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The Green Turn of Corporate Law

Working Paper nº 01/2024

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Abstract

This article introduces the concept of green turn, which refers to a distinctive normative approach to corporate sustainability through mandatory corporate legal rules. Regulators and governments are often associated with a secondary role in the dynamics of environmental, social, and governance (ESG), whose intervention should simply facilitate and support investors' initiatives. However, this diagnosis has changed in light of recent developments across the world. Over the past five years, regulators have assumed a more prominent role in proposing and introducing mandatory legal rules – instead of soft law standards – addressing corporate sustainability and climate change across jurisdictions. This article identifies the contours and key players of the green turn and provides a comprehensive analysis of the main developments in Brazil, Germany, India, the UK, and the United States. The green turn evidences the fading boundaries between private ordering and public regulation regarding environmental risks. While the early stages of the ESG movement may have brought about notable progress in integrating environmental risks into investment decisions, the green turn is a fundamental step towards effective climate governance strategies.

Introduction

In May 2024, the EU adopted the Corporate Sustainability Due Diligence Directive ("CSDDD"), a milestone that builds upon France and Germany's previous supply chain rules and existing international standards on business and human rights. A few months earlier, the SEC finalized its Climate-Related Disclosures Rules in the U.S., marking an unprecedented regulatory development regarding corporate sustainability in the country. Previously, Brazil was the first jurisdiction to adopt mandatory International Sustainability Standards Board ("ISSB") standards for sustainability disclosures, and the UK imposed The Task Force on Climate-related Financial Disclosures ("TCFD") requirements for listed companies. Concurrently, India adopted an overarching business sustainability report for top Indian companies per market capitalization. Multiple countries have enacted, or are currently considering proposals to enact, green taxonomies to establish uniform standards for sustainable investing. A handful of countries are now re-visiting fiduciary duties toward stakeholders – a development unimaginable a few decades ago.

Over the past years, regulators have assumed a more prominent role in introducing legal rules – instead of soft law standards – addressing corporate sustainability and climate change across jurisdictions.[1] Although there are important examples of measures with more teeth seeking to tackle other environmental, social, and governance (ESG) matters,[2] state-led initiatives that stand out are prompted by – but not limited to – concerns

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[1] Empirical data shows that governments and financial regulators represent one of the strongest forces driving the regulation of ESG. *Who Will Regulate ESG?*, MSCI, https://www.msci.com/who-will-regulate-esg [https://perma.cc/4DDP-DFZ8]. Scholars debate whether corporate law is the appropriate means to regulate corporate externalities. While scholars agree that "[l]eft unchecked, corporations may engage in socially harmful behavior," scholars have noted that "[t]he crucial question" is "whether corporate law is the proper channel through which to deliver this [*legal protection to non-contractual stakeholders*]." Luca Enriques, Henry Hansmann, Reinier Kraakman, & Mariana Pargendler, THE BASIC GOVERNANCE STRUCTURE: MINORITY SHAREHOLDERS AND NON-SHAREHOLDER CONSTITUENCIES IN THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 93 (John Armour, Luca Enriques et al. ed., 3rd ed. 2017). *See* also Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953, 972 (2020) (criticizing the modularity approach to corporate law and instead proposing a "careful analysis of the potential externalities of corporate governance, as well as the best means to address them"). *See* generally CARLOS PORTUGAL GOUVÊA, A ESTRUTURA DA GOVERNANÇA CORPORATIVA [The Structure of Corporate Governance] 73–74 (2022) (arguing that corporate governance is not "a subarea of corporate law" but a broader field of study with multiple public-private intersections, which include ESG policies).

[2] *See*, e.g., Code de Commerce [C. COM.] [Commercial Code], art. L225-17, as amended by Loi 2011–103 du 27 janvier 2011 Loi Copé-Zimmermann [Law 2011-103 of January 27, 2011 on The Copé-Zimmermann] (Fr.); Comissão de Valores Mobiliários, Resolução CVM No. 80 [Securities and Exchange Commission, CVM Resolution No. 80] as amended by Resolução CVM No. 180, de 22 de março de 2023, and Resolução CVM No. 198, de 31 de janeiro de 2024 [CVM Resolution No. 180, of March 22, 2023, and CVM Resolution No. 198, of January 31, 2024] (Braz.); Gesetz zur Ergänzung und Änderung der Regelungen für die gleichberechtigte Teilhabe von Frauen an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst [FÜPOG II], [Act to Supplement and Amend the Regulations for the Equal Participation of Women in Management Positions in the Private Sector and the Public Sector], Aug. 7, 2021, BGBl I (Ger.); Secretaría de Hacienda y Crédito Público, Taxonomía Sostenible de Mexico [Ministry of Finance and Public Credit, Sustainable Taxonomy of Mexico](2023) (Mex.) (encompassing gender equality targets). For an account of regulatory ESG in India, *see* Umakanth Varottil, *The Legal and Regulatory Impetus Towards ESG in India: Developments and Challenges* (NUS L., Working Paper No 2023/003, 2023).

with sustainability and climate risks.[3] This remarkable rise of mandatory sustainability has prompted a transition from a framework based almost entirely on soft law mechanisms to a hybrid regulatory regime.[4]

This article coins the term green turn of corporate law to refer to this distinct normative approach to corporate sustainability.[5] Regulation and private ordering are often depicted as mutually exclusive.[6] In contrast with this view, the evolving legal strategies to address corporate sustainability and climate risks show that private ordering is increasingly supplemented by regulation. The green turn represents a turning point in the evolution of corporate law from a traditional value-maximization paradigm to an approach that incorporates long-term sustainability into the corporate legal structure.[7] Specifically, the green turn captures this shift towards integrating sustainability concerns into the legal fabric that governs corporate actors.

The green turn is part of a global process of crystallization in existing ESG market practices. The creation and development of ESG is marked by soft law strategies

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[3] Recognizing that ESG may be described as a "highly flexible moniker") and even individual components may assume different meanings and significantly broad interpretations, this Article concentrates on the *E* of the acronym and relies on the relevant environmental issues for ESG investment decisions listed by the Who Cares Wins Report in order to delimit the scope of environmental concerns covered. Elizabeth Pollman, *The Making and Meaning of ESG* 29 (Inst. for L. & Econ., Working Paper No. 659, 2022). The list includes climate change and related risks, the need to reduce toxic releases and waste, new regulation expanding the boundaries of environmental liability with regard to products and services, increasing pressure by civil society to improve performance, transparency and accountability, and emerging markets for environmental services and environment-friendly products. It is worth noting that the factors listed may "differ across regions and sectors" and are merely exemplificative (UNITED NATIONS GLOBAL COMPACT, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD 6 (2004) [WHO CARES WINS]).

[4] For an account of regulatory ESG initiatives in India, *see* Varottil, *supra* note 3.

[5] Some jurisdictions have a clear distinction between corporate and securities law – particularly the U.S.– but line drawing is less evident elsewhere. James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116 (2017). While recognizing the important implications of the distinction, this Article conflates both fields in addressing the features of the green turn.

[6] Zohar Goshen & Assaf Hamdani, *Will Systematic Stewardship Save the Planet?* 59 (ECGI L., Working Paper No. 739 2024) ("instead of applauding the ultimately futile or counterproductive attempts of universal owners to directly address climate change, scholars and investors should encourage these entities to advocate for federal government regulation."); Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, BERKELEY BUS. L. J. 258, 263, 270 (2021) ("government action (or sometimes actions by an industry group in the form of best practices) is the only effective means for addressing significant collective action problems" but "the government has abdicated its regulatory duty and private actors have filled the void."). *Cf.* Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 315 (2022) (advancing an argument in favor of the "coexistence of mandatory and voluntary disclosure").

[7] The green turn may be situated as part of a broader framework of a "new theory of corporate governance," that is characterized by "the centrality of the debate on corporate ethics, along with the increasing importance of topics such as socio-environmental governance, the relationship between business and human rights, and the demand for diversity policies." PORTUGAL GOUVÊA, *supra* note 1, at 651; *But see* Asaf Raz, *The Legal Primacy Norm*, 74 FLA. L. REV. 933, 987 (2022) (proposing a third way by focusing on proper application and enforcement of existing corporate legal rules). *See generally,* LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N. Y. TIMES, Sept. 13, 1970, at SM17 (for contrasting views on shareholder primacy and stakeholderism).

primarily established and advanced by investors and companies.[8] More recently, the movement experienced a surge of *hard* public regulation, which not only *implants* the practices inaugurated and crystalized at the market level into national legal orders but often pursues a broader sustainability agenda. This article identifies a shift towards a more active behavior of public regulators as part of the green turn. This model challenges or revamps the line-drawing exercise between public regulation and self-contained markets.

This movement of codification for sustainability and climate risks has the potential to untangle relevant knots that have halted attempts to take ESG to the next level.[9] First, the range of enforcement mechanisms available may increase overall compliance due to liability and reputational risks associated with sustainability-related obligations.[10] Second, it is in the interest of companies and shareholders for regulators to level the playing field for certain practices to lower information asymmetries and transaction costs.[11] Third, the strengthening of government regulation in the existing market-led framework may provide better institutional and governance arrangements to cope with the collective action problems arising out of environmental and climate risks.[12]

This article provides a comprehensive analysis of the main developments in corporate sustainability in Brazil, Germany, India, the UK, and the U.S.[13] Notwithstanding the

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[8] For a description of the origins of ESG and the role of financial institutions and institutional investors in its dissemination, *see* Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765, 1796–1799 (2021); Pollman, *supra* note 4, at 14.

[9] PORTUGAL GOUVÊA, *supra* note 1, at 602, 636 (proposing the idea of "empathetic corporate ethics," building upon the "recognition of the communicative capacity of legal entities," whose implementation to "maximizing the efficiency of economic activity aiming to reach the maximum number of potential customers" should rely on socio-environmental governance).

[10] *See*, *e.g.*, John Armour, Colin Mayer & Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, 52 J. FIN. & QUANTITATIVE ANALYSIS 1429 (2015) (noting the high reputational costs of financial regulation enforcement); Joan MacLeod Heminway, *The Materiality of ESG Information: Why It May Matter,* 84 LA. L. REV. 1365, 1386 (2024) (analyzing the potential applicability of insider trading provisions vis-à-vis ESG information). However, businesses have withheld sustainability practices or information to avoid accusations of greenwashing.Xavier Font, Ihab Elgammal & Ian Lamond, *Greenhushing: The Deliberate Under Communicating of Sustainability Practices by Tourism Businesses*, 25 J. SUSTAINABLE TOURISM 1007 (2017).

[11] *See also* Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L. J. 407, 431–432 (2018) (concluding that voluntary disclosures are "ineffective" and "costly" due to "high incentives to underdisclose, technical barriers to effective reporting, and the potential market-wide effects of risk all pose particular challenges for disclosure regimes."). Even scholars who have opposed regulatory initiatives recognize that "[c]omparability and standardization may be issues that regulators may have to address." Wolf-Georg Ringe, *Investor-led Sustainability in Corporate Governance* 12 (ECGI, Working Paper No. 615, 2021. *But see*, making a case for voluntary disclosures, Scott Hirst, *Saving Climate Disclosure*, 28 STAN. J. L. BUS. & FIN. 91 (2023).

[12] Macey, *supra* note 7, at 269–270(arguing that "[g]overnment traditionally has been, and should remain, the most prominent actor in any struggle for environmental and social justice"). *Contra* Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 27 (World Bank Pol'y Rsch., Working Paper No. 5095,2009) (arguing that collective action problems in the context of climate change may be solved by polycentric and multi-scale policies by both private and public actors, as "[r]eliance on a single 'solution' may be more of a problem than a solution").

[13] This article analyzes five jurisdictions out of the top ten democratic jurisdictions ranking higher in global gross domestic product and greenhouse gas emissions,according to World Bank data, namely the U.S., India, Japan, Germany, UK, France, Brazil, and Canada. *GDP (current US$)*, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true [https://perma.cc/3RR8-5Z72]; . *Total greenhouse gas emissions (kt of CO2 equivalent)*; https://data.worldbank.org/indicator/EN.ATM.GHGT.KT.CE?most_recent_value_desc=true

striking prominence of corporate disclosure regulation in all jurisdictions, the green turn is also characterized by the growing number of legislative initiatives seeking to establish green taxonomies, environmental due diligence obligations for parent companies, specific sustainability requirements for SOEs, as well as the contentious debates on directors' fiduciary duties.[14] To address these features, this article will proceed as follows. Section I explores the idea of regulatory-level activism and identifies the key players of the green turn. Section II addresses critical developments in the field of corporate disclosures and securities regulation in Brazil, the EU, Germany, India, the UK, and the U.S. Section III deals with the new supply chain due diligence requirements, especially the French Loi de Vigilance and the German Supply Chin Act. Section IV addresses the dissemination of green taxonomies worldwide, focusing on ongoing debates in the EU and Brazil. Section V focuses on particular legal features of sustainability in the corporate legal system of each relevant jurisdiction.

