number of provisions to help shareholders engage with their investee companies; however, the global financial crisis of 2008 came about, inter alia, because these provisions were not used frequently enough.[175]

The post-crisis Walker Review[176] condemned institutional investors for their passivity and recommended that the Institutional Shareholders' Code, effectively a voluntary statement of the best practice, should be renamed as the Stewardship Code. The principal aim of the Stewardship Code was to encourage institutional investors to make greater use of their rights, to collaborate with other investors to monitor companies, and to adopt a long-term trading approach to their investments, replacing the short-term mindset. After a consultation period, the Stewardship Code was published by the Financial Reporting Council (FRC) in 2010 and was revised in 2012. In assessing its overall effectiveness, it has been reported that investors' engagement in larger companies has improved, but there is still a lack of investor activism in medium-sized companies.[177]

Recently, the FRC published the UK Stewardship Code 2020 (a revision of the Stewardship Code 2012), which aims to establish guidelines for the responsible allocation and management of capital in order to create long-term value for investors and investee companies and ensure sustainability. Nevertheless, since it is a recent publication, its effectiveness is still to be proven.[178]In conclusion, despite the adjustments in the UK system of corporate law and governance, its main feature continues to be the enhancement of shareholders' value, in the form of dividends and increment of shares price. The reforms

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[173] Financial Reporting Council. (July 2018). *Guidance on the Strategic Report* (p. 18).
[174] Financial Reporting Council. (July 2018). *Guidance on the Strategic Report* (p. 18).
[175] O'Dwyer, A. (2014). *Corporate governance after the financial crisis: the role of shareholders in monitoring the activities of the board* (p. 6). University of Aberdeen.
[176] Walker, D. (2009). *A review of corporate governance in UK banks and other financial industry entities: final recommendations.* https://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf
[177] O'Dwyer, A. (2014). *Corporate governance after the financial crisis: The role of shareholders in monitoring the activities of the board* (pp. 11-13). University of Aberdeen.
[178] Financial Reporting Council. (2020). *The UK Stewardship Code 2020.* https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf

enhanced information disclosure, but it remains weak and unreliable, and directors are still subjected only to accountability towards shareholders. UK companies continue to run on short-term pressures and sustainability still relies on the market's goodwill.[179]

The shareholder primacy is so rooted in the UK that it drives the corporate policies and practices and prevents companies' directors of using their discretion, provided to them by company law, to adopt sustainable practices. However, recently, the House of Commons Business, Energy and Industrial Strategy and Work and Pensions Committees assessing Carillion's case[180] stated that the case served as an opportunity for the government understanding of the urge for an ambitious and wide-ranging set of reforms to reset the UK's systems of corporate accountability aiming a long-term public interest.[181]

For that to happen, some deep-seated beliefs have to be left behind, including the overvaluation of shareholders' value. A more comprehensive corporate decision-making process must be adopted, and sustainability must be internalised as an end in itself. It is time to finally improve corporate governance practices towards sustainability; the society, the planet, and the economy demand this urgently.[182]

2.2.3 Germany

German company law and corporate governance system are quite peculiar, they have features that differ from the Anglo-American systems, particularly the two-tier board mechanism with employee-elected board members. Therefore, the German corporate system is frequently described as a "stakeholder value system", in antagonism to the widely spread idea of shareholder primacy, which makes Germany an interesting case study in the context of corporate sustainability. However, even though it might be thought that German company law and corporate governance are leading the run towards sustainability, the discussion on the matter has, so far, been limited. Hence, this section aims to address the accomplishments and the failings of German company law and corporate governance in the pursuit of sustainability.[183]

This topic will mainly focus on public limited companies, due to their size and economic importance. Thus, the first issue that must be assessed is: (i) whose interests the management board

[179] Johnston, A. (2019). Market-led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 216). Cambridge University Press.
[180] House of Commons. Business, Energy and Industrial Strategy and Work and Pensions Committees. (2018). *Carillion* (p. 86). HC 769. https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/769/769.pdf
[181] Johnston, A. (2019). Market-led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 216, 217). Cambridge University Press.
[182] Johnston, A. (2019). Market-led sustainability through information disclosure: the UK approach. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 217). Cambridge University Press.
[183] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 232). Cambridge University Press.

has to consider in its decisions? (ii) or are board members allowed or obliged to consider interests other than those of the shareholders? The answers to these questions have great importance in the sustainability debate.[184]

The German law on public limited companies, the "Aktiengesetz" (AktG), does not specifically frame whose interests these companies have to protect. The AktG only states that "the management board shall have direct responsibility for the management of the company"[185] and that "in conducting business, the members of the management board shall employ the care of a diligent and conscientious manager".[186]

The main debate here regards the term "direct responsibility": some say that it means that members of the management board have the discretion to make decisions (i.e., to act free from instructions, even if these instructions come from shareholders). However, it is presumable that this discretion must be used to protect the interests of the company. The law did not define what the interest of the company is or whose interests must be protected. Gladly, the majority's opinion is that the law must be interpreted within the concept of the stakeholder value (i.e., the management board discretionary decision must encompass the interests of shareholders, creditors, employees, the community, etc).[187]

This argument is based on the analysis of the legislative development of the actual German Stock Corporation Act. Before the AktG of 1965, there was the AktG of 1937, which determined that the management board was "obliged to manage the company under its own responsibility as required for the benefit of the enterprise, its employees, and the common benefit of the people and the state".[188] It is noticeable that it was a public welfare clause, since the legislator expressly used the term "common benefit"; though influenced by the national socialist ideology, the stakeholder value concept was clearly there, and beyond that, the word "shareholder" was not mentioned. The 1965 legislator excluded the terms that were based on the national socialist ideology, but, according with the general view at the time, the idea behind the wording remained the same.[189]

Although not being an unanimity, the pluralistic approach has the support of the German Corporate Governance Code, which states that "the management board assumes full responsibility for

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[184] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 232, 233). Cambridge University Press.
[185] German Stock Corporation Act (1965). Aktiengesetz (AktG), section 76(1).
[186] German Stock Corporation Act (1965). Aktiengesetz (AktG), section 93(1).
[187] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 234). Cambridge University Press.
[188] German Stock Corporation Act (1937). Aktiengesetz (AktG), section 70(1).
[189] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 234). Cambridge University Press.

managing the company in the best interests of the company, meaning that it considers the needs of the shareholders, the employees, and other stakeholders, with the objective of sustainable value creation".[190] In order to cease the doctrinal discussion about the interest of the company and prevent the increase of the shareholder value interpretation, the legislator should amend the AktG in accordance with the German Corporate Governance Code, which corresponds to the majority view of scholars.[191]

The phrase "sustainable value creation" appears in the German Corporate Governance Code. The use of the term may suggest that the management board should foster sustainable development in all of its dimensions. However, scholars commenting on the code state that the term is more connected with the economic and social dimensions of sustainability, in opposition to the shareholder value approach. This interpretation corroborates the pluralistic approach but does not stand for the environmental dimension of sustainability.

Moreover, German corporate law and corporate governance present no guideline on how the interests of various stakeholders must be balanced or tiered; therefore, it is in the hands of the members of the management board to use their discretionary powers to foster sustainable development. The only limitation to this pursuit is the paramount duty of the management board, which is to ensure the long-term profitability of the company.[192]

Regarding the German board structure and its relation to corporate sustainability, we can say that it is usually assumed that the two-tier board mechanism of the Germans has more discretion to protect interests other than those of the shareholders in comparison to the one-tier board such as in the United Kingdom's. The main reason for this is that, in Germany, employees elect part of the members of the supervisory board under the co-determination system. The co-determination mechanism is probably the most peculiar feature of German company law.[193]

A public limited company must have a dual board, consisting of a management board composed of executive board members who manage the day-to-day business, and a supervisory board that supervises the decisions of the management board.[194] The debate about the interest of the company also encompasses the supervisory board, since it supervises and, in some cases, authorises the management

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[190] German Corporate Governance Code, article 4.1.1.

[191] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 235). Cambridge University Press.

[192] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 236). Cambridge University Press.

[193] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 237). Cambridge University Press.

[194] Sandrock, O., & Plessis, J. (2017). The German system of supervisory codetermination by employees. In J. J. du Plessis, B. Großfeld, C. Luttermann, I. Saenger, O. Sandrock & M. Casper (Eds.), *German Corporate Governance in International and European Context* (pp. 167-203). Springer.

board decisions.[195] Just like the management board, the supervisory board must ensure the protection of the company's interests.[196]

The German corporate law determines that public limited companies that have more than 500 employees and less than 2000 employees must have one-third of employee-elected supervisory board members;[197] if the companies have 2000 or more employees, half of the supervisory board must be composed of employee-elected members,[198] the other half being elected by the shareholders. Whenever both sides cannot agree on a decision, the chairperson of the company—usually defined by the shareholders—has the final word.[199]

The purpose of integrating the employees' points of view in business decision-making is to achieve a more balanced outcome. Therefore, co-determination provides opportunities for the promotion of sustainability, particularly in its social dimension, at least in regard to the company's own employees, and in its economic dimension, by ensuring long-term business decisions.

However, studies have shown that, usually, employees are most likely to use their supervisory powers to achieve sustainable development when the sustainability target coincides with their own interests (i.e., employees only object management decisions that could affect their interests). Therefore, it is very unusual that employee-elected supervisory board members use their power to influence the management board for the pursuit of all three sustainability dimensions when there is no clear advantage for them. Besides that, on some occasions, the interests of the employees may conflict with the social good that is being pursued: for example, the company's employees' interests might conflict with supply chain workers' interests.[200]

The German two-tier board system additionally presents another opportunity for the promotion of sustainable development. In Germany, the emoluments of the members of the management board are established by the supervisory board. It is required by the AktG that the emoluments must be "appropriate in relation to the tasks and performance of the member of the management board and to the economic situation of the company"[201] and that they do not exceeded the customary remuneration, unless there is a particular reason. Besides that, the law brings a further requirement for listed companies: "the

[195] German Stock Corporation Act (1937). Aktiengesetz (AktG), section 111(4).
[196] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 237). Cambridge University Press.
[197] One-Third Participation Act 2004. Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat (Drittelbeteiligungsgesetz - DrittelbG), section 4.
[198] German Co-determination Act of 1976. Gesetz über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz - MitbestG), section 7.
[199] German Co-determination Act of 1976. Gesetz über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz - MitbestG), section 29(2).
[200] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 238). Cambridge University Press.
[201] German Stock Corporation Act (1937). Aktiengesetz (AktG), section 87(1).

remuneration structure is to be oriented towards the promotion of a sustainable development of the enterprise".[202]

However, there are different interpretations of the phrase "sustainable development of the enterprise". Some say that it must encompass all three sustainable development dimensions, but the majority of academic literature states that it only regards the economic aspect of sustainable development, since it was included in the law by an amendment, as a reaction to the global financial crisis, with the aim to prevent short-term economic decisions. Whereas the law wording enables a broader and more inclusive interpretation, the social and environmental dimensions should be embraced.[203]

Traditionally, stock ownership in Germany was concentrated, particularly within large banks.[204] In 1998, the Act for Control and Transparency in the Corporate Sector set new standards of corporate governance for German public listed companies and amended the AktG, introducing rules that allow share buybacks and stock options, and that protect shareholders with the right to bring derivative actions, under the conditions set out in sections 147 and 148 of the AktG. These changes contributed to the enhancement of shareholder value, which resulted, in the past two decades, in a more equity dispersion,[205] especially among foreign institutional investors.[206]

Despite not having a direct effect on the legislative framework, this shift in the share ownership structures in Germany can have an impact on how companies are governed. Since investors come from different corporate governance systems, it is expected that they will require the strengthening of shareholder value, shifting the traditional allocation of powers in the German business environment. Foreign investors, particularly investment funds, tend to call for higher and faster returns, and this pressure may compromise the pursuit of sustainability.[207]

Regarding the role of transparency in the pursuit of sustainability, and the importance of non-financial reports to achieve this goal we can highlight that the European Union Non-financial Information Reporting Directive was implemented into German national law in 2017 without changes and without further requirements. The Directive amplified German companies' report duties by including a non-