III. THE RISE OF MANDATORY CORPORATE DISCLOSURES AND SECURITIES REGULATION

Recent developments in corporate reporting and securities regulations represent the paradigmatic example of the green turn. All jurisdictions have adopted some form of mandatory sustainability disclosures over the past decade.[15] Regulatory initiatives have assumed a central role in crystallizing practices developed by the private sector into mandatory legal rules.[16] Over time, the terminology for such reporting obligations evolved from niche "environmental" or "non-financial" disclosures to mainstream and further reaching "sustainability," "ESG," and "climate" disclosures.[17]

There is a strong market case for incorporating recurring market disclosure practices into corporate legal rules or securities regulations.[18] While the U.N. has recommended sustainability disclosures since the launch of the ESG movement, which were widely

[https://perma.cc/W59D-BEVL]. From that sample, this author extracted all Global South jurisdictions (Brazil and India) and the top three Global North jurisdictions (U.S., UK, and Germany) excluding Japan. Due to the importance of EU regulation to Germany (and until recently the UK), the study also includes relevant EU developments.

[14] For an account of mandatory CSR initiatives, see Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences,* 23 U. PA. J. BUS. L. 429, 439 (2021).

[15] *See infra* Annex I, Table 1.

[16] For earlier exchanges on mandatory disclosures, see John C. Coffee Jr, *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 734 (1984); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investor*, 70 VA. L. REV. 669, 682–83 (1984).

[17] *See generally*, *infra* note 107, the EU CSRD, *infra* note 36 (Brazil's CVM Resolution 59), and *infra* note 104.

[18] For an analysis of the impacts of mandatory disclosure on corporate governance, see Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62L & CONTEMP. PROBS. 113, 118 (1999) (noting that uniform reporting requirements may also provide effective means to enforce management duties and support informed voting decisions). Although mandatory disclosures have been associated with advantages, there is criticism against the effectiveness of disclosure-based strategies.Katharina Pistor, *The Myth of Green Capitalism*, PROJECT SYNDICATE, Sept. 2021, at 18, 16 ("governments and regulators have once again succumbed to the siren song of market-friendly mechanisms. The new consensus focuses on financial disclosure because that path promises change without having to deliver it."); Chistopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L. J. 1217, 1253 (2022).

adopted by the private sector,[19] the last five years have seen unprecedented growth in regulatory disclosure frameworks, particularly focusing on climate and sustainability issues. A new paradigm has flourished for sustainability disclosures in a shift from Cadbury's comply-or-explain to *comply or be penalized* under state-enforced legal rules. This Section analyzes key developments in Brazil, the EU, Germany, India, the UK, and the U.S. and assesses the role of regulators and investors in the green turn of reporting standards.

A. Brazil

The Brazilian Securities Commission (CVM), created by Law 6,385 of 1976, is responsible for supervising publicly traded corporations and regulating capital markets. Although some have criticized the CVM for failing to comply with standards set by international organizations,[20] others have praised its efforts to improve transparency and insert sustainability concerns in a political context marked by agribusiness opposition to the agenda.[21] For a long time, ESG reporting – and environment-related disclosures, in particular – relied on investor-led practices and private ordering in Brazil.[22] However, the role of the CVM has evolved significantly during the past couple of years, with a more active and receptive posture by the regulator towards sustainability reporting.

In 2009, the CVM introduced the Reference Form – a mandatory annual report for publicly traded companies – whose rules originally included environment-related disclosures to the extent that they corresponded to "effects of State regulation over the activities of the issuer," such as environmental policies and the costs incurred to comply with existing rules.[23] Five years later, the CVM proposed a new set of rules to update the existing framework. The initial draft took one step further in adding disclosures relating to environmental risks and policies. However, the guidelines instructed issuers to indicate whether they disclosed social and environmental information and other details on its

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[19] WHO CARES WINS, *supra* note 3, at iv ("[r]egulatory frameworks should require a minimum degree of disclosure and accountability, as this will support financial analysis.").

[20] PORTUGAL GOUVÊA, *supra* note 1, at 472. *See also* Sheila C. Neder Cerezetti & Gabriela de Oliveira Junqueira, *Brazilian Corporate Sustainability Regulation in the Green Transition,* EX/ANTE – SPECIAL ISSUE 85 (2023) (noting that "CVM's new rules are considered insufficient to provide investors with trustworthy information").

[21] Luciana Dias, *Social Environmentalism and Corporate Capture in* CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 345, 354 (Beate Sjåfjell & Christopher M. Bruner eds., 2019).

[22] Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT'L L. 249, 299 (2019) (describing Brazil as a jurisdiction "primarily governed by private ordering through B3"); PORTUGAL GOUVÊA, *supra* note 1, at 473 (criticizing the "embryonic" character of CVM's regulation of social and environmental governance). For a comprehensive account of the Novo Mercado, *see* Henry Hansmann, Ronald J. Gilson & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the U.S., and the EU*, 63 STAN. L. REV. 475, 482 (2011); *see* Ricardo P. C. Leal, THE EMERGENCE OF A SERIOUS CONTENDER: CORPORATE GOVERNANCE IN BRAZIL, IN HANDBOOK ON INTERNATIONAL CORPORATE GOVERNANCE 317 (Christine A. Mallin ed., 2011).

[23] Comissão de Valores Imobiliários [CVM], Instrução No. 480 de 7 de Dezembro de 2009 [ICVM No. 480], Anexo 24, Items 7.5(b) and 10.5 (Braz.). Item 10.5 also imposed an obligation on corporate officers to comment on accounting standards relating to environmental costs ("corporate officers must indicate and comment on the critical accounting policies adopted by the issuer . . . particularly accounting estimates . . . which require subjective or complex judgments, such as: . . . environmental recovery costs"). In 2021, the term "environmental recovery costs" was replaced by "ESG factors."

elaboration and accessibility.[24] As such, the rule failed to establish a comply-or-explain standard for social and environmental disclosures, maintaining a comparatively outdated approach. In practice, the regulation of sustainability disclosures remained residual, with no comprehensive regulatory framework for Brazilian listed corporations. The reform proposal focused on the disclosure of operations to increase capital and related-party transactions – not on transparency issues – which may explain the scant progress on the subject.

During the public consultation launched by the CVM, several private entities and corporate governance institutes encouraged the strengthening of sustainability disclosures, most of which were unsuccessful. The São Paulo Stock Exchange, currently B3, proposed adopting a "comply-or-explain" standard instead of the "comply or not" rule proposed by the CVM. As noted by the Stock Exchange, disclosure of such information constitutes an "important clarification for investors" with "no substantial costs associated with [*their*] production and dissemination."[25] The CVM, on its part, discarded the suggestion by arguing that, despite the optional nature of disclosures, the information required by the draft resolution was enough for investors to assess a company's commitment to such matters.[26] Similarly, the pension fund for employees of Banco do Brasil, a major publicly-owned bank in Brazil, proposed to make environmental disclosures mandatory with a specific rule requiring the elaboration and disclosure of sustainability policies and commitments.[27] The CVM rejected the suggestions with no apparent reasoning.

At the time, the Brazilian Institute of Corporate Governance ("IBGC") and the Brazilian Global Reporting Initiative ("GRI") Network advocated for mandatory socio-environmental reports under GRI guidelines for stock issuers.[28] The Brazilian GRI Network submitted that such a rule could promote greater transparency – "so necessary for the proper functioning of the market" – and strengthen investor protection as "socio-environmental risks can represent a major loss of revenue for companies."[29] It further affirmed that environmental disclosures were already business practice among corporations, noting that "most Brazilian companies (at least 100% of the largest companies listed on the São Paulo Stock Exchange) already provide socio-environmental information at the request of other market players – both national and international."[30] At the time, the CVM deemed mandatory environmental reporting "unnecessary" due to the existing voluntary disclosure framework.[31] However, the Commission accepted the suggestion to incorporate socio-environmental risks into the list of risk factors disclosed by corporations, as endorsed by the IBGC and the Brazilian GRI Network.

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[24] CVM, Instrução No. 552 de 9 de Outubro de 2014, amending ICVM No. 480, Anexo 24, Items 4.1(j), 7.5(b) and 7.8 (Braz.).
[25] Manifestação da BM&FBOVESPA in CVM, Audiência Pública SDM No. 03/2013 (2013) [Audiência Pública SDM No. 03/2013] (Braz.).
[26] CVM, Relatório de Análise de Audiência Pública SDM No. 03/2013 (2013) [Relatório SDM No. 03/2013] (Braz.), at 29.
[27] Manifestação da Previ in Audiência Pública SDM No. 03/2013.
[28] Manifestação do Ponto Focal GRI in Audiência Pública SDM No. 03/2013, 1,2013 (Braz.); Manifestação do IBGC in Audiência Pública SDM No. 03/2013, 4–5, 2013 (Braz.).
[29] Manifestação do Ponto Focal GRI in Audiência Pública SDM No. 03/2013, 1,2013 (Braz.).
[30] *Id.*
[31] CVM, Relatório SDM No. 03/2013,14, 2013 (Braz.).

Interestingly, the national stock exchange, investor networks, and pension funds pressured the public sector for audacious and innovative requirements to boost corporate sustainability disclosures. Despite the progressive recommendations received in the consultation, the new rules entered into force with few changes compared to the initial draft submitted to public scrutiny. Three years later, in 2017, the CVM introduced a mandatory report for companies listed in Segment A concerning the Brazilian Corporate Governance Code ("Code").[32] The report included comply-or-explain disclosures relating to recommendations prescribed by the Code, such as board consideration of environmental impacts in business strategies, officer monitoring and disclosure of environmental repercussions of corporate activity, and the inclusion of non-financial aspects on officer performance evaluation.[33] Aside from these inclusions, the São Paulo Stock Exchange once again defended adopting a comply-or-explain rule for the disclosure of corporate environmental policies.[34] The Brazilian authority once more rejected this proposal with no explicit justification.

In 2021, the CVM took significant steps toward adopting a broader framework for environmental disclosures. Resolution 59, which sought to lower compliance costs and improve the information regime in the Brazilian securities market, was a turning point in terms of ESG disclosures for Brazilian companies.[35] Following a contentious public hearing with dozens of contributions, the norm introduced transparency standards relating to climate risks, adopted a comply-or-explain standard, and expanded the existing framework for environmental disclosures.[36] Aside from previously existing disclosures, the Resolution further added optional disclosures of material Sustainable Development Goals ("SDGs"), adoption of a materiality matrix, and observance of Task Force on Climate-Related Financial Disclosures ("TCFD") standards or other disclosure guidelines. As later highlighted by the Commission, "th[e] [*ESG*] agenda has been driving the development of specific regulations promoted by the CVM."[37]

The debates surrounding the drafting of Resolution 59 marked a shift from corporate niche to mainstream for ESG disclosures within the context of Brazil's capital markets regulation. Most participants in the public consultation supported the Commission's initiative to increase levels of transparency relating to ESG matters and

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[32] CVM, Instrução No. 586 de 8 de junho de 2017 [ICVM No. 586], Artigo 21, XIV, amending Instrução No. 480, 39 (Braz.).

[33] ICVM No. 586, Anexo 29-A, Items 9, 18 and 20, amending Instrução No. 480, 20,2017 (Braz.).

[34] Manifestação da BM&FBOVESPA in CVM, Audiência Pública SDM No. 10/2016, 8, 2017 (Braz.).

[35] CVM, Resolução No. 59 de 22 de dezembro de 2021, 2021 (Braz.). The reform proposal of CVM's disclosures framework with respect to ESG relied on the suggestions the Laboratório de Inovação Financeira of B3 (former BMF&BOVESPA) presented on a pre-consultation based on corporate and investor practice. *See* Proposição de Revisão da ICVM 480,https://labinovacaofinanceira.com/wp-content/uploads/2022/01/Proposicao_Revisao_ICVM_480-pre-consulta.pdf [https://perma.cc/8EP9-H4PT]. For a detailed description of Resolution 59, *see* generally MAYA GOLDFAJN,, *RESOLUÇÃO CVM 59: REGULAÇÃO DE INCENTIVO A PRÁTICAS ESG EM COMPANHIAS ABERTAS* (FGV Direito Rio, 2022) (Braz.).