[202] German Stock Corporation Act (1937). Aktiengesetz (AktG), section 87(1).
[203] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 239). Cambridge University Press.
[204] Ringe, W. G. (2014). Changing law and ownership patterns in Germany: corporate governance and the erosion of Deutschland AG. *American Journal of Comparative Law*, p. 4. Oxford Legal Research Paper Series no. 42/2014. University of Oxford.
[205] Ringe, W. G. (2014). Changing law and ownership patterns in Germany: corporate governance and the erosion of Deutschland AG. *American Journal of Comparative Law*, p. 5. Oxford Legal Research Paper Series no. 42/2014. University of Oxford.
[206] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 240). Cambridge University Press.
[207] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 240, 241). Cambridge University Press.

financial declaration duty in the management report.[208] The main issue is that the Directive only encompasses large listed companies. Therefore, many well-known companies such as the retailer Aldi or the food processing company Dr. Oetker do not have to present a non-financial report. In Germany, several leading companies do not operate in the capital market, hence, the scope of the Directive should have been amplified to encompass these strategic companies, particularly given their impact on the German economy and in international suppliers.[209]

Besides that, the national implementation of the Directive did not establish a specific model or standard for the report, it allows companies to adopt existing international, European or German CSR reporting frameworks[210], which hamper the comparison of the provided data, and that can result in less accountability. Moreover, the enforcement mechanism adopted by German law was considered weak. If a company does not provide a non-financial report or if it contains inaccurate information, a monetary fine can be applied by the Ministry of Justice[211]; however, Germans doubt if this enforcement mechanism will be truly used. Therefore, the national implementation of the Directive was controversial and quite criticised. This means that Germans missed a great opportunity to assume a leadership role in this context and to take one step further towards sustainable development.[212]

The fact that the non-financial disclosure law in Germany is not as efficient as it should be is even more alarming when we analyse voluntary disclosure practices of German listed enterprises. The investor-magazine *Fuchsbriefe* made, in 2017, a compliance rating list on how transparent the top 30 listed German companies were,[213] and the results were disappointing. In the documents assessed, companies seemed to disclose only limited and generic information. Therefore, the fact that there is no reporting standard available in the German corporate system is quite concerning, since companies usually try to arrange non-financial information in a way that favours its reputation. Thus, both disclosure law and voluntary reporting practices of companies must be enhanced in order to improve transparency, which will substantially contribute to sustainable development.[214]

Beyond company law, there are important instruments that might contribute to corporate sustainability, such as the German National Action Plan on Business and Human Rights (NAP) on the

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[208] German Commercial Code. Handelsgesetzbuch (HGB), section 289b.
[209] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 241, 242). Cambridge University Press.
[210] German Commercial Code. Handelsgesetzbuch (HGB), section 289d.
[211] German Commercial Code. Handelsgesetzbuch (HGB), section 335.
[212] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability: company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 240). Cambridge University Press.
[213] For more information about the Fuchsbriefe Compliance Rating 2017, see https://www.fuchsbriefe.de/ratings/compliance/compliance-rating-2017/
[214] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability – Company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 242). Cambridge: Cambridge University Press.

implementation of the UN Guiding Principles; and the German National Contact Point (NCP) which provides a platform for mediation in cases where there is a complaint of non-observance of the OECD Guidelines on Multinational Enterprises.[215]

The NAP acknowledges the joint responsibility of the government and companies to foster sustainable supply chains and encourage best practices in German business; therefore, it establishes measures for the implementation of human rights due diligence across the companies' supply chains and aims to promote better working conditions by increasing transparency, assessing and preventing risks, and strengthening grievance mechanisms. The NAP was presented to the German Federal Cabinet in 2016, with the goal that at least half of large German companies—with more than 500 employees—would incorporate the elements of human rights due diligence described in the NAP into their corporate processes by 2020.[216]

However, the NAP has been criticised for being too indulgent, just a minimal implementation of the UN Guiding Principles, not to mention the fact that it is not a binding legal instrument but rather a mere expectation of human rights voluntary compliance. Moreover, due to the "comply or explain" mechanism adopted by the NAP, there are good chances that companies do not adopt the recommendations of the plan, which is, sadly, another missed opportunity for achieving corporate sustainability.

NCP is a unit at the German Federal Ministry for Economic Affairs and Energy, responsible for promoting the effective implementation of the OECD Guidelines on Multinational Enterprises, which are recommendations to multinational enterprises on responsible business conduct, particularly regarding human rights, labour rights, and environmental protection. The NPC also provides a mediation procedure used to foster agreement—in a dialogue-based and consensual manner—whenever there are complaints related to the application of the Guidelines.[217]

However, the NPC complaint procedure has been criticised. The European Centre for Constitutional and Human Rights (ECCHR) analysed cases involving the German companies KiK, C&A, and Karl Rieker and observed that the NPC has a tendency to favour companies and does not clearly distinguish between acceptable and unacceptable business activities. The ECCHR also stated that the

[215] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability – Company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 242). Cambridge: Cambridge University Press.
[216] To know more about the German National Action Plan on Business and Human Rights (NAP), see https://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/Ueber-den-NAP/ueber-den-nap.html
[217] To know more about the German National Contact Point (NCP), see https://www.bmwi.de/Redaktion/EN/Textsammlungen/Foreign-Trade/national-contact-point-ncp.html

NPC "is not prepared to exploit the opportunities offered by the OECD Guidelines in order to demonstrate corporate responsibility"[218] and concluded that the weak process of the NPC does not contribute to encouraging victims of corporate abuses to make complaints.

Finally, the ECCHR recommended, among other things, the participation of civil society as an oversight body; the increase of transparency; and the publishing of clear recommendations for companies regarding their violations of the Guideline. There is hope that adjustments will be made in order to improve the NPC since it has great potential in promoting more responsible corporate conduct.[219]

In conclusion, German company law and corporate governance provide great opportunities for the promotion of corporate sustainable development. However, these tools have been underused by corporate actors and the government. Unfortunately, up till now, sustainability in Germany seems to be more rhetoric than reality.[220] Therefore, further legislative intervention is needed in order to reinforce Germany's potential for the promotion of greater corporate sustainability and to prevent corporate scandals such as the Volkswagen emission scandal.[221] Moreover, there must be a real commitment from entrepreneurs to sustainable development.

2.3 Business and Sustainability in Africa

2.3.1 South Africa

The debate about business sustainability in South Africa started in 1993, at the beginning of the new constitutional democracy. The Institute of Directors in Southern Africa invited Mervyn E. King, a retired judge from South Africa's Supreme Court, to chair a committee on corporate governance. Mr. King saw the King Committee on Corporate Governance as an opportunity to educate people on the functioning of a free economy and to set rules of best practices. In 1994, the first King Report on Corporate Governance (King I) was released by the committee: it was the first report of its kind in the country and aimed at promoting the highest standards of corporate governance in South Africa. King I also established a Code of Corporate Practices and Conduct, with an integrated and inclusive approach to corporate

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[218] European Center for Constitutional Human Rights. (2015). *ECCHR Evaluation. The OECD procedures regarding surveillance technology against Gamma and Trovicor and regarding working conditions in Asia against KiK, C&A and Karl Rieker* (p. 10). https://www.business-humanrights.org/sites/default/files/documents/OECD%20procedures_Evaluation_2015_03_10_0.pdf

[219] European Center for Constitutional Human Rights. (2015). *ECCHR Evaluation. The OECD procedures regarding surveillance technology against Gamma and Trovicor and regarding working conditions in Asia against KiK, C&A and Karl Rieker* (p. 11). https://www.business-humanrights.org/sites/default/files/documents/OECD%20procedures_Evaluation_2015_03_10_0.pdf

[220] Rühmkorf, A. (2019). Stakeholder value versus corporate sustainability – Company law and corporate governance in Germany. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 244). Cambridge: Cambridge University Press.

[221] To know more about the Volkswagen emission scandal, see Hotten, R. (2015, December 10). *Volkswagen: the scandal explained*. BBC News. https://www.bbc.com/news/business-34324772

governance, which went beyond financial and regulatory aspects of corporate governance, advocating in the interests of a wide range of stakeholders.[222]

In the light of the World Summit on Sustainable Development 2002,[223] which was held in Johannesburg later in the same year, King I was updated, encompassing new provisions on sustainability. The second King Report on Corporate Governance for South Africa (King II) was "designed to bring South African corporate governance into line with international best practice",[224] and end up becoming "a global model for propagating the triple bottom line approach to corporate reporting".[225] King II endorsed the Triple Bottom Line approach, requiring companies to report on their social and environmental practices, including the development of their human capital, and black economic empowerment.[226]

In 2003, the South African corporate law went through a reform that led to the enactment of the current Companies Act no. 71 of 2008 (the Act), and which aimed to promote competitiveness and sustainable development of the country's economy.[227] In 2009, following the corporate law reform, the third King Report on Corporate Governance (King III) was published, aiming to promote inclusive capitalism, long term sustainable capital markets and transparency, and requesting companies to report on how they were impacting (positively and negatively) the economic life of the community in which they operated, and on how they intended to enhance the positive aspects and eradicate or improve the negative aspects in the following years.[228] The 2016 King Report on Corporate Governance (King IV), followed the same rationale of the previous reports; the main particularity of King IV was that it adopted the "apply and explain" approach instead of the "apply or explain" method adopted by the previous reports,[229] which means that the application of the principles is expected and that an explanation about the implementation and development of the principles is required.

The major innovation of the Act in regard to corporate sustainability was the requirement established in sub-section 72(4)—a compulsory adoption of a social and ethics committee by state-owned companies, listed companies, and other public interest companies.[230] This provision was clearly influenced

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[222] Cliffe Dekker Attorneys. (2002). *King report on corporate governance for South Africa. What it means to you* (p. 02). http://www.mervynking.co.za/downloads/CD_King2.pdf

[223] To know more about the World Summit on Sustainable Development (WSSD), the Johannesburg Summit, see https://sustainabledevelopment.un.org/milesstones/wssd

[224] Naidoo, R. (2002). *Corporate governance: an essential guide for South African companies* (p. 12). Double Storey Books.

[225] Mongalo, T. H. (2019). The social and ethics committee: innovating corporate governance in South Africa. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 361). Cambridge University Press.

[226] Naidoo, R. (2002). *Corporate governance: an essential guide for South African companies* (p. 12). Double Storey Books.

[227] Department of Trade and Industry in South Africa. (2004, June 23). South African Company Law for the 21st century: guidelines for corporate law reform. *South Africa Government Gazette*, no. 26493 (p. 10). [General notice no. 1183]

[228] The Institute of Directors in Southern Africa and the King Committee on Corporate Governance. (2009). *King Report on Governance for South Africa (King III).*

[229] The Institute of Directors in Southern Africa and the King Committee on Corporate Governance. (2016). *King IV Report on Corporate Governance for South Africa (King IV).*

[230] See also South Africa Companies Regulation of 2011. Regulation 43.

by the socio-economic rights within the Bill of Rights under the South African Constitution of 1996, and it is seen by some as the government's attempt to promote an interventionist culture within corporations and to legislate on corporate sustainability.[231]

A company's social and ethics committee has the function to monitor the company's activities, exercising exclusive jurisdiction over matters concerning social and economic development; good corporate citizenship; the environment, health, and public safety; consumer relationships; and labour and employment matters, with full regard to applicable legislation, codes of best practice and other related norms, in order to promote corporate sustainability.[232]

In the beginning, a great number of companies applied for an exemption from that requirement. Sub-section 72(5) of the Act, establishes that if a company has a formal mechanism that performs the function that would otherwise be performed by the social and ethics committee, or if due to the nature of a company's activities it is not in the public interest to require the company to have a social and ethics committee, the company can request to the Court the exemption of the requirement. Regulation 43(2)(a) of the Companies Regulation of 2011 also states that a parent company that has a social and ethics committee can exempt its subsidiaries of having it if the referred committee also performs on behalf of its subsidiaries. Nowadays, applications for exemption are rare, and the importance of the social and ethics committee for corporate sustainability is widely acknowledged, since it fosters the application of the United Nations Global Compact Principles, the OECD recommendations regarding corruption, and the International Labour Organization's Protocol on decent work and working conditions[233] (i.e., it addresses relevant concerns that should not be neglected by companies.)[234]

However, there are disagreements about who should appoint this committee. Some scholars argue that the social and ethics committee is not a board committee (i.e., it is a separate organ of the company, and therefore, must be appointed by shareholders); others state, based on the title and overall context of section 72 of the Act, that it is a board committee.[235] This misunderstanding is especially due to the fact that the social and ethics committee is required to report to the shareholders at the company's general meeting.[236]

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[231] Mongalo, T. H. (2019). The social and ethics committee: innovating corporate governance in South Africa. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 362). Cambridge University Press.
[232] South Africa Companies Regulation of 2011. Regulation 43(5).
[233] South Africa Companies Regulation of 2011. Regulation 43(5) (a) (i) and (v).
[234] Mongalo, T. H. (2019). The social and ethics committee: innovating corporate governance in South Africa. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 363). Cambridge University Press
[235] Mongalo, T. H. (2019). The social and ethics committee: innovating corporate governance in South Africa. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 361). Cambridge University Press.
[236] South Africa Companies Regulation of 2011. Regulation 43(5) (c).