[36] *See* CVM, Resolução No. 80 de 29 de Março de 2022, 115, 138, 142, 2022 (Braz.) (discussing, inter alia, disclosures of environmental obligations of the issuer (Item 1.6), existing channels to reach the board of directors with respect to ESG matters (Item 7.2), and, if any, ESG factors taken into account in management compensation (Item 8.1(c)). In March 2022, the CVM overhauled the current disclosure framework and replaced Instruction 480 for new Resolution 80. *Id.* at 41. Nonetheless, it did not add or modify the rules relating to environmental disclosures. *Id.* at 130, 189.

[37] CVM, Relatório de Gestão do Exercício de 2021, 39, 2021 (Braz.).

complement existing rules.[38] However, the contributions were far from unanimous. A handful of participants criticized the inclusion of ESG disclosures, describing the draft as "contrary to the notion of market development through minimum state intervention."[39] In particular, those opposing the disclosures argued that the numerous obligations imposed on corporations would increase compliance costs – thereby contradicting the original purpose of Resolution 59 – while remaining unable to provide reliable information for the market.[40]

Interestingly, resistance to the insertion of ESG disclosures also stemmed from a secretariat of the Ministry of Finance. Aside from the abovementioned arguments, the government bench interestingly articulated that ESG "has emerged internationally as an initiative of the private sector" as it is "the agent that morally and legally, with rare exceptions, can discriminate and select one option, available on the market, over another."[41] The Secretariat concluded by affirming that "precisely because it is a market solution, it is not up to the state (...) to interfere."[42] Although the reasoning is unequivocal in asserting that ESG factors emanate from, and by force of, the markets, it fails to notice that, in Brazil and beyond, states are increasingly stepping in – at least in the environmental arena – to codify market practices into legal rules. The initiative of the CVM may be inserted in a broader trend to *turn* corporate and securities regulation *green*, which is precisely the tone of the Commission's response to the secretariat, explaining that "there is not only a significant demand from investors for more information on the subject, (...) but there are also multiple initiatives developed in other jurisdictions to meet this demand."[43]

In light of increasing investor interest in ESG factors, by the time of the proposal of Regulation 59, the CVM had already expressed that "future more robust and prescriptive regulatory initiatives focused on sustainability issues should not be ruled out."[44] In 2023, the CVM instituted the Sustainable Finance Plan to better understand disclosure practices adopted in the market, harmonize Brazilian rules with international trends, and create uniform reporting standards.[45] As part of the initiatives of the

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[38] *See*, for instance, Manifestação de AMEC, ANBIMA, IBGC, LAB, LACLIMA, Mattos Filho Advogados & Previ in CVM, Audiência Pública SDM No. 09/2020, 2020, (Braz.).

[39] Manifestação de Chediak Advogados, Instituto Livre Mercado, Instituto Mises Brasil & Instituto Liberal in Audiência Pública No. 09/2020, 2020 (Braz.). The contributions of Instituto Livre Mercado, Instituto Mises Brasil, and Instituto Liberal also suggested the suppression of environmental and climate risks from the list of risk factors that must be disclosed by corporations arguing that the different categories carry "redundancies" and "[t]rying to separate these categories is costly and of no value to the investment decision." Manifestação de Instituto Livre Mercado, Instituto Mises Brasil & Instituto Liberal in Audiência Pública No. 09/2020, 5, 2020 (Braz.).

[40] Manifestação de Chediak Advogados in Audiência Pública No. 09/2020, 4, 2020 (Braz.) ("instead of reducing compliance costs by reducing mandatory disclosure to the minimum necessary, it [CVM] aims to expand them"); Parecer SEI No. 3465/2021/ME, § 8, 2021 (Braz.) ("[i]n the opposite direction to reducing the regulatory burden, the draft suggests implementing a compulsory requirement for information relating to social, environmental and corporate governance (ESG) aspects").

[41] Parecer SEI No. 3465/2021/ME, §11, 2021 (Braz.).

[42] *Id.* § 10.

[43] CVM, Relatório de Análise de Audiência Pública SDM No. 09/20 (2020),11–12, Septembro de 2020 (Braz.).

[44] CVM, Edital de Audiência Pública SDM No. 09/20 (2020),10, Septembro de 2020 (Braz.).

[45] *See* Portaria CVM/PTE/Nº 10 de 23 de janeiro de 2023, Diário Oficial da União [D.O.U.] de 24.1.2023 (Braz.).

Sustainable Finance Plan, the CVM approved a new regulation concerning environmental disclosures in October 2023, which establishes voluntary sustainability disclosures based on ISSB standards set to become mandatory by 2026.[46] With this rule, Brazil was hailed as the first country to adopt "global ESG reporting rules."[47] For one, Finance Minister Fernando Haddad praised it as a "regulatory milestone [*that*] puts our country at the forefront of what is most modern in the world."[48] ISSB Chair Emmanuel Faber similarly commended the initiative for "setting out a clear roadmap towards mandatory adoption."[49]

Over the years, private forces have pressured regulators for a further reaching regulatory framework in Brazil. However, it appears that Brazilian corporate sustainability disclosures are keeping up with pressures from investors. Perhaps this recent rulemaking movement represents a delayed response to long-standing demands from investors, which have continuously pressured the agency for more robust incorporation of environmental concerns. Brazil has seen a rise in state-sponsored sustainability and environmental requirements in corporate law since 2021 – primarily due to CVM initiatives.

B. Germany

German sustainability disclosures have evolved according to the requirements set at the EU level. With a new regulatory framework stemming from the EU, Germany should announce novel legislation to transpose the requirements to national law soon. Germany's capital markets authority, the Federal Financial Supervisory Authority ("BaFin"), has also exercised its regulatory mandate in accordance with EU standards. As the EU has been a determinant player in shaping Germany's corporate governance and sustainability regulation,[50] this Section will address relevant developments (i) at the EU level and (ii) in Germany.

i. EU level

The EU has been praised globally as a corporate sustainability leader. The initial EU regime of corporate financial disclosures did not encompass sustainability reporting requirements.[51] Concerns about the inclusion of environmental issues in the accounts of enterprises were first addressed in 1992 by a Commission proposal for a resolution

[46] CVM, Resolução No. 193 de 24 de Outubro 2023, 3 (Braz.) (citing IOSCO's recommendations and the ecologic agenda jointly instituted by the Ministry of Finance and the CVM).
[47] Michael Kapoor, *Brazil Becomes First Country to Adopt Global ESG Reporting Rules*, BLOOMBERG LAW (Oct. 20, 2023, 10:20 AM MST), https://news.bloomberglaw.com/esg/brazil-becomes-first-country-to-adopt-global-esg-reporting-rules [https://perma.cc/THP3-ZAC9].
[48] *Ministério da Fazenda e CVM juntos no desenvolvimento das finanças sustentáveis no país*, GOV. BR (Oct. 20, 2023, 12:54 PM), https://www.gov.br/cvm/pt-br/assuntos/noticias/ministerio-da-fazenda-e-cvm-juntos-no-desenvolvimento-das-financas-sustentaveis-no-pais [https://perma.cc/4CZB-SW85].
[49] *Brazil adopts ISSB global baseline, as IFRS Foundation Trustees meet in Latin America,* INTERNATIONAL FINANCIAL REPORTING STANDARDS (Oct. 20, 2023), https://www.ifrs.org/news-and-events/news/2023/10/brazil-adopts-issb-global-baseline/ [https://perma.cc/465V-S443].
[50] Prior to Brexit, EU legislation also influenced UK norms on corporate disclosures, which will be addressed in this Section as well.
[51] *See* Fourth Council Directive 78/660/EEC of 25 July 1978, 1978 O.J. (L 222) 21 (first establishing reporting requirements) (later repealed by the 2013 EU Accounting Directive); *see also* Seventh Council Directive 83/349/EEC of 13 June 1983, 1983 O.J. (L 193) 26 (later repealed by the 2013 EU Accounting Directive).

concerning sustainable development.[52] At the time, the Commission requested a report on sustainability disclosures by the EU's Accounting Advisory Forum, which concluded that environment-related information should solely be disclosed "to the extent that they are material to the financial performance or financial position of the undertaking."[53]

Until the 2000s, EU initiatives to address corporate governance and sustainability mainly consisted of soft law standards that set a "voluntarist conception."[54] In 1999, in light of "demands of investors and consumers" for sustainability-related disclosures, the Commission issued a communication recommending the issuance of further guidance on the subject by the EU.[55] Two years later, in response to several calls throughout the years, the EU officially recommended the inclusion of disclosures concerning environmental expenditures, liabilities, risks, and related assets that may affect the financial position and results of the company.[56] However, such disclosures remained at the company's discretion.

The position of the EU on corporate sustainability has experienced a perceptible shift from its first pronouncements to more recent resolutions and directives. On several occasions at the beginning of the 2000s, the EU reaffirmed "the voluntary, transparent and credible nature of CSR activities,"[57] representing "neither a substitute for appropriate regulation in relevant fields nor a covert approach to introducing such legislation."[58] The European Multistakeholder Forum, an attempt to promote initiatives on CSR at the EU level, likewise attributed a merely supporting role to governments and public

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[52] *Commission Proposal for a Resolution of the Council on a Community programme of policy and action in relation to the environment and sustainable development,* at 72, COM (92) 23 final Vol. I (Mar. 27, 1992); *Towards sustainability. A European Community programme of policy and action in relation to the environment and sustainable development*, at 72, COM (92) 23 final Vol. II (Mar. 27, 1992)) (listing subsequently the issues mentioned).

[53] *See* Appendix D – The Accounting Advisory Forum's 'Environmental Issues in Financial Accounting' (1995) of Kathryn Jones, *Study on Environmental Reporting by Companies*, Office for Official Publications of the European Communities (2000) at 155.

[54] ANDREW JOHNSTON, EC REGULATION OF CORPORATE GOVERNANCE 356 (2009).

[55] *Communication from the Commission to the European Parliament and the Council Single Market and Environment*, at 13–14, COM (1999) 263 final (June 8, 1999).

[56] *Commission Recommendation of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies*, annex, 2001 O.J. (L 156) 44, 36; Presidency Conclusions, Lisbon European Council (Mar. 24, 2000) (proving that at least since 2000, the EU has been calling on companies "sense of social responsibility," including towards sustainable development).

[57] *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 8, COM (2002) 347 final (July 2, 2002). *See also*, *Green paper - Promoting a European Framework for Corporate Social Responsibility*, at 4, COM (2001) 366 final (July 18, 2001) ("Corporate social responsibility is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment."); Council Resolution on the Follow-Up to the Green Paper on Corporate Social Responsibility, 2002 O.J. (C 86). For statements after the ESG movement, *see Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, COM (2006) 136 final (Mar. 22, 2006); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region*s *a Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 25, 2011).

[58] European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: A New Partnership, 2007 O.J. (C 301E) 45, 49.

authorities.[59] Later, the EU revisited the organization's stance on corporate sustainability by spelling out that "business cannot take over public authorities' responsibility for promoting, implementing and monitoring social and environmental standards." [60] Moreover, it endorsed a new conception of CSR, which ended the "dichotomy between voluntary and compulsory approaches."[61]

In this context, the 2013 EU Accounting Directive ("Accounting Directive") introduced disclosures of environment-related matters in the management report as long as they represented "non-financial key performance indicators relevant to the particular business."[62] The Accounting Directive was amended one year later by the NFRD, which imposed disclosures of non-financial statements for large public-interest entities (i.e., listed companies, large credit, and insurance institutions) with over 500 employees; these encompass a description of the business model, policies and due diligence, principal risks, and non-financial performance indicators relating to environmental matters.[63] Notably, the NFRD failed to include specific climate-related disclosures. However, the NFRD represents the first significant sustainability disclosure imposed by the EU, although admittedly narrow in scope. A few years later, the rule was transposed to the German Commercial Code and the UK Companies Act.[64]

More recently, the EU launched a public consultation in which they sought to review the NFRD. On that occasion, several institutional investors, banks, stock exchanges, scholars, and consulting firms expressed their interest in adding other categories of non-financial disclosures to the existing rules. [65] 71% of respondents expressed concerns about the comparability of disclosures. [66] Large companies demonstrated high levels of support for expanding reporting requirements, while limited liability companies were the most resistant.[67] Trade associations and some companies generally expressed opposition to extending the disclosures to medium and small companies.[68]

Following the consultation, the EU approved the Corporate Sustainable Reporting Directive ("CSRD"), which replaces the NFRD by imposing broader, climate-focused disclosure requirements consistent with suggestions emanating from the market and

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[59] European Multistakeholder Forum on Corporate Social Responsibility*: Final Results and Recommendations*, at 14 (June 29, 2004), https://philea.issuelab.org/resource/corporate-social-responsibility-final-results-and-recommendations.html; *See* Olivier De Schutter, *Corporate Social Responsibility European Style*, 14 EUR. L. J. 203, 215 (2008); *See also* JOHNSTON, *supra* note 54, at 357–58.
[60] European Parliament Resolution of 6 February 2013 on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth, 2016 O.J. (C 24) 28.
[61] *Id.* at 29.
[62] European Parliament Directive 2013/34/EU, 2013 O.J. (L 182) 19, 38.
[63] European Parliament and Council Directive 2014/95/EU, 2014 O.J. (L 330) 1, 4.
[64] *See infra* Sections III.B.ii, D.
[65] See *supra* Section II.A.
[66] Summary Report of the Public Consultation on the Review of the Non-Financial Reporting Directive 20 February 2020 - 11 June 2020, at 3 (2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:Ares(2020)3997889 [https://perma.cc/R6RG-KHGK].
[67] *Id.* at 4.
[68] *Id.* at 28.

expanding the companies within its scope of application.[69] The CSRD requires, *inter alia*, disclosures of sustainability matters related to the entity's business model, risk management strategies, sustainability targets and progress, the role played by administrative management, supervisory boards in climate management, supply chain due diligence, sustainability policies, and relevant sustainability indicators. While the obligations initially apply to large undertakings and listed companies in EU-regulated markets, they are set to be gradually implemented – with some level of resistance – to medium and small companies.[70]

ii. National level

Germany has long been diagnosed as a stakeholder-oriented jurisdiction in comparative corporate law literature, a notion remarkably illustrated by its archetypal two-tier codetermined board.[71] Some have indicated that the wide inclusion of stakeholders – particularly employees – in the German corporate structure possibly makes it fit for innovations towards the promotion of sustainability.[72] At a first glance, the German welfare capitalism model might seem attractive for pioneering corporate sustainability *implants*. However, such reforms were met with significant levels of resistance, particularly from industry associations, certain companies, and professional bodies.

Much of the German framework on sustainable corporations and financial markets was shaped by initiatives stemming from the EU, particularly in terms of corporate disclosures. EU-mandated disclosures were transposed to national law through amendments to the Commercial Code. Following the NFRD, the German Commercial Code was amended in 2017 to include mandatory non-financial statements aimed at complementing the management report.[73] The non-financial report – which is subject to auditing by the supervisory board –[74] must refer to environmental, employee-related, and

[69] Directive 2022/2464, of the European Parliament and of the Council of 14 December 2022, O.J. (L 322), 15. Recently, the EU established the ESRS unified framework for disclosures (Commission Delegated Regulation 2023/2772, of July 31, 2023, Supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards O.J. (L) 22 (EU).
[70] More recently, the EU delayed the implementation for specific sectors – such as oil, gas, and mining – and non-EU companies (European Council Press Release 99/24, Council and Parliament Agree to Delay Sustainability Reporting for Certain Sectors and Third-Country Companies by Two Years (Feb. 14, 2024)).
[71] *See* Klaus J. Hopt, *The German Two Tier Board: Experience, Theories, Reforms*, in COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 227 (Klaus J. Hopt, Hideki Kanda et al., eds., 1998) (explaining the roots of codetermination in Germany); Wilhelm Haarmann and Clemens Philipp Schindler, *Germany*, in THE EUROPEAN COMPANY 237, 253 (Dirk Van Gerven & Paul Storm, eds., 2006) (explaining employee participation in German companies).
[72] Andreas Rühmkorf, *Stakeholder Value Versus Corporate Sustainability*, in CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 232, 238 (Beate Sjåfjell & Christopher M. Bruner, eds., 2019) (arguing that employee representation in the supervisory board, with long-term interests, may foster the inclusion of concerns with sustainable development within the company); Konstantin Bottenberg, Anja Tuschke, & Miriam Flickingerf, *Corporate Governance Between Shareholder and Stakeholder Orientation: Lessons from Germany*, 26 J. MGMT. INQUIRY 165 (2017).
[73] Handelsgesetzbuch [HGB], §§ 289b and 315(b) (Ger.) as amended by CSR-Richtlinie-Umsetzungsgesetz (CSR-RUG), Apr. 11, 2017, BGBL. I 2017 at 802 (Ger.) For a commentary, *see* generally Dirk Uwer & Michael Schramm, *The Transposition of the CSR Directive into German Commercial Law*, 1 P.A. (Persona e Amministrazione) 197 (2018).
[74] Aktiengesetz [AktG], § 171 (Ger.).

social matters, including respect for human rights and combat to corruption and bribery.[75] It should also include and explain, as long as they are pertinent, likely future developments and material opportunities and risks relating to the environment.[76]

The implementation of the NFRD was highly controversial in defining the scope of the mandatory non-financial disclosures. Because major German companies did not operate in capital markets, interest groups disputed whether or not to extend the duty beyond the requirements set forth by the NFRD.[77] Most public contributions endorsed a one-to-one transposition of EU rules.[78] Legislators ultimately opted to maintain the initial criteria of application and refused to extend the non-financial report to non-listed or medium-sized entities due to the "burdens" represented by mandatory reporting.[79]

The decision was criticized for leaving out important companies with global supply chains.[80] While Germany could have possibly seized this opportunity to take the lead as the avant-garde of Europe's corporate sustainability, it ended up adopting a tick-the-box approach regarding EU's prescriptions. Others have argued that, in such instances, ticking the box is not necessarily bad, as solo efforts without coordination at a European level might lead to gold plating.[81] Interestingly, however, the German CSR Amendments slightly modified EU's NFRD in terms of environmental disclosures. The NFRD initially provided simply for disclosures of "environmental matters," while the version implemented by Germany lays down an exemplificative list that includes "GHG emissions, water consumption, air pollution, use of renewable or non-renewable energy, and protection of biological diversity."[82]

The controversies surrounding the CSR Amendments to the German Commercial Code are not unique to the German context. All jurisdictions presented, in varying degrees and at different moments, some kind of resistance to initiatives regarding sustainability reporting. Aside from current Commercial Code provisions, German companies must also

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[75] Handelsgesetzbuch [HGB], §§ 289(c) and 315(c) (Ger.).
[76] Handelsgesetzbuch [HGB], § 315(3) (Ger.).
[77] Rühmkorf, *supra* note 74, at 242. For criticism against the bill, *see* Statement from the German Housing Industry (GdW) of April 11, 2016. For support of non-extension to medium-sized corporations, *see* Statement from the Headquarters for GmbH of April 11, 2016 (Ger.), and Statement from the Federal Bar Association of April 14, 2016 (Ger.). But for a pro-extension argument, *see* Statement from the Oxford Committee for Famine Relief (Oxfam) of April 15, 2016, and Statement from the Network for Corporate Accountability (CorA) of April 25, 2016 (Ger.).
[78] Out of the 16 public contributions in the Bundesgerichtshof website (https://www.bundesgerichtshof.de/DE/Bibliothek/GesMat/WP18/C/CSR-Rl-UmsG.html?nn=10772256) [https://perma.cc/KL57-S849], 14 supported a strict transposition of the NFRD to German law – 7 from professional bodies, 6 from trade associations, 1 from a consulting firm. Only 2 supported the adoption of a broader set of rules – an NGO and an institute for consumer protection.
[79] Uwer & Shramm, *supra* note 75, at 200 (noting that the limited scope would "spare" such companies of "the additional administrative and financial burdens" incurred to comply with mandatory reporting.").
[80] Rühmkorf, *supra* note 74, at 242 (noting that "[t]he consequence of the exact implementation of the Directive into German law is that, for example, well-known companies such as the retailer Aldi or the food processing company Dr. Oetker do not have to issue a nonfinancial statement.").
[81] Stellungnahme des BVI zum Zwischenbericht des Sustainable Finance-Beirats, Bedeutung der nachhaltigen Finanzwirtschaft für die große Transformation, April 30, 2020 (Ger.) ("Germany can only become a leader in the field of sustainable finance by playing a pioneering role in shaping developments at European level.").
[82] HGB, § 289(c). This inclusion may be traced back to the suggestions by environmental NGOs during the public consultation period (*see*, e.g., Bund für Umwelt und Naturschutz Deutschland, Kommentar zum CSR-Richtlinie-Umsetzungsgesetz (Apr. 11, 2016) (Ger.)).

comply with reporting requirements set forth by the Taxonomy Regulation, which mandates disclosures of turnover and capital and operational expenditures deemed "environmentally sustainable."[83] With EU's new rules on sustainability disclosures, legislators now discuss amendments to the German Commercial Code which will broaden the existing disclosure framework in terms of both information covered and companies bound by the requirements.

BaFin – although focused on financial regulation – has also played a role in fostering the adoption of sustainability standards in German corporate law. In 2019, the agency published non-binding guidelines on sustainability risks, in which it sets the tone on regulatory expectations and recommends best practices for supervised entities.[84] The agency adopted a broad principle-based approach which both reinforces EU initiatives and preserves a certain degree of flexibility to accommodate new regulations. In an article published as part of a collection on Sustainability promoted by BaFin, Silke Stremlau, Chairwoman of the Sustainable Finance Advisory Board of Germany, defended a more active posture from legislators and supervisors. She attributed the climate emergence to a "systemic crisis" that "sees the economy as the only structuring axis of society."[85] Her statement emphasizes that such a scenario "requires a fundamental change, not 'business as usual' under the cover of sustainability or the UN's colourful SDG icons."[86]

C. India

India has been hailed as an example of heterodox stakeholderism when it began incorporating broad stakeholder concerns into national legislation.[87] The 2009 CSR Voluntary Guidelines of the Ministry of Corporate Affairs ("MCA") marked the first government-led initiative to promote sustainability disclosures in India.[88] The document laid down the core elements of CSR policies—among which was respect for the environment—and recommended the dissemination of information on such policies to all stakeholders.[89]

Two years later, an updated version of the original document was published in the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business ("NVGs"), which urged "businesses to embrace the 'triple bottom-line' approach whereby its financial performance can be harmonized with the expectations of society, the environment and the many stakeholders it interfaces with in a sustainable manner."[90] Based on the NVGs, the Securities and Exchange Board of India ("SEBI") introduced the Business Responsibility Report ("BRR")—the first framework for

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[83] Regulation 2020/852, of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation 2019/2088, 2020 O.J. (L 98) 13, 17 (EU).
[84] Bundesanstalt für Finanzdienstleistungsaufsicht [BaFin], *Guidance Notice on Dealing with Sustainability Risks*, 9 (Issued on Jan. 15, 2020) (Ger.).
[85] Silke Stremlau, *Sustainability as an Opportunity*, 2 BAFIN PERSPECTIVES: SUSTAINABILITY 49, 52 (2019).
[86] *Id.* at 52–3.
[87] Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE U. L. REV. 535, 553 (2024).
[88] Ministry of Corporate Affairs, *Corporate Social Responsibility Voluntary Guidelines* 6, (Issued on Dec. 14, 2009) (India).
[89] *Id.* at 12–13.
[90] Ministry of Corporate Affairs, *National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business* 6, (Issued in July 2011) (India).

corporate sustainable disclosures in India—stressing that "businesses should not only be responsible but they should also be seen as socially, economically and environmentally responsible."[91]

Following the formulation of sustainability disclosures as part of a voluntary framework, the SEBI made the BRR mandatory in 2012 for India's top 100 listed companies according to market capitalization.[92] In a 2011 statement, SEBI explained that "it has been decided to mandate listed entities to submit Business Responsibility Reports" in order to "assess fulfillment of the environmental, social and governance responsibilities of listed entities."[93] The Circular introducing the mandatory report further noted that companies—as "critical components of the social system"—are "accountable not merely to their shareholders from a revenue and profitability perspective but also to the larger society which is also its stakeholder."[94] By then, SEBI made it clear that "responsible business practices in the interest of the social set-up and the environment are as vital as their financial and operational performance."[95] Subsequently, SEBI expanded the mandatory disclosure requirements for the top 500 and 1,000 listed companies by market capitalization, respectively, in 2015 and 2019.[96]

Comparatively, India is a pioneer in terms of compulsory sustainability disclosures. In 2012, before all other jurisdictions in this study, the country imposed mandatory disclosures concerning strategies and initiatives to address climate change and global warming, assessment of potential environmental risks, waste management, and energy efficiency to its largest publicly traded companies. The regulatory evolution in India is also distinguishable from other jurisdictions: while Germany, the UK, and Brazil moved first to a comply-or-explain model, India went straight from a voluntary framework to mandatory reports within a year. Interestingly, while the efforts of the EU are praised for breaking new ground, much less is said about the Indian model of mandatory corporate disclosures.