Mongalo says that "the fact that the Companies Act 2008, requires the social and ethics committee to report to the shareholders, rather than the board, does not make the committee a shareholder committee... it remains a board committee, albeit of a special kind".[237] This discussion is quite relevant because, if considered a board committee, the members of the social and ethics committee must be subjected to fiduciary duties and duties of care, skill, and diligence, just like directors.[238]

Moreover, the argument that the social and ethics committee is a board committee is reinforced by section 66 of the Act that establishes that all original powers with regard to corporate governance belong to the board (i.e., these powers emanate from the law and not from the shareholders, which was not the case under the Companies Act no. 61 of 1973, which established that the power to manage the company was delegated by the shareholders to the board of directors in general meetings or the company's articles of association.) This provision of the Act shifted the South African corporate governance system, placing more accountability on the governing board and moving away from the shareholder-centric approach. Despite the clear indication of the law to accord original powers to the board, it authorises shareholders to remove directors without a specific reason,[239] which may indicate that there was not a complete shift from the previous corporate governance system. Regarding the social and ethics committee, the acknowledgment of its original board powers is extremely important since the fulfilment of its functions depends on that. Considering the relevant role of the social and ethics committee on the promotion of corporate sustainable development, it is clear that the legislators' intention in establishing the committee was to legislate on corporate sustainability.[240]

Another clear characteristic that leads the social and ethics committee to be a board committee is the establishment within section 72 called "Board committees" of the clear legislators' intention to stipulate a special kind of board committee. Besides that, the sub-section 72(1)(a) denotes that the board may appoint any number of committees of directors, which corroborates the idea that the social and ethics committee is a board committee. Furthermore, Regulation 43(3) of the Companies Regulation of 2011 states that "a board of a company that is required to have a social and ethics committee..." (i.e., there are no doubts in relation to the legislators' intention of establishing the social and ethics committee as a board committee.)[241]

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[237] Mongalo, T. H. (2019). The social and ethics committee: innovating corporate governance in South Africa. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 364). Cambridge University Press.

[238] South Africa Companies Act no. 71 of 2008, section 76(3) (c).

[239] South Africa Companies Act no. 71 of 2008, section 71.

[240] Mongalo, T. H. (2019). The social and ethics committee: innovating corporate governance in South Africa. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 367, 368). Cambridge University Press.

[241] Mongalo, T. H. (2019). The social and ethics committee: innovating corporate governance in South Africa. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 365, 366). Cambridge University Press.

Finally, the argument that the social and ethics committee is a shareholder committee because it has the obligation to report to the shareholders at the company's annual general meeting—in accordance with Regulation 43(5)(c) of the Companies Regulation of 2011—is a weak claim since there are other committees that have the same obligation, such as the audit committee, which is, unquestionably, a board committee.[242]

As shown above, before the Act, corporate sustainability in South Africa was mostly subjected to a self-regulatory regime, but there were exceptions. The Mineral and Petroleum Resources Development Act 28 of 2002 is an example of legislated corporate sustainability that aims "to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development".[243] Companies that operate in the mining and petroleum industry are also subjected to the Mining and Petroleum Resources Development Regulations of 2004, which requires, among other things, that companies develop a social and labour plan[244] and an environmental management programme.[245]

The main advantage of legislated corporate sustainability is the enforcement regime. Companies that operate in the mining and petroleum industry are subjected to government surveillance. In this regard, one can say that the introduction of the social and ethics committee under the Act also elevated corporate sustainability in South Africa from a regime of self-regulatory corporate governance, within the "comply or/and explain" approach, to a regime capable of legal enforcement.[246]

In conclusion, the social and ethics committee seems to be a great innovation created by South Africa's corporate law, which intends to subject the shareholders' interests to those of other stakeholders. It remains to be seen if, in the long run, it will accomplish the wishful sustainable development of companies. For that to happen, it is very important that the social and ethics committee is acknowledged as a board committee, since its functions can be better exercised within a board scope, with original powers and fiduciary responsibilities.

2.3.2 Nigeria

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[242] Mongalo, T. H. (2019). The social and ethics committee: innovating corporate governance in South Africa. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 366). Cambridge University Press.

[243] The South Africa Mineral and Petroleum Resources Development Act 28 of 2002. Preamble (p. 5).

[244] South Africa's Mining and Petroleum Resources Development Regulations of 2004, section 46.

[245] South Africa's Mining and Petroleum Resources Development Regulations of 2004, section 51.

[246] Mongalo, T. H. (2019). The social and ethics committee: innovating corporate governance in South Africa. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 370, 371). Cambridge University Press.

Sustainability matters are very sensitive for Nigeria, particularly because this oil-rich West African country suffers from huge environmental degradation. Nigeria's poor governance and intense corruption contribute to the irresponsible exploitation of its crude oil, mostly by multinational companies, and therefore, to the poverty of the Nigerian population.

The Nigerian economy is totally dependent on the oil and gas sector, which represents more than 90% of the country's yearly incomes. The Niger Delta is the Nigerian region that suffers the most with pollution and gas flaring, it is constantly facing environmental disasters and health epidemics, and has no essential services such as primary health care to solve these situations.[247]

Despite having abundant natural resources Nigeria fails to supply a sufficient amount of electricity, which disrupts companies already established in Nigeria and discourages new investments there, ruining the development of its own economy, and, as a result, leading to unemployment and poverty.[248]

Nigeria's precarious situation has led the government to ratify international agreements in order to improve corporate sustainability and accountability in the country. In 2017, Nigeria ratified the Paris Climate Agreement and established Nigeria's Intended Nationally Determined Contribution (INDC)[249] which is a multi-sectoral policy document containing Nigeria's contribution to the success of the Paris Agreement, the growth of its economy in a sustainable way, and the reduction of carbon pollution.

With the INDC's targets in view, in 2017, Nigeria issued certified sovereign green bonds,[250] which are fixed income securities, to raise funds for financing the implementation of its projects which includes solar energy supply, mass transportation, climate smart agriculture, and other initiatives that mitigate the effects of climate change.

In regard to corporate norms on sustainability, Nigeria faces some challenges. The lack of mandatory rules on the matter, and the failure to harmonise corporate governance regulations push sustainability to the self-regulatory and philanthropy sphere. Moreover, while several environmental laws and regulations exist, they are not enforced, which leads to no compliance and corporate impunity.[251]

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[247] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 373). Cambridge University Press.

[248] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 374). Cambridge University Press.

[249] To know more about the Nigeria's Intended Nationally Determined Contribution (INDC), see http://extwprlegs1.fao.org/docs/pdf/nig187295.pdf

[250] To know more about the Nigeria's Green Bond, see https://environment.gov.ng/green-bonds/ and https://www.climatebonds.net/certification/federal-government-nigeria

[251] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 374, 375). Cambridge University Press.

In 2007 the Nigerian government enacted a law[252] creating the National Environmental Standards and Regulations Enforcement Agency (NESREA),[253] an environmental agency that has the responsibility of protecting and developing Nigeria's environment, guaranteeing the enforcement of laws, policies, international agreements and other norms on environmental matters.[254] However, Uzo-Peters says that this law "is more breached than observed by stakeholders", and that the agency only plays "a figurehead role", not serving as a regulator as prescribed in the law.[255] Moreover, the NESREA Act does not regulate oil and gas companies, which are regulated by the Department of Petroleum Resources Environmental Guidelines and Standards for the Petroleum Industry in Nigeria 2001 (EGASPIN) implying lower environmental standards frequently breached.[256]

The current legislation applicable to the oil and gas industry is the Petroleum Act 1969, which has no adequate provisions for the protection of the environment and the affected communities. Nigeria's government has been working on new legislation to replace the current Act. However, if enacted, the Petroleum Industry Governance Bill (PIGB)[257] will, actually, worsen sustainability in Nigeria, since its focus is the liberalisation of the petroleum industry, with less governmental interference, and regulation. Besides that, the proposed law prevents the Federal Ministry of Environment from enforcing environmental policies on sector's companies, leaving it under the sole supervision of the Nigerian Petroleum Regulatory Commission. In addition to the PIGB, there is another proposed legislation encompassing sustainability, the Petroleum Host and Impacted Communities Development Bill (HCB),[258] whose purpose is to determine how host communities are compensated for the impacts of oil companies' production. However, the current draft gives the companies the power to decide how the communities' development projects must be implemented.[259]

Therefore, although promising a full reform of the Nigerian oil and gas sector, with proper provisions for corporate citizenship and corporate social responsibility, the proposed drafts contain flaws. It also remains to be seen if their provisions will in fact be enforced. Besides that, considering the

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[252] National Environmental Standards and Regulations Enforcement Agency (establishment) Act, 2007. Act no. 25.

[253] To know more about the National Environmental Standards and Regulations Enforcement Agency (NESREA), see https://www.nesrea.gov.ng/

[254] Ijaiya, H., & Joseph, O. (2014). Rethinking Environmental Law Enforcement in Nigeria. *Beijing Law Review, 5*, 313.

[255] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 375). Cambridge University Press.

[256] Ekhator, E. O. (2016). Public regulation of the oil and gas industry in Nigeria: an evaluation. *Annual Survey of International & Comparative Law*, *21*(1), article 6, 63.

[257] To know more about the Petroleum Industry Governance Bill (PIGB), see https://www.stakeholderdemocracy.org/wp-content/uploads/2018/12/PIGB-11.12.18-JB.pdf

[258] To know more about the Petroleum Host and Impacted Communities Development Bill (HCB), see https://www.stakeholderdemocracy.org/wp-content/uploads/2018/12/HCB-11.12.18-JB.pdf

[259] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 376). Cambridge University Press.

relevance of the oil and gas sector for Nigeria, there is an urgent need for the creation of a mandatory sector-specific corporate sustainability code, but, until now, the reform does not encompass that.

Another Nigerian attempt to address sustainability is the Nigerian Extractives Industries Transparency Initiative Act 2007 (NEITI Act)[260] which establishes standards to promote accountable and transparent management of oil, gas, and mineral resources. In other words, the NEITI Act focuses on ceasing corruption in transactions among the Nigerian Federal Government and companies operating in the extractive sector. However, in practice, the NEITI Act is quite weak since it depends on the Nigerian government for enforcement. There is no political will to enforce the provisions on corruption and, therefore, multinational companies do not comply with the best practices.[261] Some developed countries, such as the United States, have established legislation to prevent their companies to get involved in corruption scandals in low-income countries. The United States Foreign Corrupt Practices Act (FCPA) allows the government of the United States to punish American companies for corruptive behaviours perpetrated in host countries. This extraterritorial effect is key to fighting corruption.[262]

In 2018, Nigeria reached a sad milestone: it became the poverty capital of the world, surpassing India, with more than 42% of its population living in extreme poverty conditions. The oil price collapse of 2014–2016 combined with corruption and poor governance led the country to these circumstances. The country's inclusive growth is urgent, and if Nigeria is unable to change its trajectory, it will have approximately 110 million people living in extreme poverty by the year 2030.[263] Adequate regulation of the oil and gas industry is mandatory to revert this condition since the sector represents a huge part of the Nigerian economy.

Despite having a chapter encompassing social, economic, and environmental rights,[264] the Nigerian Constitution of 1999 states that these rights are non-justiciable.[265] However, the Constitution seems contradictory: in section 13, it states that all organs of government which exercise legislative, executive, or judicial powers have the duty and responsibility to observe and apply the provisions of the

[260] To know more about the Nigerian Extractives Industries Transparency Initiative Act 2007 (NEITI Act), see https://eiti.org/files/documents/neiti_act_2007.pdf

[261] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 377). Cambridge University Press.

[262] Makinwa, A. O. (2009). Researching civil remedies for international corruption: the choice of the functional comparative method. *Erasmus Law Review*, *2*(3), 339.

[263] To know more about the Global Poverty Ranking, see Kharas, H., Hamel, K., & Hofer, M. (2018, December 13). *Rethinking global poverty reduction in 2019.* Brookings. https://www.brookings.edu/blog/future-development/2018/12/13/rethinking-global-poverty-reduction-in-2019

[264] Constitution of the Federal Republic of Nigeria of 1999. Chapter II: Fundamental Objectives and directive Principles of State Policy.

[265] Constitution of the Federal Republic of Nigeria of 1999, section 6(6) (c).

referred chapter.[266] Therefore, except for the first-generation human rights,[267] there is no constitutional basis for the enforcement of socio-economic rights in Nigeria. Acknowledging these socio-economic rights as justiciable under the Constitution would create a solid ground for its enforcement, and, thus, adequate protection for citizens and the environment.

The Companies and Allied Matters Act 1990 (CAMA)[268], amended in 2004, is the current law regulating the operation and administration of companies in Nigeria. The CAMA does not expressly address aspects of sustainability—on the contrary, it tacitly encourages profit maximisation.[269] Regarding legal duties of the directors, the CAMA refers:

> A director shall act at all times in what he believes to be the best interests of a company as a whole so as to preserve its assets, further its business, and promote the purpose for which it was formed and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances.[270]

In Nigeria, there is no great discussion and jurisprudence regarding the directors' duty to act in "the best interest of the company". However, the Nigerian Supreme Court has already held[271] that directors of a company were entitled to refuse additional debt, acknowledging that it was in the best interest of the company.[272] Hence, although the CAMA provision is not being used to achieve the social and environmental dimensions of sustainability, it was, at least, used to ensure the economic dimension of sustainability.

While the CAMA only requires financial reports, the Nigerian Stock Exchange Sustainability Disclosure Guidelines 2019 (NSE Guidelines) request listed companies to submit periodical non-financial reports, encompassing wider aspects of their business, including environmental and social matters. These reports are mandatory for companies listed on the NSE Premium Board, which encompasses companies that meet higher corporate governance standards. Other companies are encouraged to disclose sustainability information, but there are no sanctions for non-compliance. Moreover, the NSE Guidelines

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[266] Godson, O. D. (2016). *Economic, social and cultural rights under the 1999 Constitution of the Federal Republic of Nigeria and the enforceability problem*. https://africlaw.com/2016/07/08/economic-social-and-cultural-rights-under-the-1999-constitution-of-the-federal-republic-of-nigeria-and-the-enforceability-problem

[267] Constitution of the Federal Republic of Nigeria of 1999, Chapter IV: Fundamental Rights.

[268] This law repealed the Companies Act of 1968, was amended in 2004, and it's going through a reform that will lead to the enactment of the Companies and Allied Matters Act (Repeal and Re-enactment) Bill, 2018 (CAM Bill), which, unfortunately, has no adequate provisions on corporate sustainability.

[269] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 375, 379). Cambridge University Press.

[270] The Companies and Allied Matters Act 1990 (CAMA), section 279(3).

[271] See Artra Industries Nigeria Limited v. The Nigerian Bank for Commerce and Industry, LPELR-SC.27/1997 (1998)

[272] Hannatu, A. (2015). A critical analysis of the director's duty to act in what he believes to be the best interests of the company: a proposal for amendment. *Ahmadu Bello University Journal of Commercial Law*, *7*(1), 183.

say that NSE may introduce sustainability ratings to assess the performance of listed companies.[273] However, many companies operating in Nigeria are not listed under the NSE, including the "country's top polluters".[274] Therefore, the NSE Guidelines have a limited impact on the promotion of sustainability in Nigeria.

The Investments and Securities Act 2007 (ISA), aiming to create an efficient and transparent securities market, established the Nigerian Security and Exchange Commission (SEC) to pursue these objectives and attract investors. The SEC established the Nigerian Securities and Exchange Commission Corporate Governance Code for Public Companies 2011 (SEC Code) which is a voluntary corporate governance code, originally created in 2003 and revised in 2011, applicable to all public companies listed on a recognised securities exchange in Nigeria.[275]

The SEC Code aims to ensure the highest standards of transparency, accountability and good corporate governance. It establishes board responsibilities, stating that the company board is accountable and responsible for the management of the company and its performance; it must ensure good corporate governance, environmental sustainability, and the highest ethical standards. It encourages shareholder activism and protects minority shareholders. Moreover, the SEC Code requests companies to "pay adequate attention to the interests of its stakeholders such as its employees, host community, the consumers, and the general public".[276] The SEC Code also encourages companies to disclose annual reports on corporate governance, which should include information about sustainability policies and programmes concerning environmental protection, and other corporate social responsibility issues.

However, despite having ambitious objectives, the SEC Code has numerous flaws. First, it applies only to public companies, whereas most of the multinationals are established in Nigeria as private companies; then, it fails to provide guidance for the implementation and operationalisation of its policies; lastly, it is a voluntary code which means that companies will probably not comply with its provisions, especially considering Nigeria's business scenario and its poor governance.[277]

In 2011, the Financial Reporting Council (FRC) was created by the Federal Ministry of Industry, Trade and Investment to establish accounting, corporate governance, and financial reporting standards.

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[273] Nigerian Stock Exchange Sustainability Disclosure Guidelines 2019, section 4(4.2) (c).
[274] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 380). Cambridge University Press.
[275] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 380, 381). Cambridge University Press.
[276] Nigerian Securities and Exchange Commission Corporate Governance Code for Public Companies 2011 (SEC Code), section 28.
[277] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 380-382). Cambridge University Press.

In 2018, the FRC published the Nigerian Code of Corporate Governance (NCCG), which is a voluntary code that aims to institutionalise corporate governance best practices in Nigerian companies, complement the sector-specific corporate governance codes existing in the country, and regulate companies in sectors in which there are no specific codes. The code applies to all public companies, private holding companies of public companies, concessioners or privatised companies, as well as private companies in regulated sectors.[278] The NCCG adopts the "apply and explain" approach, requiring companies to apply all principles and explain how they were implemented. The NCCG started to be, in fact, implemented in January 2020, so it is still to be seen if there will be any relevant impact in Nigeria's business practice.

Regarding sector-specific codes, in Nigeria, there are: (i) the Code of Corporate Governance for the Telecommunications Industry 2016 (NCC Code), issued by the Nigerian Communications Commission; (ii) the Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014 (CBN Code), issued by the Central Bank of Nigeria; (iii) the Code of Good Corporate Governance for Insurance Industry in Nigeria 2009 (NAICOM Code), issued by the National Insurance Commission; and (iv) the Code of Corporate Governance for Licensed Pension Operators 2008 (PENCOM Code), issued by the National Pension Commission. While having multiple sector-specific codes tends to represent unequal levels of accountability, transparency, and sustainability (i.e., no uniform corporate governance standard), it can also bring opportunities to tackle specific-sector issues. The Nigerian sector-specific codes are in need of reform, particularly the elder ones, which still present shareholder-oriented corporate governance, focused on profit maximisation. The codes should be reformed following international standards for the best practices, in order to foster corporate sustainable development.

Usually, multinational companies have their internal codes of conduct. This voluntary self-regulation is, actually, industry-driven and aims to comply with international standards established by international organisations, such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines); the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles); and the International Labour Organisation Declaration on Fundamental Principles and Rights at Work (ILO Declaration), amongst others. The major problem with self-regulation is that since it is voluntary, it is easily circumvented, having more theoretical than practical effect.[279]

[278] Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018.

[279] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 385). Cambridge University Press.

In short, Nigerians cannot rely on self-regulation to combat their numerous socio-economic issues. Internal codes of conduct and voluntary corporate governance codes created by government bodies are not enforceable, and, therefore, have little or no impact on Nigeria's deeper structural problems, such as corruption, poverty, and environmental degradation.[280]

In conclusion, achieving sustainability is not an easy task, particularly in countries like Nigeria where social-economic imbalances are deep-rooted. In order to grow as a country, Nigeria needs to make a legislative reform, enacting laws to fight corruption, amending its corporate law to include sustainability provisions, and establishing mandatory stakeholder-oriented corporate governance codes for critical sectors such as the oil and gas industry. Moreover, Nigerian citizens must demand the enforcement of laws and adequate punishment for corrupt government officials.

2.4 Business and Sustainability in Asia

2.4.1 China

Sustainability is a critical subject in China since the country's image is frequently associated with human rights abuses, low-quality products, and environmental pollution. However, this poor international reputation has been the major driver for corporate social responsibility (CSR) development in China.[281]

In 1972, China attended the United Nations Conference on the Human Environment (the Stockholm Conference). Thenceforth, recognising its environmental problems, China signed international environment-related treaties and started collaborating with other countries and international organisations to take environmental protection actions.[282]

In 1994, China established sustainable development as a national strategy but continued to prioritise short-term economic gains. Moreover, the concept of corporate sustainability was only adopted by Chinese corporate law and corporate governance in 2005, when the reform of the Chinese Company Law incorporated CSR into its provisions.[283] Since then, state-led CSR initiatives, such as mandatory

[280] Uzo-Peters, A. (2019). Reforming the Nigerian oil and gas sector: towards corporate sustainability? In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 385-386). Cambridge University Press.
[281] Lin, L.-W. (2010). Corporate social responsibility in China: window dressing or structural change? *Berkeley Journal of International Law (BJIL)*, *28*(1), 64-65.
[282] Liu, J. (2010). China's road to sustainability. *Science Magazine, 328,* 50.
[283] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 431). Cambridge University Press.

environmental disclosure for heavy-polluting companies and private voluntary initiatives, as well as CSR standards, guidelines, organisations, forums, and awards have been prospering.[284]

The Company Law of the People's Republic of China of 2005 (Company Law) states that "[w]hen engaging in business activities, a company shall abide by laws and administrative regulations, observe social morality and business ethics, act in good faith, accept supervision by the government and the public, and bear social responsibilities."[285]

Chinese Company Law is silent about environmental responsibility; those matters are exclusively in the scope of environmental law, which regulates the environmental aspect of the companies' activities.[286] On the other hand, it significantly improved employee rights, obliging companies to solicit the labour union and employees' opinions and suggestions when discussing or deciding major issues concerning its business operation.[287] Moreover, Chinese Company Law established mandatory employee participation in corporate governance (i.e., it adopted the co-determination rule that obliges companies to have employee representatives in their supervisory board.)[288]

The Chinese focus on workers when addressing CSR is not a coincidence. The social dimension of sustainability—and the CSR itself—are "central to the ideological and constitutional foundation of the Chinese state".[289] The Constitution of the People's Republic of China states that "[t]he People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants".[290]

In regard to the arrangement of corporate powers, Chinese Company Law establishes that shareholders are the centre of the corporate decision-making process. The law gives shareholders powers to decide over any major corporate issue, as well as appoint and remove board members, and to control the management and supervisory board decisions by approving their reports.[291] Usually, the management board takes care of CSR issues, but, as aforementioned, shareholders can reassess board decisions.[292] This can be detrimental to corporate sustainability since the shareholders' short-term interests can conflict

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[284] Lin, L.-W. (2010). Corporate social responsibility in China: window dressing or structural change? *Berkeley Journal of International Law (BJIL)*, *28*(1), 64-65.
[285] Company Law of the People's Republic of China (revised in 2013), article 5.
[286] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 433). Cambridge University Press.
[287] Company Law of the People's Republic of China (revised in 2013), article 18.
[288] Company Law of the People's Republic of China (revised in 2013), articles, 51, 70 and 117.
[289] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 434). Cambridge University Press.
[290] Constitution of the People's Republic of China (as amendment in 2004), article 1.
[291] Company Law of the People's Republic of China (revised in 2013), article 37.
[292] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 437). Cambridge University Press.

with long-term corporate sustainable development. However, institutional shareholder activism seems to be growing in China. As institutional investors are usually well informed and less passive than retail shareholders, it is more likely they support CSR proposals and can even require companies' boards to commit to sustainable development.[293]

China's stock exchanges have been playing a very relevant role in advancing corporate social responsibility (CSR) in the country. Listed companies of the Shanghai Stock Exchange (SSE) and Shenzhen Stock Exchange (SZSE) are encouraged to disclose non-financial performance information.[294] Moreover, the SSE and SZSE's guidelines adopted a wider approach of CRS than the Chinese Company Law.[295]

The Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies (SZSE Instructions) define CSR as "the obligations listed companies should assume for the social development, for natural environment and resources, and for the interested parties including their shareholders, creditors, employees, customers, consumers, suppliers and communities."[296] Furthermore, the SZSE Instructions emphasise that "[w]hile pursuing economic results and protecting shareholders' interest",[297] listed companies must protect its stakeholders' interests, and "commit to social welfare services"[298] in order to achieve "social harmony".[299] In addition, the SZSE Instructions highlight that companies "should not seek improper benefits by bribery, smuggling and other unlawful activities"[300] and require companies to "perform their social responsibilities, make regular evaluation and issue voluntary disclosure on the performance".[301]

The SZSE Instructions are divided into five main subjects: (i) the protection of shareholders and creditors' interests; (ii) the protection of employees' interests; (iii) the protection of suppliers, customers and consumers' interests; (iv) environmental protection and sustainable development; and (v) public relations and social welfare services. The SZSE Instructions encompass all three dimensions of sustainability and go beyond.