Due to the important national and international developments that took place after the NVGs – such as the 2013 Companies Act and the Paris Agreement – the MCA introduced a revised version of the document in 2019, the National Guidelines on Responsible Business Conduct ("NGRBC").[97] At the same time, the MCA set a working group to revise and update the BRR. As a result, the SEBI replaced the BRR with the Business Responsibility and Sustainability Report ("BRSR") in 2021, whose terminology "better reflect[s] the intent and scope of reporting requirement."[98]

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[91] *Id.* at 34.

[92] Securities and Exchange Board of India, Business Responsibility Reports, CIR/CFD/DIL/8/2012 1 (Issued on Aug. 13, 2012).

[93] Securities and Exchange Board of India, SEBI Board Meeting, Press Release 145/2011 (Issued on Nov. 24, 2011).

[94] Securities and Exchange Board of India, 10 SEBI Bulletin 901, 954 (Issued on Oct. 5, 2012).

[95] Business Responsibilities Reports, *supra* note 94, at 1.

[96] SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 34; SEBI (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2019, Reg. 34.

[97] Ministry of Corporate Affairs, National Guidelines on Responsible Business Conduct (Issued on March 15, 2019) (India).

[98] Ministry of Corporate Affairs, Report of the Committee on Business Responsibility Reporting, at 30 (Issued on May 8, 2020) (India).

The BRSR is an updated and comprehensive framework for mandatory reporting in India. The preliminary drafts subject to public consultation resemble an extended version of the BRR. However, the BSRS underwent substantial changes after discussions with corporations, stakeholders, and international organizations. During the public consultation, commentators suggested "more granular" disclosures regarding "resource usage, Green-house gases (GHG) and air emissions, [*and*] waste generation."[99] On the other hand, "[f]ew corporates" had the view that internationally set disclosure standards, including those already in the annual report, "should not be sought again."[100]

The final version of the BRSR contained a more robust and granular framework of sustainability disclosures, such as Scope 1 and 2 GHG emissions, energy sources, fuel consumption, extended details on other pollutant emissions, and waste generation description. As noted by the Chairman of SEBI, "[i]nvestors are demanding more and more disclosures on ESG aspects and with the new BRSR, we are fully geared up to provide such disclosures."[101] More recently, India extended core reporting requirements of the BRSR – including Scope 1 and 2 emissions in the supply chain, renewable energy consumption, and waste and resources management – for the value chain of the top 250 listed companies by market capitalization.[102]

D. UK

The UK has a long tradition as a shareholder value-oriented jurisdiction relying strongly on private ordering mechanisms of corporate governance. The 2006 Companies Act has been described as a central mechanism of the *juridification* of corporate governance with "a greater role" of the state in "the rule-making (Code-making) process and disclosure regime."[103] Since its beginnings, the Companies Act mandates the inclusion of a business review in directors' report. For quoted companies, disclosed information included environmental matters, employees, and social and community issues to the extent they are relevant to understanding its "development, performance or position."[104] In order to complement the existing framework, the 2013 Regulations introduced a strategic report of directors, which seeks to provide a tool for evaluating directors' duty to promote the success of the company under Section 172.[105] The requirements, initially required as part of the directors' report, were transposed to the strategic report, including the disclosures on environmental matters.

The UK stands out as a leading jurisdiction in the establishment of mandatory climate related disclosures. Since 2013, listed companies must disclose Scope 1 and 2 GHG emissions in directors' reports. The disclosures arise from Section 85 of the 2008 Climate Change Act, which called for public regulation of GHG emissions disclosures

[99] Memorandum to the Securities and Exchange Board of India, Business Responsibility and Sustainability Reporting by listed entities § 3.3 (2021).
[100] *Id.*
[101] Ajay Tyagi, SEBI (CCI's Annual Capital Market Conference 2021) Beyond India: Accelerating Growth through Capital Markets (July 28, 2021).
[102] Securities and Exchange Board of India, BRSR Core – Framework for assurance and ESG disclosures for value chain, SEBI/HO/CFD/CFD-SEC-2/P/CIR/2023/122, at 6 (Issued on July 12, 2023).
[103] Chris Riley, *The Juridification of Corporate Governance, in* THE REFORM OF UNITED KINGDOM COMPANY LAW 192 (John de Lacy ed., 2002).
[104] Companies Act 2006 as enacted, § 417(5)(b) (UK)
[105] Financial Reporting Council, Guidance on the Strategic Report (June 16, 2022) (UK)..

until 2012. In 2011, the Department for Environment, Food and Rural Affairs ("DEFRA") sought public comment on whether and how companies should report GHG emissions. While a voluntary alternative was available, most respondents expressed their preference for the introduction of mandatory reporting for all "large companies"[106] in the UK – the furthest-reaching option suggested by DEFRA, which was expected to cover between 17,000 and 31,000 companies at the time.[107]

While the high number of individual respondents certainly influenced the results, most companies supported some form of regulation instead of voluntary disclosures.[108] In contrast, the majority of trade associations favored private ordering over any kind of regulatory initiative.[109] In spite of public support, the DEFRA set aside mandatory reporting for all large companies due to "the level of uncertainty around the expected costs and benefits."[110] The final version of the 2013 Regulations ended up sticking to mandatory reporting for listed companies, covering an estimated 1,100 companies at that point.[111] Interestingly, mandatory GHG disclosures in the UK were only preceded by India's BRR disclosures set in 2012. However, UK climate reporting requirements were initially broader than India's concerning scope of application, with the latter's gradual expansion over the years.

In 2016, the UK transposed EU's NFRD to national law. As similar requirements already existed for UK quoted companies, the NFRD did not bring about substantial changes in the reporting requirements.[112] The scope of mandatory disclosures in the UK was in fact broader than that provided by the EU, encompassing not only large listed companies but all quoted companies. Prior to the transpositon, the consultation proposed to either transpose the NFRD in addition to the current framework or as a deregulatory law, restricting the existing obligations.[113] Only 3 out of 28 respondents favored the latter, while the majority was "critical" of that option as "the loss of transparency for smaller listed companies would weaken the UK's position as a leader in corporate reporting."[114] In contrast with Germany, which also transposed EU requirements in the same period, the UK's sustainability disclosures initiatives may be considered more comprehensive and

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[106] As defined by the Companies Act 2006, §§ 382–383, 465–466.
[107] Dep't for Env't, Food, and Rural Aff.s, Measuring and Reporting of Greenhouse Gas Emissions by UK Companies (June 2012) (UK), at 11–12 ("86% (1730) of respondents supported the mandatory inclusion of some scope 3 emissions. However, this figure is heavily determined by the fact that more than 1600 individuals, prompted by the Christian Aid campaign supported this option. Of other respondents (companies, investors, trade associations and other organisations), only 20% supported the inclusion of at least some scope 3 emissions in regulation.").
[108] *Id.* at 5.
[109] *Id.*
[110] *Id.* at 8; Explanatory Memorandum to The Companies Act 2006 (Strategic Report and Directors' Report Regulations 2013) (2013 No. 1970) § 8.11 (UK).
[111] DEP'T FOR ENV'T, FOOD AND RURAL AFFS., MEASURING AND REPORTING OF GREENHOUSE GAS EMISSIONS BY UK COMPANIES: A CONSULTATION ON OPTIONS, 2011, at 12 (UK).
[112] *But see* DEP'T FOR BUS. INNOVATION & SKILLS, THE NON-FIN. REPORTING DIRECTIVE, A CALL FOR VIEWS ON EFFECTIVE REPORTING ALONGSIDE PROPOSALS TO IMPLEMENT EU REQUIREMENTS, 2016, at 14–16 (U.K.).
[113] The Companies Partnerships and Groups Regulations 2016, No. 1245, Explanatory Notes ¶1–6 (U.K.); DEP'T FOR BUS. INNOVATION & SKILLS, THE NON-FIN. REPORTING DIRECTIVE, THE GOVERNMENT RESPONSE TO THE CONSULTATION ON IMPLEMENTATION OF THE DIRECTIVE, 2016, at 5–6 (UK).
[114] DEP'T FOR BUS. INNOVATION & SKILLS, THE NON-FIN. REPORTING DIRECTIVE, THE GOVERNMENT RESPONSE TO THE CONSULTATION ON IMPLEMENTATION OF THE DIRECTIVE, 2016, 6 (UK).

bolder. However, similarly to the debates in Germany, 11 respondents suggested expanding the scope of disclosure requirements to close companies, which was rejected by the UK government as a "greater reporting burden."[115]

In 2018, the UK expanded the existing disclosures with the introduction of a mandatory group-level energy and carbon report not only for quoted companies but also for large unquoted companies and limited liability partnerships.[116] Aside from Scope 1 and 2 emissions, the Streamlined Energy and Carbon Reporting framework includes transparency relating to energy consumption and efficiency, emissions intensity ratio, and methodology. The far-reaching scope of application is unprecedented from a comparative perspective. At least for now, all other jurisdictions analyzed limit disclosure requirements to publicly traded companies. On the other hand, the disclosures fail to cover Scope 3 emissions – which were recently adopted by EU's CSRD. In general, the consultation evidenced broad support for extending GHG reporting to limited liability partnerships (91%), but respondents were divided with respect to unquoted companies (52,9%).[117]

As of 2020, the Financial Conduct Authority ("FCA") established disclosures under TCFD standards for premium listed companies.[118] Later, it expanded the requirements for all listed companies in the UK.[119] More recently, the UK amended the non-financial disclosures of the strategic report to introduce a broader set of sustainability and climate-related reporting requirements, including risks, opportunities, business model, strategies, targets, and performance indicators.[120] The opinions expressed in the public consultation reflect "widespread support" from all sectors, including trade associations, professional bodies, and companies.[121] The new requirements are significantly broad and the climate disclosures framework of the UK remains a pioneer in the incorporation of sustainability disclosures from a comparative perspective.

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At least since the beginning of the 2000s, investors and civil society demand specific guidance from the SEC on climate disclosures.[122] Responding to such requests, in 2010,

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[115] *Id.*

[116] The Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018, SI 2018 No. 1155 (UK).

[117] DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, STREAMLINED ENERGY & CARBON REPORTING, GOVERNMENT RESPONSE, 2018 at 16, 21 (UK). Due to data unavailability, as personal information was removed from consultation responses made public, it was not possible to analyze the contributions of different sectors and categories of respondents.

[118] Proposals to Enhance Climate-Related Disclosures by Listed Issuers and Clarification of Existing Disclosure Obligations 2020, PS20/17 (UK).

[119] Enhancing Climate-Related Disclosures by Standard Listed Companies 2021, PS21/23 (UK).

[120] The Companies (Strategic Report) (Climate-Related Financial Disclosure) Regulations 2022, SI 2022 No. 31 (UK).

[121] DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, CONSULTATION RESPONSE: MANDATORY CLIMATE-RELATED FINANCIAL DISCLOSURES BY PUBLICLY QUOTED COMPANIES, LARGE PRIVATE COMPANIES, AND LLPS, 2021, at 18 (UK). Due to data unavailability, it was not possible to analyze the contributions of different sectors and categories of respondents.

[122] *See* Petition for Interpretative Guidance on Climate Risk Disclosure, Petition Rule 4-547B (Sept. 18, 2007); Comments on Rulemaking Petition: Request for Interpretive Guidance on Climate Risk Disclosure, SEC File No. 4-547; Free Enterprise Action Fund, Petition for Interpretative Guidance on Business Risk of

the SEC published a Climate Change Guidance on the applicability of existing disclosure requirements to climate change.[123] The Guidance outlines the ways in which climate change disclosures may be accommodated within the existing framework, such as the standard of materiality,[124] compliance costs linked to environmental regulation, and environmental litigation proceedings.