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[293] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 443). Cambridge University Press.

[294] Global Reporting Initiative. (2012, September 5). *Investing in a sustainable future: The role of the Shanghai Stock Exchange in the uptake of sustainability reporting initiatives in China.* Global Reporting. https://www.globalreporting.org/information/news-and-press-center/Pages/Investing-in-a-sustainable-future-The-role-of-the-Shanghai-Stock-Exchange-in-the-uptake-of-sustainability-reporting-initiat.aspx

[295] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 431). Cambridge University Press.

[296] Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies of 2006, article 2.

[297] Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies of 2006, article 3.

[298] Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies of 2006, article 3.

[299] Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies of 2006, article 3.

[300] Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies of 2006, article 4.

[301] Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies of 2006, article 5.

Despite having, in general, reproduced the requirements of existing laws and regulations, the provisions of the SZSE Instructions have also included some ethical responsibilities for listed companies.[302] For example, regarding the chapter on suppliers, customers, and consumers, the SZSE Instructions required companies to comply with intellectual property law, consumer protection law, and other laws, and, additionally, established that "[c]ompanies shall urge their customers and suppliers to comply with business code of conduct and moral ethics or stop partnership with customers or suppliers who refuse to make improvement in this regard".[303] Moreover, aside from requiring companies' sustainable development, the SZSE Instructions also encourage companies to engage in philanthropic activities.[304]

The SSE's Notice on Strengthening the Social Responsibility of Listed Companies and Issuing the Guidelines for Environmental Information Disclosure of Listed Companies on the Shanghai Stock Exchange (SSE Notice) follows the same direction SZSE Instructions do, requiring companies to fulfil all three dimensions of sustainability, by pursuing long-term financial interests, the development of society, and environmental protection.[305] Moreover, just like the SZSE Instructions, the SSE Notice goes further on companies' accountability, bringing ethical duties to companies that shall "strive to exceed its business goals".[306]

Moreover, SSE Notice presents a great innovation. It adopted the notion of "social contribution" and encourages companies to disclose the social contribution value per share in the annual CSR report. A social contribution is equal corporate earnings plus "value-added" created for stakeholder (taxes, salaries, loan interests, etc.) minus "social costs" (carbon footprints, for example.)[307]

Quantifying CSR is very important, not only for the public to have a fuller understanding of the true value the company creates for its stakeholders, but also to encourage companies to really engage in CSR activities. By improving their numbers, companies are directly improving sustainability. Moreover, having a formula to calculate a CSR rate is useful for making rankings and comparing companies properly. Despite the advancement, social contributions reports are voluntary, and in addition—unfortunately—

[302] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 435). Cambridge University Press.
[303] Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies of 2006, article 23.
[304] Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies of 2006, article 32.
[305] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 435). Cambridge University Press.
[306] The SSE's Notice on Strengthening the Social Responsibility of Listed Companies and Issuing the Guidelines for Environmental Information Disclosure of Listed Companies on the Shanghai Stock Exchange of 2008 (SSE Notice), section 1.
[307] The SSE's Notice on Strengthening the Social Responsibility of Listed Companies and Issuing the Guidelines for Environmental Information Disclosure of Listed Companies on the Shanghai Stock Exchange of 2008 (SSE Notice), section 4.

companies still manipulate their results by underreporting their social costs.[308] Hence, a mandatory report regime and straightforward standards for better calculating the social contributions are necessary.

Regarding CSR disclosure rules in China, in general, the voluntariness principle is applicable—in other words, reports containing non-financial information are not mandatory, but there are exceptions. The China Securities Regulatory Commission (CSRC) encourages companies to disclose information on the fulfilment of their social responsibilities but does not oblige them to do so; companies "in the heavy pollution industry" are an exception and are required to disclose information regarding environmental issues, in accordance with environmental laws and regulations.[309] In reality, the CSRC only requires firms to disclose information that is already requested by environmental norms.[310]

Under the SSE disclosure rules, CSR reports are mandatory only to companies participating in the SSE Corporate Governance Index, dual-listed companies, and financial services companies. Concerning the SZSE, only companies participating in the SZSE 100 Index are obliged to disclose CSR-related information.[311]

Another advancement of the Chinese stock exchange was the development of a green securities market. Green securities are mainly used to support green industry projects, including green bonds, green indices, and green funds. In 2017, the SSE and the Luxembourg Stock Exchange jointly launched the Green Bond Index, to track the performance of Chinese green bonds. The indices facilitate investment in green securities and foment the businesses' sustainable development.[312]

In conclusion, in the last years, sustainability has gained the attention of the Chinese government and private entities. For example, the Chinese government has been demonstrating a great commitment to the implementation of the 2030 Agenda for Sustainable Development.[313] Specifically regarding corporate sustainability, China's corporate law and corporate governance provide a fertile field for corporate sustainable development, although there is room for improvement. In this regard, it is important to highlight the inclusion of a CSR provision in Chinese Company Law and the innovative adoption of the

[308] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 436). Cambridge University Press.
[309] CSRC Announcement (2014), no. 21, article 25.
[310] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 436). Cambridge University Press.
[311] Xi, C. (2019). Shareholder voting and corporate sustainability in China: an empirical study. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 437). Cambridge University Press.
[312] To know more about the Shanghai Stock Exchange and the Luxembourg Stock Exchange Green Bond Index, see http://english.sse.com.cn/markets/greensecurities/ and https://www.bourse.lu/sse-green-bond-index
[313] To know how China is implementing the 2030 Agenda for Sustainable Development, see Jiang, X. (2020, February 28). *How China is implementing the 2030 agenda for sustainable development*. OECD Development Matters. https://oecd-development-matters.org/2020/02/28/how-china-is-implementing-the-2030-agenda-for-sustainable-development/

concept of social contribution value per share by the Chinese stock exchange, which helps to quantify CSR and assess the companies' level of commitment with sustainability.

2.4.2 Japan

Japan's engagement with corporate sustainability commenced in the early 1970s; in the previous decade, the rapid growth of the Japanese economy resulted in several cases of environmental degradation. In order to protect the companies' reputation, Japanese business leaders started to embrace corporate social responsibility (CSR). In 1973, the Japan Association of Corporate Executives published a report addressing environmental, economic, and social problems that Japanese companies were facing at that time, and encouraging companies to take action to harmonise their financial goals with social goals.[314]

In 1974, the Diet[315] mentioned CSR in its resolution attached to the Commercial Code revision; however, no articles in this regard were included in the law.[316] Since then, the Japanese government created numerous policies addressing business sustainability but never enacted any legal provisions on that matter.

Nevertheless, the Japanese Supreme Court had already acknowledged, in 1970, the directors' discretion to pursue CSR. It held, in a derivative action regarding a corporate donation to a political party that "a company has to respond to the expectation and demand of the society, even if meeting such an expectation or demand does not bring benefit to the company".[317] This jurisprudence enabled corporate leaders to adopt sustainability practices with no fear of breaching their corporate duties.

In the 1990s, Japanese companies started to be aware of "environmental management" practices. In light of the United Nations Framework Convention on Climate Change (UNFCCC) conference, held in Japan in 1997, for the adoption of the Kyoto Protocol,[318] the Japanese Agency of Environment[319] promoted several initiatives to foster the companies' environmental management, such as the

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[314] Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 448). Cambridge University Press.

[315] The National Diet is Japan's bicameral legislative body. It is composed of a lower house, the House of Representatives, and an upper house, the House of Councillors.

[316] Kawamura, M. (2004). *The evolution of corporate social responsibility in Japan (part 1): parallels with the history of corporate reform* (p. 5). NLI Research.

[317] Japanese Supreme Court, June 24, 1970, *Minshû* vol. 24, no. 6, p. 625, quoted from Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 449). Cambridge University Press.

[318] To know more about the Kyoto Protocol, see https://unfccc.int/kyoto_protocol

[319] The Japanese Agency of Environment was converted to Ministry of Environment in 2001.

Environment Action Plan Award,[320] that rewarded companies for their engagement to environmental protection.[321]

The best achievement of the Agency of Environment policies at the time was the large adoption of environmental reporting by Japanese companies. Over the years, and especially more recently, companies started to adopt more comprehensive reports, encompassing CSR and corporate sustainability as a whole.[322] In 1996, the Agency of Environment developed the "Eco-action 21" a system of self-commitment, assessment, and reporting concerning environmental practices that was transformed into certification in 2004.[323]

In 2001, the Japanese Council for Regulatory Reform acknowledging the relevance of environmental policies have established, within the Three-Year Program of Regulatory Reform, that government agencies should encourage environmental reporting and accounting.[324] However, once again, these policies did not engender any legally binding duty. In 2004, the Japanese government enacted the Law Concerning the Promotion of Business Activities with Environmental Consideration by Specified Corporations, etc., by Facilitating Access to Environmental Information, and Other Measures, imposing on public administration corporations the duty to publish environmental reports;[325] the law also established that private companies should make efforts to disclose environmental reports;[326] in other words, private entities were not obliged to do it.

In contrast with environmental sustainability, the social dimension of sustainability, especially employee welfare, is widely regulated by Japanese laws. In Japan, long-term employment—or, as Gibson and Roe say, "lifetime employment"[327]—is very common, and employees have access of numerous benefits. Employee benefits are imposed on companies as mandatory and are seen as a heavy burden by Japanese companies. It is important to highlight that these great employee benefits only apply to core employees; temporary workers and part-timers are not contemplated. Therefore, companies that have heavy labour expenses are gradually reducing the number of core employees by not replacing the retired

[320] The Environment Action Plan Award is now called Environment Communication Award.
[321] Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 450). Cambridge University Press.
[322] Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 450). Cambridge University Press.
[323] Japan for Sustainability. (2005, February 7). *'Eco Action 21' Certification for Small/Medium Organizations.* https://www.japanfs.org/en/news/archives/news_id025830.html
[324] Council for Regulatory Reform. (2001). *First Report Regarding Promotion of Regulatory Reform*, section 5. https://www8.cao.go.jp/kisei/en/011211report/1.html#env
[325] Law no. 77 of 2004, article 9(1).
[326] Law no. 77 of 2004, article 11.
[327] Gilson, R. J., & Roe, M. J. (1997). Lifetime employment: labor peace and the evolution of Japanese corporate governance. *Columbia Law Review*, *99*, 508. 10.2307/1123585.

employees with the newly graduated, and creating only temporary and part-time positions[328] (i.e., unbalanced labour expenses may lead to work precariousness.)

In 2015, Japan's corporate regulatory framework went through a reform. The Corporate Governance Code was implemented for companies listed under the Tokyo Stock Exchange and other smaller stock exchanges and the Japanese Companies Act was amended. The main purpose of the reform was to improve Japanese companies' performance by making business decisions more agile, since many of them were stuck in bureaucracy. Before the reform, shareholders, particularly international institutional investors, complained about the lack of adequate monitoring of the management board. In Japanese large public companies, it was common that the board of directors was composed of inside directors, which are senior employees. Therefore, the Japanese Companies Act was amended to include a "comply or explain" provision requiring listed companies to appoint outside directors or explain why it was unreasonable to do so.[329]

Despite being created with the purpose of making the companies' management board more attentive to shareholders' interests, the Corporate Governance Code of 2015 also directed attention to a wider range of social concerns, encompassing stakeholders' interests through CSR provisions. In this regard, the Code states that:

> Companies should fully recognize that their sustainable growth and the creation of mid- to long-term corporate value are brought as a result of the provision of resources and contributions made by a range of stakeholders, including employees, customers, business partners, creditors and local communities. As such, companies should endeavor to appropriately cooperate with these stakeholders.[330]

Moreover, the Code's principle 2.3 on Sustainability Issues, including Social and Environmental Matters, provides that "[c]ompanies should take appropriate measures to address sustainability issues, including social and environmental matters". Furthermore, its supplementary principle adds by stating that:

> With the recognition that dealing with sustainability issues is an important element of risk management, the board should take appropriate actions to this end. Given the increasing

[328] Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 452, 453). Cambridge University Press.
[329] Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 446, 447). Cambridge University Press.
[330] Japan's Corporate Governance Code of 2015, section 2, general principle 2. The Code was revised in 2018, but section 2 was not changed.

demand and interest with respect to sustainability issues in recent years, the board should consider addressing these matters positively and proactively.[331]

Japan's Corporate Governance Code adopts the "comply or explain" approach. Despite that, listed companies have been largely complying with the aforementioned principles. An assessment made by the Financial Services Agency and the Tokyo Stock Exchange found that more than 99% of listed companies complied with the principle 2.3 and its supplementary principle after twelve months of the Code's implementation, and in the following years.[332] Considering the large number of companies that did not comply with other principles of the Code, Japanese companies seem to be really aware of the importance of sustainability issues. However, this commitment must surpass the theoretical sphere since the Code expects the companies' management board to take proactive actions to enhance sustainability.[333]

In 2017, the Japan Business Federation revised the Charter of Corporate Behaviour aiming to align it with national and international initiatives on sustainability, particularly the United Nations Sustainable Development Goals,[334] and foster the companies' contribution to the development of a sustainable society. Among other concerns, the Charter addresses: (i) sustainable economic growth and the resolution of social issues; (ii) fair disclosure of information and dialogue with stakeholders; (iii) respect for human rights; (iv) the reform of work practices; and (v) engagement in environmental issues. The adoption of the Chapter principles is voluntary but works as a best practice guideline.[335]

Principles are a good foundation for corporate sustainability, but their effectiveness relies on enforcement mechanisms. However, it does not necessarily mean that a legal enforcement measure must be enacted. As the Japanese society is quite concerned about its reputation and integrity, compliance may result from government incentive and peer pressure, in order to build a positive image among its suppliers, customers, and consumers. Moreover, recently, capital market pressure has also started to interfere in corporate sustainability.[336] In Japan, the Government Pension Investment Fund

[331] Japan's Corporate Governance Code of 2015. Supplementary Principle 2.3.1. The Code was revised in 2018, but supplementary principle 2.3.1 was not changed.
[332] Japan Exchange Group. *How Listed Companies Have Addressed Japan's Corporate Governance Code*. Reports available at https://www.jpx.co.jp/english/equities/listing/cg/
[333] Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 454, 455). Cambridge University Press.
[334] To know more about the United Nations Sustainable Development Goals, see https://www.un.org/sustainabledevelopment/sustainable-development-goals/
[335] Japan Business Federation (Keidanren). (2017). *Charter of Corporate Behavior*. http://www.keidanren.or.jp/en/policy/csr/charter2017.html
[336] Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 455, 456). Cambridge University Press.

(GPIF), which is a semi-governmental entity that manages funds of the Japanese national pension system,[337] is leading the so-called "responsible investment".[338]

In 2015, the GPIF signed up to the United Nations Principles for Responsible Investment (UN PRI).[339] In the following year, the GPIF requested Japanese stock exchanges to implement ESG indices to facilitate investment decisions. In 2017, the GPIF adopted two general ESG indices and one index focused on social risks, and, in the following year, adopted two environmental-related indices.[340] The initiatives of the GPIF already drove Japanese investors' attention to the UN PRI principles and to environmental, social, and governance (ESG) factors that must be taken into consideration in investment decisions. In the long-term, GPIF results can serve as proof of the advantages of responsible investment and encourage other investors.[341]

However, it is important to highlight that private institutional investors face greater challenges that may compromise their commitment with corporate sustainability. The GPIF is a public pension whose assets belong to citizens, who, usually, do not interfere in the GPIF investments decisions. On the other hand, asset holders of private institutions are more likely to monitor the institutions' investments and to demand profit maximisation and short-term returns. Therefore, these institutions are more preoccupied with shareholder's interests and less attentive to stakeholder's interests and the long-term benefit of corporates' sustainable development. Thus, in this case, pressure from the capital market may work against corporate sustainability. Acknowledging this problem, the Japanese government has been making efforts to make investors understand the importance of sustainability.[342]

Thus, the Financial Services Agency established, in 2013, the Council of Experts Concerning the Japanese Version of the Stewardship Code. In 2014, the Council published the Principles for Responsible Institutional Investors (Japan's Stewardship Code), which are guidelines to institutional investors, which aims to foster medium- to long-term investments and promote the sustainable development of investee companies. In this regard, the Code states: "Institutional investors should monitor investee companies

[337] Government Pension Investment Fund (GPIF). *Profile*. https://www.gpif.go.jp/en/about/profile.html
[338] To know more about responsible investment, see *What is responsible investment*. UNPRI. https://www.unpri.org/pri/an-introduction-to-responsible-investment/what-is-responsible-investment
[339] To know more about the United Nations Principles for Responsible Investment (UN PRI), see *About the PRI*. UNPRI. https://www.unpri.org/pri/about-the-pri
[340] Government Pension Investment Fund (GPIF). *ESG Index*. https://www.gpif.go.jp/en/investment/esg.html
[341] Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 456). Cambridge University Press.
[342] Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 456). Cambridge University Press.

so that they can appropriately fulfill their stewardship responsibilities with an orientation towards the sustainable growth of the companies."[343]

Moreover, concerned with the aging of Japanese society, the population shrinkage, and in achieving the Gross Domestic Product (GDP) target established in the Japan Revitalization Strategy 2016,[344] the Ministry of Economy, Trade and Industry published, in 2017, the Guidance for Collaborative Value Creation. The Guidance pursues the optimisation of the investment chain, for the enhancement of companies' earning powers and sustainable corporate value creation, in order to achieve long-term returns for companies and investors and sustainable development of the Japanese economy.[345]

Another way of pursuing corporate sustainability is through derivative actions. Shareholders can challenge the directors' liability when their management not only fails to achieve sustainability but also causes damages to the company. Since 2012, there is jurisprudence in this regard. The shareholders of a company that allegedly recycled waste sulfuric acid into landfill material claimed, in a derivative action, that former directors should be liable for soil pollution since the company's landfill material contained more hexavalent chromium than the allowed amount under the environmental regulation. The Osaka District Court held the directors liable and required them to pay part of the recovery costs that the company incurred after the local government ordered the company to clean the polluted soil.[346]

In conclusion, despite Japan's great efforts in addressing corporate sustainability since the 1970s, no provisions in this regard have been enacted in Japanese corporate law yet. However, the legislative gap has been filled by several initiatives, made by private entities, the government, and companies themselves. Although corporate sustainability policies are voluntary and non-binding, companies seem to comply with them in order to preserve their integrity and reputation, since the Japanese society is highly aware of the importance of corporate economic, social, and environmental responsibilities.

2.4.3 India

India has the second-largest population in the world after China and has been known as the fastest-growing economy in the world. Due to its large population and rapid growth, sustainability can be

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[343] Principles for Responsible Institutional Investors 2014 (Japan's Stewardship Code), principle no. 3. The Code was revised in 2017, but principle no. 3 remains the same.

[344] To know more about the Japan Revitalization Strategy 2016, see https://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/hombun1_160602_en.pdf

[345] Ministry of Economy, Trade and Industry. (2017). *Guidance for Collaborative Value Creation.* https://www.meti.go.jp/english/press/2017/pdf/0529_004c.pdf

[346] Osaka District Court, June 29, 2012, *Shiryôban Shôji Hômu* no. 342, p. 131 cited in Kozuka, S. (2019). Corporate governance reform, social norms and sustainability in Japanese companies. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 458). Cambridge University Press.

a challenge. Even so, India is becoming a world model in combating climate change and meeting the Sustainable Development Goals (SDGs),[347] particularly in regard to climate action, meaning that India has taken action to adapt to climate change and invest in low-carbon development.

The costs for the implementation of SDGs are very elevated and the government cannot afford all on its own. Therefore, the contribution of private companies is very important for the achievement of the goals. Indian companies must integrate the SDGs into their corporate governance strategies aiming at a long-term sustainable development and the development of the community. In the past years, India has done some reforms in its corporate law and corporate governance policies in order to encourage companies to engage with sustainability.

In 2009, the Ministry of Corporate Affairs published the Corporate Social Responsibility Voluntary Guidelines[348] in order to make companies' traditional contributions to social welfare evolve from charity and philanthropy to Corporate Social Responsibility (CSR). After receiving feedback from various stakeholders, the government decided to amplify the scope of the guidelines to encompass social, environmental, and economic corporate responsibilities and, therefore, published, in 2011, the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business (NVGs).[349] The NVGs adopted the "apply or explain" approach which was applicable to small and large business in all sectors, including foreign multinational corporations; set nine principles and ways on implementing them; and suggested a reporting framework to help companies disclose information to demonstrate the adoption of the guidelines.

In 2018, the NVGs were updated, becoming the National Guidelines on Responsible Business Conduct (NGRBC).[350] The NGRBC elevated the previous guidelines by aligning them with the UN Guiding Principles for Business and Human Rights (UNGPs), the UN Sustainable Development Goals (SDGs), the Paris Agreement on Climate Change of 2015, the Core Conventions 138 and 182 on child labour by the International Labour Organization (ILO), the Securities Exchange Board of India Annual Business Responsibility Reports (ABRRs), and India's Companies Act 2013.

India's Companies Act 2013 (Act) was enacted to consolidate and amend laws relating to companies. The main aim of the Act was to enhance corporate governance and adopt mechanisms of

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[347] To know more about India's progress across the Sustainable Development Goals (SDGs), see https://sustainabledevelopment.un.org/memberstates/india

[348] Ministry of Corporate Affairs, Government of India. (2009). *Corporate Social Responsibility Voluntary Guidelines 2009.* https://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf

[349] Ministry of Corporate Affairs, Government of India. (2011). *National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business of 2011.* https://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf

[350] Ministry of Corporate Affairs, Government of India. (2018). *National Guidelines on Responsible Business Conduct of 2018.* https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf

investor protection. For example, the Act introduced provisions regarding independent directors, and related party-transactions, and has extended the duties of the management board. Moreover, several provisions were included in the Act “to make companies work towards achieving desired sustainable development goals”.[351] In regard to directors’ duties, the Act states that:

> A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment.[352]

Furthermore, the Act requires the board of directors to present in the company’s general meeting a report that shall include “the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year”,[353] and requires large companies to constitute a Corporate Social Responsibility Committee of the Board, which must formulate a CSR policy, recommend the amount of expenditure to be incurred on CSR activities, and monitor the adoption of the referred policy.[354]

The most innovative provision of the Act is that it requires large companies to spend every year at least 2% of their average net profits on the measures described in their CSR policies.[355] Moreover, the Act presents a list of social issues that must be addressed by companies in their CSR policies, such as eradicating extreme hunger and poverty, promoting education, and ensuring environmental sustainability.[356]

Between 2018 and 2019, CSR spendings by companies listed on the National Stock Exchange of India increased by 18%. In line with the previous years, education and healthcare were the areas that received more financial resources. The number of companies that complied with the Act and spent on CSR climbed to 1055, which represents 93% of the 1132 companies assessed; nevertheless, 77 companies did not spend anything on CSR.[357]

In order to make companies comply with the Act and spend on CSR projects, India amended the Act in 2019 and 2020. A provision was included in the Act establishing that unspent money pursuant to

[351] Kaur, H. (2019). Achieving sustainable development goals in India. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 462). Cambridge University Press.
[352] India’s Companies Act 2013. Act no. 18 of 2013, section 166(2).
[353] India’s Companies Act 2013. Act no. 18 of 2013, section 134(3) (o).
[354] India’s Companies Act 2013. Act no. 18 of 2013, section 135.
[355] India’s Companies Act 2013. Act no. 18 of 2013, section 135(5).
[356] India’s Companies Act 2013. Act no°. 18 of 2013, Schedule VII.
[357] The NSE Infobase analysis was based on 1132 companies listed under India’s National Exchange in March of 2019 and whose CSR details were available in their annual reports. http://www.primedatabasegroup.com/newsroom/PR-346.pdf

CSR policies must be transferred to a special account and must be spent on CSR projects within a period of three years.[358] Another provision was included to establish that companies that do not spend the money on CSR or do not transfer the excess amount unspent to a special account will be liable to a penalty of twice the amount required to be spent or transferred by the company. Moreover, every officer of the company who is in default will be liable to a penalty of one-tenth of the amount required to be spent or transferred.[359]

These mandatory CSR spends are unquestionably a great innovation of India's corporate law and demonstrate the efforts of the country's government in pursuing sustainability. However, India still needs to improve other areas of law that relate to corporate sustainability. For example, social issues are critically affected by businesses behaviour. Human rights and working conditions are some of the concerns that must be taken into consideration when addressing the social dimension of sustainability.