A few years later, the SEC once again addressed the possibility of expanding existing disclosure requirements to cover ESG aspects. In 2016, the agency launched a public comment to reform reporting requirements in Regulation S-K.[125] In spite of the several calls from investors, the Commission failed to promote any significant amendments in terms of environmental reporting.[126] The inertia of the SEC was criticized due to the insufficiency of private initiatives in tacking information asymmetries caused by the inconsistent disclosure practices among companies.[127] Acting Chair Lee condemned the "unsustainable silence" of the SEC, which ignored the "unprecedented and massive campaign to obtain voluntary climate-related disclosures from companies," and ultimately "failed to include, or even discuss whether to include, the crucial topic of climate risk."[128]

One year later, the SEC once again called for public input on climate-related disclosures.[129] In contrast with the first attempts to discuss the topic, the SEC faced growing pressure to implement ESG and sustainability disclosures from investors, asset managers, and civil society. Likewise, the literature echoed demands for action by the SEC in order to "standardize disclosure" making it "useful to investors, workers, consumers, communities within which the companies operate, and other stakeholders, as

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Global Warming Regulation, Petition Rule 4-549 (Oct. 22, 2007); U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-808, ENVIRONMENTAL DISCLOSURE: SEC SHOULD EXPLORE WAYS TO IMPROVE TRACKING AND TRANSPARENCY OF INFORMATION (2004) (previously, the Government Accountability Office already recommended the inclusion of climate-related disclosures within the SEC framework in 2004)

[123] Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 33-9106, Exchange Act Release No. 34-61469, 75 Fed. Reg. 82 (Feb. 8, 2010).

[124] The standard of materiality was set by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 439 (noting that a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote").

[125] Business and Financial Disclosure Required by Regulation S-K, Exchange Act Release No. 33-10064; 34-77599; File No. S7-06-16 (Apr. 13, 2016).

[126] Modernization of Regulation S-K Items 101, 103, and 105, Exchange Act Release Nos. 33-10825; 34-89670; File No. S7-11-19 (Aug. 26, 2020). For petitions from investors and asset managers, see Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure (May 14, 2020); Petition for Rulemaking and Subsequent Comments on Request for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure, File No. 4-730 (2018-2021).

[127] *See* Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEXAS L. REV. 1453 (criticizing the inertia of the SEC to address ESG disclosures); Ho, *supra* note 12, at 443 (noting the growing investor demand for climate disclosures).

[128] Allison Herren Lee, U.S. SEC. & EXCH. COMM'N, Regulation S-K and ESG Disclosures: An Unsustainable Silence (Aug. 26, 2020), https://www.sec.gov/newsroom/speeches-statements/lee-regulation-s-k-2020-08-26 [https://perma.cc/D6U4-A7J6].

[129] Allison Herren Lee, U.S. SEC. & EXCH. COMM'N, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), https://www.sec.gov/newsroom/speeches-statements/lee-climate-change-disclosures [https://perma.cc/X8YB-C2UK].

well as regulators who protect the public."[130] This context led to the proposal for the Enhancement and Standardization of Climate-Related Disclosures for Investors ("Proposal") of 2022.[131] The SEC sought to standardize climate disclosures in line with international standards, thereby including reporting of board oversight of climate risks, climate risks with potential material impacts, processes for risk identification and management, annual GHG emissions – encompassing Scope 3 disclosures – and emissions reduction targets.

The SEC received an unprecedented number of contributions, but they were far from unanimous. The contrasting reactions to the Proposal have led scholars to describe it as a "political firestorm" and a "a hot-button topic."[132] Although key asset managers, major corporations, pension funds, investor networks, NGOs, and proxy advisory firms manifested support to the initiative, the SEC's Proposal received significant backlash from chambers of commerce, trade associations, civil society, and politicians. The subject was equally contentious among scholars.[133] Not even the SEC reached a consensus on the Proposal, as illustrated by Commissioner Peirce's heavy opposition to what she described as a "hulking green structure" that is set to "cast a long shadow on investors, the economy, and this agency."[134]

This divide is not limited to SEC's Proposal. Over the past years, ESG factors – sustainability included – have become part of a highly polarized ideological battle in the U.S (and elsewhere, to a lesser extent).[135] In response to the emergence of a *green wave* in the financial system, the anti-ESG movement has sparked as a significant political motion deeply embedded in the Friedman doctrine. By the end of 2023, at least 18 states had enacted legislation seeking to restrict ESG investing.[136] States have usually enacted

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[130] *See* generally Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism*, ROOSEVELT INST.8-9 (2020); Cynthia A. Williams & Jill E. Fisch, Request for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure (Oct. 1, 2018), https://www.sec.gov/files/rules/petitions/2018/petn4-730.pdf [https://perma.cc/QLG5-8KQJ]; Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L. J. 923 (2019). For more recent accounts, see Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 UNIV. ILLINOIS L. REV. 277 (2022); Madison Condon, *Market Myopia's Climate Bubble*, 1 UTAH L. REV. 63 (2022).

[131] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87FR. 69 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, 249).

[132] Virginia Harper Ho, *Climate Disclosure Line-Drawing & Securities Regulation*, 56 U.C. DAVIS L. REV. 1875, 1877 (2023); George S. Georgiev, *The SEC's Climate Disclosure Proposal: Critiquing the Critics,* (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, 249).

[133] On the one hand, see George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 RUTGERS L. REC. 101 (2022); Letter from Jill E. Fisch, et al. to the U.S. Sec. Exch. Comm'n (June 6, 2022) (on file with the Social Science Research Network). *But see* Letter from Lawrence A. Cunningham et al. to the U.S. Sec. Exch. Comm'n (Apr. 25, 2022)) (on file with the Social Science Research Network); Stephen M. Bainbridge, The SEC's Misguided Climate Disclosure Rule Proposal, 41 BANKING & FIN. SERV. POL'Y REP. 1 (2022).

[134] Hester M. Peirce, U.S. SEC. & EXCH. COMM'N, We are NOT the Securities and Environment Commission – At Least Not Yet (Mar. 21, 2022), https://www.sec.gov/newsroom/speeches-statements/peirce-climate-disclosure-20220321 [https://perma.cc/TG3H-9GSN].

[135] *How ESG Became Part of America's Culture Wars*, THE ECONOMIST (June 21, 2023).

[136] States that restrict consideration of environmental criteria in investments by the public retirement system and/or public entities in January 2024: H.B. 1845, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); H.B. 1253, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); H.B. 3, 125th Leg., Reg. Sess. (Fla. 2023); S.B. 1405, 67th Leg., Reg. Sess. (Idaho 2023); H.B. 1008, 123rd Gen. Assemb., Reg. Sess. (Ind. 2023); H.B. 2100, 2023 Leg., Reg. Sess. (Kan. 2023); H.B. 236, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023); H.B. 228, 68th Leg.,

prohibitions on consideration of ESG factors in investment decisions involving publicly held assets and restrained investments in, and contracting with, companies that boycott or discriminate certain industries (e.g. fossil fuel and tobacco).[137] For one, Florida's recent anti-ESG legislation has been reported as a "new-standard bearer in America," with the furthest-reaching restrictions on state and local investment.[138] According to the rule, investment decisions must be based solely on "pecuniary factors," which expressly excludes "the furtherance of any social, political, or ideological interests."[139]

A strikingly different example is California's groundbreaking mandatory climate disclosure regime. Attracting much less controversy than the SEC's Climate Disclosures Proposal, the state passed the Climate-Related Financial Risk Act ("Climate Risk Act") and the Climate Corporate Data Accountability Act ("Climate Data Act") in 2023.[140] The novel legislation has drawn inspiration from the Greenhouse Gas Protocol and TFCD disclosure standards. While the Climate Risk Act requires disclosure of biennial climate-related financial risk reports, the Climate Data Act imposes compulsory annual reporting subject to independent third-party auditing of Scope 1, 2, and 3 emissions. Both apply to any "business entity doing business" in California with total yearly revenue over USD 500,000,000 and 1,000,000,000, respectively. This climate-disclosure framework, which goes beyond SEC's rules, consubstantiates California's long-lasting stance as a sustainability leader in the U.S., standing out amidst a clear pushback trend in state legislation.

Historically, sustainability reporting in the U.S. is marked by a strong prevalence of private ordering.[141] Even if highly polarized, the discussions concerning sustainability disclosures in the U.S. – defending its mandatory introduction or explicit limitation – are

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Reg. Sess. (Mont. 2023); H.B. 1267, 2023 Gen. Ct., Reg. Sess. (N.H. 2023); H.B. 750, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023); H.B. 1429, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); S.B. 0955, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.Con.R. 110, 2023 Leg., Reg. Sess. (La. 2023); S.B. 0096, 65th Leg., Gen. Sess. (Utah 2023); H.B. 2862, 86th Leg., Reg. Sess. (W. Va. 2023). . States that require public entities to divest from, or refrain from contracting with, companies that boycott or discriminate against certain sectors (such as fossil fuel companies) as of January 2024: S.B. 261, 2023 Leg., Reg. Sess. (Ala. 2023); H.B. 1307, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); H.B. 1845, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); S.B. 62, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); H.B. 190, 67th Leg., Reg. Sess. (Idaho 2023); H.B. 191, 67th Leg., Reg. Sess. (Idaho 2023); H.B. 1008, 123rd Gen. Assemb., Reg. Sess. (Ind. 2023); H.B. 2100, 2023 Leg., Reg. Sess. (Kan. 2023); S.B. 205, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023); H.Con.R. 70, 2023 Leg., Reg. Sess. (La. 2023); H.B. 356, 68th Leg., Reg. Sess. (Mont. 2023); H.B. 1469, 2023 Gen. Ct., Reg. Sess. (N.H. 2023); H.B. 1429, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); H.B. 2291, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); H.B. 2034, 59th Leg., Reg. Sess. (Okla. 2023); S.B. 2649, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); S.B. 13, 88th Leg., Reg. Sess. (Tex. 2023); S.B. 19, 88th Leg., Reg. Sess. (Tex. 2023); S.B. 833, 88th Leg., Reg. Sess. (Tex. 2023); S.B. 0097, 65th Leg., Gen. Sess. (Utah 2023); H.B. 0449, 65th Leg., Gen. Sess. (Utah 2023); H.B. 0281, 65th Leg., Gen. Sess. (Utah 2023); S.B. 262, 86th Leg., Reg. Sess. (W. Va. 2023); H.B. 0236, 67th Leg., Gen. Sess. (Wyo. 2023).

[137] For related works, see Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 801 (1993) (demonstrating that activism and social investment by public pension funds is limited by political influences and union pressure).

[138] Leah Malone & Emily B. Holland, *Florida Passes Farthest-Reaching Anti-ESG Law to Date*, HARV. L. SCH. F. ON CORP. GOVERNANCE (2023).

[139] 2023 Fla. Sess. Law Serv. Ch. 2023-28 (C.S.C.S.H.B. 3).

[140] CAL. HEALTH & SAFETY CODE § 38533 (West 2024); CAL. HEALTH & SAFETY CODE § 38532 (West 2024).

[141] Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT'L L. 249, 291 (explaining that "U.S. non-financial reporting practice continues to defer heavily to private ordering and private regulation").

increasingly mainstream in corporate and securities law. Notably, U.S. regulators have faced comparatively more resistance in advancing climate disclosures than other jurisdictions analyzed. In March 2024, the SEC published the final rule on climate-related disclosures introducing, inter alia, mandatory reporting requirements of material climate-related risks, mitigation and adaptation strategies, transition plans, management oversight of climate-related material risks, climate targets, and Scope 1 and 2 emissions.[142] Although the rule represents a compromised version of the initial proposal, it introduces significant regulatory changes to the existing disclosure framework in the US.

IV. OTHER RELEVANT LEGAL DEVELOPMENTS OF THE GREEN TURN

This Section addresses (A) the new supply chain due diligence requirements, particularly the EU Corporate Due Diligence Directive, the French Loi de Vigilance and the German Supply Chain Act, (B) the dissemination of green taxonomies around the world, with a focus on ongoing debates in the EU and Brazil, (C) fiduciary duties towards stakeholders, specifically the UK and Indian statutory provisions, and (D) specific SOE sustainability practices in Brazil and Germany.

A. Parent Company Environmental Due Diligence on The Rise

The growing number of jurisdictions implementing obligations related to human rights and environmental due diligence represents a key legal implant of standards developed within the framework of international corporate law. Although a handful of jurisdictions have had specific due diligence or disclosure requirements with scope limited to a set of topics for years – such as child labor – only recently was a comprehensive duty with specific liability mechanisms developed. While originally conceived with a focus on human rights violations, it also has important implications for corporate sustainability. Scholars have considered the due diligence obligation a key regulatory strategy for transitioning from a financial model of ESG to an entity-based model.[143] This feature of the green turn also reflects a broader trend of legal strategies seeking to address the regulatory gaps created by the rise of multinational companies.

The Loi de vigilance introduced by France represents a revolutionary development in corporate supply chain due diligence.[144] In 2017, France introduced the duty of vigilance for French publicly traded companies with at least 5,000 employees in French-based subsidiaries or 10,000 employees, including subsidiaries abroad. The preparatory works evidence that instituting legal mechanisms for the accountability of multinational corporations is rooted in the commotion generated after the Rana Plaza collapse in 2013.[145]

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[142] Press Release, Sec. Exch. Comm'n, The Enhancement and Standardization of Climate-Related Disclosures for Investors (Mar. 6, 2024), https://www.sec.gov/newsroom/press-releases/2024-31 [https://perma.cc/VEK4-DYXY].

[143] Iain MacNeil & Irene-Marié Esser, *From a Financial to an Entity Model of ESG*, 23 EUR. BUS. ORG. L. REV. 9, 32 (2022).

[144] *See* C. COM., Article L. 225-102-4 (Fr.).

[145] *See, e.g.,* Assemblée nationale, XIVe législature, Session ordinaire de 2014-2015, Première séance du lundi 30 mars 2015 (Fr.) ("[l]es échanges commerciaux mondiaux contribuent en effet au rayonnement et au développement économiques des pays qui y participent. Cependant, ils s'accompagnent parfois de pratiques néfastes pour l'environnement ou les droits de l'homme. Nous ne pouvons pas continuer à ignorer

The French secretary of state noted that the law introduces a duty to implement "a due diligence plan" that covers "all areas of corporate social responsibility – environmental, social, human rights and anti-corruption." [146] The president of the Commission on Sustainable Development further affirmed that "[c]limate and development are interdependent issues of crucial importance to mankind," whose success depends "not only from the public sector but also and above all from the private sector," particularly in the case of large multinational companies.[147] He further described the rule as a "first step" which "paves the way for the biggest companies to assume their responsibilities."[148]

Although concepts aligned with the Loi de vigilance have been considered a milestone in the field of business and human rights,[149], at least until now, its applicability remains uncertain.[150] Several critics have pointed out limitations in the duty of vigilance, such as its limited scope of application and the contract-based approach to assessing relations within the scope of the duty.[151] Following the French duty of vigilance, Germany adopted an analogous but arguably narrower due diligence framework for large companies concerning human rights violations and environmental impacts.

Analogously, Germany has also imposed mandatory human rights and environmental due diligence. Despite "fierce criticism" from German business associations, the Supply Chain Act ("LkSG") was enacted in 2022 with "quite positive" overall reactions.[152] The LkSG mandates human rights and environmental due diligence for companies with central administration, principal place of business, administrative headquarters, statutory seat, or branch office in Germany.[153] In contrast with the contract-based approach adopted by France, German law follows a risk-based approach, which requires businesses to establish risk management systems.[154]

Moreover, the LkSG has a broader scope of application than the French counterpart since the LkSG applies to companies with over 1,000 employees as of 2024. Nonetheless, the LkSG has been criticized for imposing a limited range of obligations on corporations, with "considerable weaknesses" in terms of actual supply chain control. [155] Critics have also decried the excessive human rights focus, with no "equivalent protection

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certaines pratiques sous prétexte qu'elles ont cours à l'étranger, dans des pays qui ne respectent pas les contraintes et les normes qui s'appliquent à nos entreprises sur le territoire français. Le drame du Rana Plaza est, à cet égard, emblématique.").

[146] *Id.*.

[147] *Id.*

[148] *Id.*

[149] *See* Elise Groulx Diggs, Milton C. Regan & Beatrice Parance, *Business and Human Rights as a Galaxy of Norms*, 50 GEO. J. INT'L L. 309, 318 (2019).

[150] Elsa Savourey & Stéphane Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption*, 6 BUS. & HUM. RTS. J. 141, 145–49 (2021).

[151] *See* Giesela Rühl, *Towards a German Supply Chain Act? Comments from a Choice of Law and a Comparative Perspective*, *in* EUR. Y.B. INT'L ECON. L. 55, 67–68 (Marc Bungenberg et al ed., 2020) (criticizing the limitations and barriers on the effectiveness of the French Loi de vigilance).

[152] Anne-Christin Mittwoch & Fernanda Luisa Bremenkamp, *The German Supply Chain Act – A Sustainable Regulatory Framework for Internationally Active Market Players?* 55 REV. EUR. & COMP. L. 189, 190 (2023).

[153] Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations in Supply Chains], July 26, 2021, at § 1(1) (Ger.).

[154] *See*, *e.g.*, *Id.* at §§ 3(1), 4-5.

[155] Mittwoch & Bremenkamp, *supra* note 155, at 200.

for ecological concerns."[156] Another weakness lies in excluding civil liability from the LkSG, limiting enforcement mechanisms to administrative fines.[157]

Other jurisdictions have embraced some kind of supply chain control rules, but far less extensive.[158] Several other jurisdictions currently analyze supply chain and corporate sustainability bills. At a supranational level, the EU recently passed European-wide supply chain due diligence obligations. In February 2022, hundreds of EU companies called upon the EU for mandatory human rights and environmental due diligence in line with the UNGP and OECD Guidelines, setting "an ambitious standard of conduct" and requiring the "widest possible range of businesses to reach it."[159] Private-led pressure arguably helped overcome the EU's inertia: although the EU had already conducted studies on the topic, thus far, no legislative proposal has been on the table. Later that month, the Commission submitted the CSDDD draft for Parliament approval.[160] Despite recognizing the voluntary initiatives of companies, the Commission highlighted that "there is need for a larger scale improvement that is difficult to achieve with voluntary action."[161]

Corporations have also recognized such limitations and supported EU regulatory initiatives. In the public consultation held to discuss the supply chain due diligence, most respondents approved the introduction of EU-level mandatory due diligence and "seemed unconvinced" about the effectiveness of non-mandatory guidance;[162] Of the business

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[156] *Id.* at 197.
[157] Günther Maihold, Melanie Müller, Christina Saulich, & Svenja Schöneich, *Responsibility in Supply Chains: Germany's Due Diligence Act is a Good Start*, STIFTUNG WISSENSCHAFT UND POLITIK (Mar. 2021), https://www.swp-berlin.org/publications/products/comments/2021C21_Responsibility_Supply_Chains.pdf [https://perma.cc/V8PR-CTHP].
[158] *Modern Slavery Act 2018* (Cth) (Austl.); Fighting Against Forced Labour and Child Labour in Supply Chains Act, S.C. 2023, c 9 (Can.); Guidelines on Respecting Human Rights in Responsible Supply Chains, Sept. 2022 (Japan); Wet Zorgplicht Kinderarbeid 24 oktober 2019, Stb. 2019, 401 (Neth.); åpenhetsloven 1 juli 2022 (Nor.); Verordnung über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit [VSoTr] [Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour] Dec. 3, 2021, SR 221.433 (Switz.); Modern Slavery Act 2015, c. 30 (UK); The California Transparency in Supply Chains Act of 2010, codified as CAL. CIV. CODE § 1714.43 and CAL. REV. and TAX CODE § 19547.5; Uyghur Forced Labor Prevention Act, Pub. L. No.117-78 135 Stat. 1525 (2021); Regulation 2017/821, European Parliament and Council of May 17, 2017, 2017 O.J. (L 130) 60.
[159] Letter to the European Commission, *Making EU Legislation on Mandatory Human Rights and Environmental Due Diligence Effective*, BUS. & HUM. RTS. RES. CTR. (Feb. 8, 2022), https://media.business-humanrights.org/media/documents/EU_ business_statement_Feb_2022.pdf [https://perma.cc/2FMG-5HKT].
[160] *Commission Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and Amending Directive*, COM (2022) 71 final (Feb. 23, 2022).
[161] European Commission Press Release IP/22/1145, Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains (Feb. 23, 2022). *See also Study on Due Diligence Requirements T*hrough the *Supply Chain*, at 16 (Jan. 2010), https://op.europa.eu/s/zhsq ("Just over one-third of business respondents indicated that their companies undertake due diligence which takes into account all human rights and environmental impacts, and a further one-third undertake due diligence limited to certain areas. However, the majority of business respondents which are undertaking due diligence include first tier suppliers only. Due diligence practices beyond the first tier and for the downstream value chain were significantly lower."). *See also* Impact Assessment Report, *infra* note170, at 13-15.
[162] *Study on Due Diligence Requirements Through the Supply Chain*, *supra* note 164, at 17 (noting that "[a]lmost all interviewees were in principle in favour of a policy change to introduce a general standard at the EU level").

respondents, 52,94% expressed that new mandatory due diligence requirements are likely to have environmental impacts, while 52,55% indicated that existing requirements are "not effective, efficient and coherent." [163] The numbers were even higher for stakeholders.[164] Conversely, most industry organizations heavily opposed a mandatory due diligence proposal.[165]

The recently approved due diligence directive, which has been described as "a 'do no harm' instrument inspired by the UNGPs,"[166] seeks to "reinforce sustainability in corporate governance and management systems."[167] While EU corporate governance debates have traditionally centered on agency problems, the Commission Staff noted the increasing need for "better considering the interests of 'stakeholders' (employees, other affected people, the environment, etc.) in corporate strategies and decisions [.]"[168] Under the CSDDD, companies must adopt a [long term] due diligence policy based on risk assessment of actual or potential human rights and environmental adverse impacts and develop a climate mitigation transition plan.[169]

The CSDDD mixes elements of the German risk-based model enforced by administrative sanctions with the French management report plan and civil liability framework.[170] While the final version of the CSDDD was watered-down in terms of the scope of application and obligations imposed,[171] it makes significant progress – at least theoretically – in enforcing environmental and human rights obligations for multinational companies.[172] Article 22, for instance, specifically requires the climate transition plan to include time-bound targets, a description of decarbonization levers, action plans to reach

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[163] *Id.* at 94 and 105 ("[O]nly 25.55% of business respondents, felt that existing laws were effective, efficient and coherent.").

[164] *Id.* at 105 ("The vast majority (86.39%) indicated that it would have social impacts, contrasted with only 4.08% who disagreed. Again, 81.63% indicated that it would have environmental impacts, and only 4.76% indicated that this is unlikely.").

[165] *Id.* at 17 ("[I]ndustry organisation survey respondents were overall not in favour of the introduction of new policy changes, including mandatory due diligence.").

[166] Nicolas Bueno, Nadia Bernaz, Gabrielle Holly & Olga Martin-Ortega, *The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise*, BUS. & HUM. RTS. J. 1, 7 (2024).

[167] *See* Commission Staff Working Document, *Impact Assessment Report*, at 8, SWD (2022) 42 final (Feb. 23, 2022); \; Commission Staff Working Document, *Executive Summary of the Impact Assessment Report*, at 2, SWD (2022) 43 final (Feb. 23, 2022).

[168] Impact Assessment Report, *supra* note170, at 2-3.

[169] Directive 2024/1760, of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive 2019/1937 and Regulation 2023/2859 (Text with EEA Relevance), art. 1(1), 5(1), 7(1) and 8(1), 2024 O.J. (EU)

[170] *Id.* at art. 24-27.

[171] Peer C. Zumbansen, *Global Value Chain Legislation, Modern Slavery, Climate Change and Finance: Lessons from the European Corporate Sustainability Due Diligence Directive ("CSDDD"),* MCGILL SGI RSCH. PAPERS IN BUS., FIN., L. AND SOC'Y,Apr. 4, 2024, Research Paper No. 2024-08, at 3-4.

[172] Directive 2024/1760, of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive 2019/1937 and Regulation 2023/2859 (Text with EEA Relevance), art.2, 2024 O.J. (EU). The obligations apply to EU companies with over 1,000 employees and total yearly turnover of more than 450,000,000 euros (or parent company of a group meeting this criteria) and EU companies that entered into franchising or licensing agreement in return for royalties over 22,500,000 euros in EU with total yearly turnover of more than 80,000,000 euros. The CSDDD also applies to foreign companies (or parent company of a group) with yearly turnover over 450,000,000 in the EU and foreign companies that entered into franchising or licensing agreement in return for royalties over 22,500,000 euros in EU with total yearly turnover over 80,000,000 euros in the EU.

mitigation targets, an explanation and quantification of investments supporting the transition plan, and a description of the role played by management.