After a long reform, in 2019, new labour laws were enacted in India. The government consolidated around 45 laws into four labour codes: The Code on Wages 2019, the Occupational Safety, Health and Working Conditions Code 2019, the Code on Social Security 2019, and the Industrial Relations Code 2019. However, the codes present some flaws. For example, the Code on Wages, which proposes the implementation of a minimum wage, does not take into consideration different socio-economic conditions across different states of India and does not contain any provisions to forbid discrimination on the basis of caste or religion; it only prohibits discrimination on the ground of gender.[360] Thus, although some Indian companies have better labour welfare initiatives than described in the laws, the codes must be amended to fill these gaps.[361]

In regard to environmental sustainability, on one hand, India lies at the core of global environmental problems; on the other hand, Indian authorities have been taking several initiatives to tackle these issues and India has been well scored in SDGs in regard to climate action.

Currently, air quality in Indian cities is worse than in China. According to IQAir 2019 World Air Quality Report,[362] 25 of the top 50 most polluted cities in the world are located in India. Deforestation in India is another concern: in 2019, India had only 21% of forest cover.[363] Water pollution and poor waste

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[358] The Companies (Amendment) Act 2019. Act no. 22 of 2019, section 21.
[359] The Companies (Amendment) Act 2019. Act no. 22 of 2019, section 21 and The Companies (Amendment) Bill 2020. Bill no. 88 of 2020, section 27.
[360] The Code on Wages, 2019. Act no. 29 of 2019, section 3.
[361] Kaur, H. (2019). Achieving sustainable development goals in India. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 469). Cambridge University Press.
[362] IQAir. (2019). *2019 World Air Quality Report*. https://www.iqair.com/world-most-polluted-cities
[363] Pandey, K. (2019, December 30). *India's forest cover goes up by nearly 3% this decade; but all is not well.* DownToEarth. https://www.downtoearth.org.in/news/forests/india-s-forest-cover-goes-up-by-nearly-3-this-decade-but-all-is-not-well-68624

management are also critical environmental problems. 60% of the sewage in urban areas is untreated and ends up in lakes and rivers.[364] Although India produces far less waste than developed countries, it still struggles with how to deal with it. With fast urbanisation and rapid economic growth, the country faces massive waste management challenges having, in 2018, 75% of its municipal garbage having been dumped without processing.[365]

In 2008, the Prime Minister's Council on Climate Change (PMCCC) published the first National Plan on Climate Change (NAPCC). Since then, India has been improving its climate change performance index (CCPI). In 2018, India stood in 14th place, in 2019 in 11th place, and in 2020 in 9th place.[366] In 2014, the government launched the Clean India Campaign (Swachh Bharat Abhiyaan) aiming to clean up India's streets and the Clean Ganga (Namami Gange Programme) aiming to clean the Ganges river by the end of 2020.

Under the Paris Agreement (2015), India has committed to diminishing the usage of fossil fuel, reducing greenhouse gas emission, and creating a carbon sink through forest cover by 2030. Currently, the country is on track to achieve these goals. India is also a leader in promoting renewable energy: they are looking to reach an ambitious target of 500 GW of renewables by 2028 that will result in 40% of the country's electricity being generated from non-fossil fuels by 2030. Moreover, Indian solar parks are the world's biggest and provide a symbol of the country's effort in achieving its environmental goals.[367] In January 2019, the Ministry for Environment launched the National Clean Air Programme (NCAP), which aims to cut by 20–30% the concentration of coarse and fine particles in 102 cities by 2024.[368]

Some governmental initiatives may represent challenges for companies established in India, but others can be used as opportunities: for example, India provides great opportunities for companies in the sector of renewable energies.

Regarding economic aspects of corporate sustainability, since India improved its corporate governance, its position in the World Bank's Ease of Doing Business survey climbed 23 places, reaching

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[364] NDTV. (2009, February 6). *60 per cent of sewage in urban India goes untreated: green court*. https://www.ndtv.com/india-news/60-per-cent-of-sewage-in-urban-india-goes-untreated-green-court-1988937

[365] Jadhav, R. (2018, July 30). *75% of municipal garbage in India dumped without processing*. The Times of India. https://timesofindia.indiatimes.com/india/75-of-municipal-garbage-in-india-dumped-without-processing/articleshow/65190477.cms

[366] Climate Change Performance Index. https://www.climate-change-performance-index.org/climate-change-performance-index-2020

[367] European Parliament. (2009). *India: Environmental Issues.* https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637920/EPRS_BRI(2019)637920_EN.pdf

[368] Ministry of Environment, Forest & Climate Change, Government of India. (2019). *National Clean Air Programme (NCAP)*. http://moef.gov.in/wp-content/uploads/2019/05/NCAP_Report.pdf

the 77th place among 190 countries surveyed in 2019,[369] which is probably the reason for the increase of investments in the country.

However, two reforms have affected India's economy in recent years. The first was the demonetisation of high-value currency notes in 2016 in order to check the flow of unaccounted money in the economy and fight corruption. The demonetisation had some adverse effects on India's economy—for example, the diminishing of cash flow, which affected particularly cash-intensive industries and the informal sector; the loss of 1.5 million jobs in the months immediately following the demonetisation;[370] and consequently, the reduction of the Gross Domestic Product growth rate. The second reform was the implementation of the Goods and Services Tax (GST) in 2017, which aimed to end the cascading taxes and integrate the taxation system. Even so, many small and medium companies, particularly in the unorganised sector, struggled to comply with the new regime, which resulted in more cash transactions so that tax could be avoided.[371]

In conclusion, India has taken great steps towards sustainability by reforming its corporate law and corporate governance and creating domestic policies in order to achieve its international commitments. By far, India's great innovation in regard to corporate sustainability was the establishment of mandatory CSR spendings by large companies. However, the country still has huge challenges to be addressed, particularly in which concerns environmental sustainability. Therefore, it is very important that companies work in partnerships with the government towards the sustainable development of India.

[369] World Bank Group Flagship. (2019). *Doing Business 2019.* https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf

[370] Vyas, M. (2017) *1.5 million jobs lost in first four months of 2017.* Centre for Monitoring Indian Economy. https://www.cmie.com/kommon/bin/sr.php?kall=warticle&dt=2017-07-11%2011:07:31&msec=463

[371] Kaur, H. (2019). Achieving sustainable development goals in India. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 471, 472). Cambridge University Press.

Chapter III – Innovations for Corporate Sustainability

In the previous chapter, we have noticed how corporate law and corporate governance have been evolving in several jurisdictions, in order to address the economic, social, and environmental challenges that we, as a society, are facing. The importance of corporate law and corporate governance for the fulfilment of the so desired sustainable development is unquestionable; however, there are other instruments that can contribute to the achievement of sustainability. This chapter aims to address two innovative tools that have been recently developed and that can be great contributors to corporate sustainability: one regards to sustainable financing, showing how capital can drive corporations to engage in sustainable activities; the other shows how market actors can foster sustainable initiatives, by a better selection, through adequate information, in which companies they invest or from which companies they consume.

3.1 Green Bonds

Corporate governance is traditionally oriented towards the shareholders' interests, focusing on profit maximisation and the rise of equity price. Corporate governance usually gives relatively little attention to the creditors' interests. However, private debt (for example, loans and bonds) represent a large portion of the capital used by corporations to run their business and, therefore, can serve as a huge influence in corporate behaviour.[372]

In this regard, green bonds provide a substantial opportunity in the promotion of corporate sustainability, since its main differential is that it is used to fund environmental-related projects, activities, and assets. Moreover, it has been appointed as one of the key financing instruments for the achievement of the Paris Agreement and the Sustainable Development Goals (SDGs).[373]

A green bond is "a fixed-income financial instrument"[374] used to finance green projects, meaning projects that deliver environmental benefits. Some examples of green projects are (i) climate mitigation activities, such as renewable energy production (solar, wind, and hydropower); (ii) climate adaptation activities, such as reforestation; (iii) clean-transport facilities, such as subways and electric vehicles; (iv) recycling; (v) energy-efficient buildings; and (vi) water treatment.

A wider definition of green bonds encompasses "unlabelled climate-aligned" bonds, which are bonds to fund environment-related projects, but which are not labelled as green bonds; and bonds issued

[372] Park, S. K. (2019). Green bonds and beyond: debt financing as a sustainability driver. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 596). Cambridge University Press.
[373] European Commission. Action plan: financing sustainable growth. COM (2018) 97 final.
[374] Park, S. K. (2019). Green bonds and beyond: debt financing as a sustainability driver. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 601). Cambridge University Press.

by "pure-play" companies (i.e., companies whose core business relates to green activities, for example, wind energy companies.)[375] Green bonds were first issued in 2007 by the European Investment Bank,[376] followed by the World Bank in 2008.[377] Ever since, the green bond market has remarkably grown.

In order to widen the scope of green bonds to encompass all three dimensions of sustainability,[378] the financing market has created social bonds, which is a debt instrument to finance projects that have a social impact, such as housing, food security, and education;[379] and sustainability bonds, which is the combination of both, supporting social and environmental projects.[380]

Green bonds are considered simple, flexible, and fungible, and, therefore, appealing to institutional investors, since this kind of investor is always trying to balance short-term financial performance and long-term sustainability goals.[381]

Since it is a recently established market, the green bond market lacks direct public regulation in most jurisdictions, which may facilitate greenwashing. In this regard, private standards, certification schemes, and indices have been established in the green bond market in order to minimise this vulnerability.

China and India were the first countries to regulate the green bond market. In China, the green bond market is regulated, since 2015, by China's central bank—the People's Bank of China (PBoC).[382] In 2016, China's National Development and Reform Commission published guidelines.[383] India's national government securities regulator, the Securities and Exchange Board of India, also published guidelines for the green bond market in 2016.[384] Currently, the European Commission is exploring the possibility of a legislative initiative for an EU Green Bond Standard under the EU Action Plan on Sustainable Finance.[385]

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[375] Organisation for Economic Cooperation and Development (OECD). (2017). *Mobilising bond markets for a low-carbon transition* (p. 23). https://read.oecd-ilibrary.org/environment/mobilising-bond-markets-for-a-low-carbon-transition_9789264272323-en#page3

[376] The European Investment Bank. *10 years of Green Bonds: Join the celebration*. https://www.eib.org/en/investor_relations/cab/ten-years-of-green-bonds/index.htm

[377] The World Bank (2009, March 18). *10 Years of Green Bonds: creating the blueprint for sustainability across capital markets*. https://www.worldbank.org/en/news/immersive-story/2019/03/18/10-years-of-green-bonds-creating-the-blueprint-for-sustainability-across-capital-markets

[378] Park, S. K. (2018). Social bonds for sustainable development: a human rights perspective on impact investing. *Business and Human Rights Journal*, 233.

[379] International Capital Market Association. (2018). *Social Bond Principle: voluntary process guidelines for issuing social bonds.* file:///C:/Users/mari_/Downloads/Social%20Bond%20Principles%20-%20June%202018%20140618%20WEB.pdf

[380] International Capital Market Association. (2018). *Sustainability Bond Guidelines*. https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Sustainability-Bonds-Guidelines-June-2018-270520.pdf

[381] Park, S. K. (2019). Green bonds and beyond: debt financing as a sustainability driver. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 601). Cambridge University Press.

[382] The People's Bank of China Announcement no. 39 of 2015; and The Green Finance Committee of China Society of Finance and Banking. *Preparation Instructions on Green Bond Endorsed Project Catalogue* (2015).

[383] See Climate Bonds Initiative & the IISD International Institute for Sustainable Development. (2016). *Roadmap for China: Green bond guidelines for the next stage of market growth*. https://www.cbd.int/financial/gmr/china-bonds-guidance.pdf

[384] Securities and Exchange Board of India. (2016, January 11). *SEBI Board Meeting* [Press release 10/2016].

[385] European Commission. *EU Green Bond Standard*. https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-green-bond-standard_en

In this context, green bonds are mostly ruled by private institutions, which assess and audit the corporations' conduct and require corporations to disclosure social and environmental reports. These private governance regimes aim to fill the legislative gap left by governments and fulfil the market needs by establishing standards, procedures, and guidelines.

In this regard, the Green Bonds Principles (GBPs) "are the leading global standard in the green bond market".[386] They were elaborated by the International Capital Market Association and consist of voluntary guidelines for the launching of credible green bonds (i.e., aims to promote best practice.) They encourage issuers to improve transparency and disclosure in order to help investors to make well-informed investing decisions.[387]

Certification provides another layer of protection for investors since it combines the establishment of standards with third-party surveillance. The Climate Bonds Standard and Certification Scheme from the Climate Bonds Initiative (CBI) follows this rationale. In order to certify a green bond, an issuer must comply with the CBI requirements, which include, inter alia, an independent third-party verification in accordance with existing standards, such as ISAE 3000.[388]

Green bond indices are a type of market-led regulation. They are primarily based on the information disclosed by companies to inform and influence investors' decisions. Several green bond indices and other sustainability indices, such as the Dow Jones Sustainability Indexes and the FTSE4Good Index Series, have been launched in the past years, and are becoming an essential tool for the so-called "responsible investors".[389]

In sum, green bonds have great potential to push sustainable finance to a greater level, since their simplicity, flexibility, and fungibility attract investors. However, to date, neither public regulation nor private governance could provide mechanisms to prevent greenwashing and guarantee that green bond issuers are, in fact, committed to sustainability. Green bonds still rely on the market participants' ability to investigate if a company is indeed pursuing sustainable development, and on investor reliance on the economic and sustainability performance of new financial products. Although private governance has been useful to the development of the green bond market their voluntary, permissive nature puts in danger the primary aim of green bonds, which is to foster sustainability. In case issuers start taking

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[386] Park, S. K. (2019). Green bonds and beyond: debt financing as a sustainability driver. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 604). Cambridge University Press.

[387] International Capital Market Association. (2018). *Green Bond Principles: voluntary process guidelines for issuing Green Bonds*. https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Green-Bonds-Principles-June-2018-270520.pdf

[388] Climate Bonds Initiative. *Certification under the Climate Bonds Standard*. https://www.climatebonds.net/certification

[389] Park, S. K. (2019). Green bonds and beyond: debt financing as a sustainability driver. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 604, 605). Cambridge University Press.

advantage of the lack of assertiveness and enforcement of private standards, the whole green bond market can fall into disbelief. To avoid scepticism in regard to green bonds, a transition from private governance to public regulation must occur.[390]

3.2 Certifications

Sustainability is, definitely, the biggest challenge of the XXI century. Though laws and regulations are necessary to restrain bad corporate conducts, they have limited powers to create, in fact, sustainable value, since one of the basic premises of the market economy is that companies should prioritise their own profits, rather than the welfare of society. In this sense, "market forces need to be activated in order to create incentives for companies to act sustainably";[391] in other words, the best promoter of sustainability is market demand itself.

Market actors, particularly consumers and investors, are becoming much more aware of their choices' impact on society and the environment, and, therefore, have been pursuing to consume and invest in sustainable products and services. According to the 2015 Nielsen Company research, 66% of 30.000 survey respondents, in 60 countries, are prepared to pay more for products and services to support companies committed to making a positive social and environmental impact.[392] With this trend in view, the market has been launching new "sustainable" companies, products, and services every day, in order to meet these new market needs.

However, choosing companies in which to invest, or from which to consume, is not an easy task. Companies are highly diverse; they present various levels of risk and different marketing strategies. Assessing this wide range of information is hard for industry specialists, and even harder for consumers. Therefore, there is an urge to correct these informational asymmetries and help companies which are really committed to sustainability to be seen by consumers and investors. In this sense, certification schemes might represent a great help, "if designed properly, they could provide means for sustainable companies to signal their good behaviour to the market",[393] making consumers and investors' choices easier to be made.

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[390] Park, S. K. (2019). Green bonds and beyond: debt financing as a sustainability driver. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 606). Cambridge University Press.

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[392] The Nielsen Company. (2015). *The sustainability imperative: new insights on consumer expectations*. https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/Global20Sustainability20Report_October202015.pdf

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In this regard, product certification, such as fair-trade coffee, or organic cosmetics, is considerably ahead in relation to companies' certification as a whole, since the later demands much more thorough research. However, a few certification schemes have been developed in various jurisdictions.

In the United States, there is the B Corporation Certification, which is a private certification issued by B Lab, a non-profit US organisation that operates worldwide and is financed by private sponsors, including the Rockefeller Foundation, and by annual licence fees paid by certified corporations.[394] In the United Kingdom, there is the Social Enterprise Mark scheme, which is run by a community interest company limited by shares, owned by the RISE Legacy Trust, and financed by licence fees;[395] and the Certified Social Enterprise, which is also a private scheme, run by the Social Enterprise UK, a community interest company limited by guarantees, and which is also financed by licence fees.[396] In France, there is a two-level certification (ESS/ESUS) which is provided by the Ministry of the Economy, Finance, and Recovery;[397] and in South Korea there is the Social Enterprises Certification which is provided by the Ministry of Labour.[398]

The major difference among the referred certification schemes regards the institutional framework in which they operate. The American and British schemes are private, while the French and South Korean are public (i.e., they are administrated by State entities and are operated according to national laws.)

There are different procedures among these certification schemes, but these differences don't always correspond to their institutional variation (i.e., if they are public or private schemes.) For instance, the procedure to obtain a certification differs substantially among the certifying entities (some are more formalised than others), but private schemes are not necessarily less formal than public schemes. The Certified Social Enterprise seems to be the most informal scheme. To obtain their membership, a company only needs to do a declaration stating that it meets the certification criteria (i.e., it is a self-certification scheme.)[399] The other referred schemes, in contrast, are less discretionary: they are based on objective assessments made by the certifying entities.[400] The certification expiring term also differs in

[394] B Corporation. *About B Lab*. https://bcorporation.net/about-b-lab
[395] The Social Enterprise Mark. *About us.* https://www.socialenterprisemark.org.uk/about-us/
[396] Social Enterprise. *Who we are.* https://www.socialenterprise.org.uk/who-we-are/
[397] Ministère de l'Économie des Finances et de la Relance. (2018, July 4). *ESS: qu'est-ce que l'agrément "Entreprise solidaire d'utilité sociale" [What is the "Solidarity Company of Social Utility" approval?].* https://www.economie.gouv.fr/entreprises/agrement-entreprise-solidaire-utilite-sociale-ess
[398] South Korean Social Enterprise Promotion Act of 2007. English version available at https://www.icnl.org/research/library/south-korea_socent/
[399] Social Enterprise UK. *Join SEUK.* https://www.socialenterprise.org.uk/join-seuk/
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each certification scheme. The French scheme has a five-year validity,[401] the South Korean certificate is valid until cancellation, but requires periodic reports,[402] and the U.S. and U.K. schemes require annual or triennial renewals.[403]

Moreover, there are three relevant differences between public and private certification schemes. The first regards to their territorial scope of application: whereas public regimes are limited to their respective countries, private regimes can certify companies established in various countries. Second, the fees drastically differ in public and private schemes: whereas public schemes demand either no fees or small fixed administrative fees, private schemes usually require fees in proportion to the turnover of certified companies.[404]The third difference concerns financial incentives given by the government to certified companies: certified companies under public regimes can usually benefit from subsidies and tax reductions.[405]

In sum, public certification schemes are not necessarily superior to private schemes—the approval requirements and the short validity terms, with frequent re-assessments, are more important. Nevertheless, these merits do not always translate for consumers, who must be aware of these procedural requirements in order to avoid greenwashing. In the aftermath, for companies, the effectiveness of certification schemes depends on their economic impact. In this respect, certifications can provide competitive advantages to certified companies, and make sustainable corporate behaviour economically attractive. In other words, certification schemes qualify as market-based regulatory instruments, which have demand-based effects. Therefore, certification of companies has "the potential to be an effective regulatory tool that may help to reconcile sustainability concerns with the functional mechanisms of market economies".[406] However, it is a relatively recent regulatory innovation, and, thereby, still needs to prove its value.

Conclusion

[401] Ministère de l'Économie des Finances et de la Relance. (2018, July 4). *Quelle est la durée de l'agrément ESUS [How long is ESUS accreditation?].* https://www.economie.gouv.fr/entreprises/agrement-entreprise-solidaire-utilite-sociale-ess

[402] South Korean Social Enterprise Promotion Act of 2007, article 17. English version available at https://www.icnl.org/research/library/south-korea_socent/

[403] See the comparative table available at https://www.socialenterprisemark.org.uk/wp-content/uploads/2020/03/Social-Enterprise-Mark-Comparison.pdf

[404] See the comparative table available at https://www.socialenterprisemark.org.uk/wp-content/uploads/2020/03/Social-Enterprise-Mark-Comparison.pdf

[405] Möslein, F. (2019). Certifying "good" companies. A comparative study of regulatory design. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (pp. 675, 679). Cambridge University Press.

[406] Möslein, F. (2019). Certifying "good" companies. A comparative study of regulatory design. In B. Sjåfjell & C. M. Bruner (Eds.), *The Cambridge handbook of corporate law, corporate governance and sustainability* (p. 681). Cambridge University Press.

This work aimed to demonstrate the importance of corporate law and corporate governance to the pursuit of sustainability, and how both of them have been evolving in different countries in order to conduct the sustainable development of companies around the world.

Unfortunately, our society is still struggling on an unsustainable path, disregarding the planetary boundaries on which human survival depends. In addition, we continue to witness several scandals regarding human rights abuses, mostly involving multinationals and their supply chains. Furthermore, the old-fashioned shareholder-centric approach of corporate law and governance, which is still adopted in several countries, is, undoubtedly, one of the major contributors to global financial crises. Therefore, the biggest challenge of our times is to transform this scenario.

The relevance of corporate law and corporate governance as vectors of the enhancement of business behaviour can no longer be contested. Although extra-corporate norms, such as labour law, and environmental law can contribute to the achievement of sustainability, their ex post and reactive nature makes them not sufficient to cover the matter. Corporate law and governance, if well-designed, can offer a precautionary approach to environmental, social, and economic concerns, and thus make corporations achieve, in fact, sustainable development.

Since the conduct of business is becoming increasingly globalised, there is a growing necessity of dealing with corporate sustainability issues in a more integrated way. In this respect, there have been some great initiatives, both in international and national spheres. International organisations have been promoting conferences, presenting reports, and proposing agreements and schedules to tackle sustainable development targets. At the same time, countries have been including (albeit slowly) sustainability-related provisions in their national laws. Private institutions have also been contributing by encouraging companies to adopt the best practices.

In this sense, it is worth highlighting a few cases where corporate law or corporate governance have been improved in order to address sustainability. For example, in South Africa, corporate law requires state-owned companies, listed companies, and other public interest companies to establish a social and ethics committee, which must have far-reaching original board powers regarding sustainability matters; in China, the Shanghai Stock Exchange guidelines encourage companies to disclose the social contribution value per share in their annual CSR report (i.e., they established a formula to quantify CSR, in order to better assess companies commitment with social and environmental causes and to better inform stakeholders about it); and in India, corporate law requires large companies to contribute with 2%

of their average net profits on CSR projects. However, since these are recent developments of corporate law and governance, future research must be done in order to assess their efficacy.

Moreover, recently, similar initiatives have been implemented by investors in order to reorient corporate governance and push companies towards sustainability. New investment structures have been created to meet the needs of a new responsible investing market. In this sense, we examined the green bonds market in order to demonstrate how capital can drive corporations to engage in sustainable activities. However, we got to the conclusion that green bonds are lacking adequate regulation since the actual private governance regime is failing to prevent greenwashing.

Additionally, we aimed to demonstrate how market actors, particularly consumers and investors, can foster sustainability by improving their consuming and investing habits. Instead of expecting that regular companies adopt sustainability, consumers and investors should change their habits and relocate their capital to companies that have a sustainable-related core business; thus, the market itself and the financial aspect of businesses would drive companies towards better practices. In this regard, certification schemes allow market actors to better select, through adequate information, in which companies to invest or from which companies to consume, and, additionally, they can provide competitive advantages to sustainable companies.

Finally, it is important to emphasise that, despite well-intentioned, the presented initiatives are not enough to completely address such a big challenge. In other words, these initiatives point out the direction that corporations must follow, but more ambitious initiatives must be adopted to fulfil the current economic, social, and environmental demands. Without fundamental reforms in corporate structures, corporate laws, corporate governance, and government systems all over the world, it is unrealistic to expect the achievement of sustainability. Furthermore, without the engagement of each and every human being in this great challenge, we cannot expect a better future.

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