B. Rethinking Directors' Fiduciary Duties

This section addresses sustainability-related developments relating to a director's fiduciary duty towards stakeholders, both generally and specific to the environment. Only India and the UK have statutory provisions referring specifically to a duty concerning the environment, although both jurisdictions adopt distinct approaches to such a duty.[173] In the U.S., discussions surrounding liability risks vis-à-vis sustainability and climate concerns are centered on the applicability of the Caremark duty.

Since the second half of the 20th century, Indian law has been deeply influenced by stakeholder theories.[174] The 2013 Companies Act introduced the first codification of directors' duties in Indian law. A pioneering example is demonstrated in Section 166(2), which states that directors must act "in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment."[175] Scholars have described it as "a radical experiment with corporate purpose."[176]

Upon introducing the comprehensive reference to stakeholders – which was not in earlier drafts of the bill – the Parliamentary Standing Committee on Finance noted that the Companies Act must "have a futuristic vision." This must entail appropriately addressing "all contemporary as well as emerging issues," including "ecology and environmental pressures."[177] Commentators have noted that Indian law "arguably imposes a greater onus on directors concerning climate change" and that the text of Section 166(2) "treats climate change (…) as an end in itself, and not merely as a financial risk."[178]

In *M.K. Ranjitsinh v. Union of India*, there was a dispute concerning damages caused to local fauna by overhead power lines. Although the case did not involve directors' liability, the Supreme Court of India mentioned the specific duty of directors towards the environment. The Court construed a broad interpretation of "environment" under Section 166(2), which includes the "interrelationship" between "water, air, land, and human being, other living creatures, plants, microorganisms, and property."[179] Scholars have interpreted that, by noting that the financial costs cannot outweigh the efforts to mitigate damages, the Court ultimately conceded that "[a] decision taken seemingly in the

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[173] For a traditional discussion on the extent of directors' duties, see Adolf Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1060-69 (1931); Merrick Dodd, *For Whom are Corporate Managers Trustees?* 45 HARV. L. REV. 1145, 1153-57 (1932).

[174] Umakanth Varottil, *The Stakeholder Approach to Corporate Law: A Historical Perspective from India*,RSCH. HANDBOOK ON THE HIST. OF CORP. AND CO. L. 381-400 (Harwell Wells ed., 2018).

[175] The Companies Act, 2013, § 166(2) (India).

[176] Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective*, 40 SEATTLE U.L. REV. 465, 466 (2017).

[177] Standing Committee on Finance, Twenty-First Report on The Companies Bill, 2009 (Issued on August 31, 2010) (India).

[178] UMAKANTH VAROTTIL, DIRECTORS' LIABILITY AND CLIMATE RISK: WHITE PAPER ON INDIA, 25 (2021).

[179] M.K. Rannjitsinh v. Union of India, Unreported Judgment, Writ Petition (Civil) No. 838 of 2019, decided on April 19, 2021 (SC) 12 (India). The government successfully requested reform of the decision to change the directions for implementation. *See* M.K. Rannjitsinh v. Union of India, Unreported Judgment, Writ Petition (Civil) No. 838 of 2019, decided on Mar. 21, 2024 (SC) 71-72 (India).

financial interest of the company and its shareholders, but which is detrimental to the environment, may transgress section 166."[180]

Interestingly, years before the commencement of discussions in India, the Supreme Court of Canada had already consolidated a broad stakeholder orientation towards directors' duties.[181] By 2004, the *Peoples Department Stores* decision noted that "the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders."[182] Instead, "it may be legitimate . . . for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment."[183] The standard laid down in 2004 was later crystalized by the Court's landmark decision in BCE Inc v. 1976 Debentureholders in 2008. On that occasion, the Supreme Court noted that "[i]n 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."[184]

The UK provides a distinct model of codification of directors' fiduciary duties vis-à-vis stakeholders. Under Section 172(1), directors must act in good faith "to promote the success of the company for the benefit of its members as a whole" regarding, inter alia, "the impact of the company's operations on the community and the environment." Section 172 "codifies the current law" by enshrining the principle of "enlightened shareholder value" ("ESV").[185] The idea behind ESV may be traced back to Jensen's enlightened value maximization theory. The theory purports to optimize long-term firm market value by paying attention to all firm constituencies under the value generation criterion.[186] In the drafting stages, legislators expressly opted for the ESV approach instead of a pluralist one on the grounds that directors' primary attribution is to "maximise value for the company's shareholders" while stakeholders' interests must be considered "when judging what was in the interests of shareholders."[187]

In a recent derivative suit brought by minority shareholder ClientEarth, the High Court held that Shell directors were not in breach of Section 172 for allegedly failing to manage climate risks, noting that such an autonomous duty has "insufficient regard to

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[180] Legal Opinion from Shyam Divan to the Commonwealth Climate and Law Initiative*, Directors' Obligations to Consider ClimateChange-Related Risk in India* 13 (Sept. 7, 2021).

[181] Teck Corp. v. Millar, 1972 CanLII 950, 314 (Can.B.C.S.C.). ("A classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders."); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, ¶ 48 (Can.); BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, 565 (Can.).

[182] Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, ¶ 42 (Can.).

[183] *Id.*

[184] BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, ¶ 40 (Can.).

[185] Companies Act 2006, c. 46, Explanatory Notes ¶ 325 (UK).

[186] Michael C. Jensen, *Value Maximisation, Stakeholder Theory, and The Corporate Objective Function*, 12 BUS. ETHICS Q. 235, 245–246 (2002).

[187] HC Trade and Industry Comm., *The White Paper on Modernising Company Law: Sixth Report of Session 2002–03*, HC 439, 7 (Apr. 1, 2003) (U.K.)..

how the legislature has formulated the general duties."[188] The case was largely inspired by the precedent set by the Dutch District Court in Milieudefensie et al. v. Royal Dutch Shell plc. – which, in turn, draws upon the Dutch Supreme Court landmark Urgenda Foundation v. The Netherlands.[189] The heterodox District Court decision held that Shell is responsible for respecting human rights within the corporate group and throughout its supply chain, ordering the company to reduce emissions significantly.[190]

The English version of the dispute was strikingly different. The High Court dismissed the derivative action against Shell directors, finding that ClientEarth had failed to establish a prima facie case for a breach of directors' fiduciary duties.[191] The decision held that "incidental duties" to manage climate risk were inconsistent with the "well-established principle that it is for directors themselves to determine (acting in good faith) how best to promote the success of a company for the benefit of its members as a whole."[192]

In the U.S., scholars have considered the liability of directors for a *new* sustainability-related duty of care based on the Caremark precedent. In 1996, the Delaware Chancery Court recognized a breach of directors' "duty to attempt in good faith" to ensure the existence of an adequate "corporate information and reporting system."[193] The opinion notes, however, that the Caremark oversight duty is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[194] While some scholars have attempted to defend the application of the Caremark precedent to hold directors liable for environmental duties,[195] others describe it as an "odd and almost wholly unsuitable choice."[196] The Caremark decision may influence board members as a soft law standard, creating an incentive for sustainability initiatives.[197]

C. Sustainability Requirements for SOEs

Other jurisdictions provide interesting examples of codification of sustainability-related obligations vis-à-vis SOEs. Particularly, Brazil and Germany impose certain

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[188] ClientEarth v. Shell Plc, [2023] EWHC (Ch) 1897, [¶ 37], (U.K.) (noting that it "cut[s] across their [directors] general duty to have regard to the many competing considerations").
[189] See Maria Eduarda Lessa, *Climate Litigation as Strategic Litigation: An Empirical Assessment,* Working Paper, 11–12 (2024), for a description of Urgenda.
[190] Rb. Den Haag 26 mei 2021, ECLI:NL:RBDHA:2021:5337, m.nt. (Vereniging Milieudefensie/Royal Dutch Shell plc) (Neth.).
[191] *ClientEarth*, [2023] EWHC [¶ 59].
[192] *Id.* [¶ 19].
[193] In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).
[194] *Id.* at 967. *See also* Brett McDonnell, Hari M. Osofsky, Jacqueline Peel, & Anita Foerster, *Green Boardrooms?,* 53 CONN. L. REV. 335, 389 (2021) (noting that the Caremark offers "some limited hope").
[195] For works defending a broader adoption of the Caremark duty in the context of climate risks, see Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties*, 2 UTAH L. REV. 313, 355 (2020); Leo E. Strine Jr., Kirby M. Smith, & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885 (2021); Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties,* 2022 COLUM. BUS. L. REV. 732 (2022); Cynthia A. Williams, Sarah Baker, & Alex Cooper, *Directors' Fiduciary Duties and Climate Change: Emerging Risks*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 8, 2021).
[196] Stephen M. Bainbridge, *Don't Compound the Caremark Mistake by Extending It to ESG Oversight*, 77 BUS. LAW. 651, 666 (2022). *See also* H. Justin Pace & Lawrence J. Trautman, *Caremark and Climate Change: Imperfect Together,* 25 U. PENN J. BUS. L. 777, 828 (2023).
[197] Claire A. Hill, *Caremark as Soft Law,* 90 TEMP. L. REV. 681, 684 (2018).

obligations on SOEs. In Brazil, Law 13,303 of 2016 (SOE Law) establishes an annual sustainability report for SOEs (Article 8, IX) and mandates that public and mixed economy companies "adopt practices of environmental sustainability and corporate social responsibility compatible with the market in which they act." (Article 27, Second Paragraph).[198] Similarly, the German Climate Protection Act, which seeks to ensure protection from climate change and compliance with the climate targets of Germany, provides that "[t]he Federation shall endeavor in corporations (…) under its supervision, in its special funds and in the private legal entities that are wholly or partially under its ownership, to ensure that these bodies also pursue climate-neutral organisation of their administrative activity."[199]

Conclusion

Over the past five years, the role of regulators in advancing corporate sustainability and climate-related concerns has grown substantially. Recent regulatory developments in Brazil, Germany, India, the U.S., and the U.K. have significantly increased corporate legal and securities regulations addressing environmental risks and responsibilities. Corporate legal rules are no longer strictly modular but gradually incorporate corporate environmental externalities. The green turn marks the initial steps toward a broader paradigm change in corporate law and securities regulation.

States and regulators cannot be set aside in this process. A rigid and artificial division between the public and the private sector is inadequate to address the systemic risks posed by climate change effectively. The green turn evidences the fading boundaries between private ordering and public regulation with respect to environmental risks. While the early stages of the ESG movement may have brought about notable progress in integrating environmental risks into investment decisions, the green turn is a fundamental step towards effective climate governance strategies.

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[198] Lei No. 13.303, de 30 de junho de 2016, Diário Oficial da União [D.O.U.] de 1.7.2016 (Braz.).The provision has been subject to criticism by the literature due to enforcement problems. *See* PORTUGAL GOUVÊA, *supra* note 1, at 470 ("The law failed to create a specific system for monitoring and implementing these criteria, which limits the effectiveness of these measures."). Other scholars have referred to the significantly broad codification of controlling shareholders duties under Brazilian law (Dias, *supra* note 22, at 352).

[199] Bundes-Klimaschutzgesetz [KSG] [Federal Climate Protection Act], Dec. 12, 2019, Bundesgesetzblatt [BGBl]. I at S. 2513, as amended byErstes Gesetz zur Änderung des Bundes-Klimaschutzgesetzes, Aug. 18, 2021, BGBl. I at S. 3905, § 15(3) (Ger.).

Annex I

Table 1. Regulatory Initiatives Per Year

Year First Added	**Brazil**	**EU**	**Germany**	**India**	**UK**	**US**
Mandatory climate disclosures	2023	2022	2016	2012	2013	2024
Parent company environmental due diligence	N/A	2024	2022	N/A	N/A	N/A
Sustainability-related supply chain disclosures	2023	2022	N/A	2023	2020	2024
Scope 3 emissions disclosures	2023	2022	N/A	2021*	2021**	N/A
Green taxonomy	L/P	2021	2021	L/P	L/P	N/A

N/A: No law or regulation as of March 2024.
L/P: Ongoing lawmaking process or legislative debates.
* Leadership indicator under the BRSR
** Listed companies only.

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