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Corporate purpose beyond borders: A key to saving our planet or colonialism repackaged?

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Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?

Law Working Paper N° 744/2023
January 2024

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Abstract

The "corporate purpose" debate, while extremely important, has largely been built on an understanding of corporate law and governance that is local – jurisdiction bound – while the issue of climate change is global; pollution does not respect jurisdictional borders. Despite this, in practice, states, multinational corporations, and transnational organizations are increasingly using formal and informal mechanisms to shape sustainable corporate governance beyond jurisdictional borders – a colossal development that has been hiding in plain sight. This article develops a taxonomy for identifying and analyzing the forces driving corporate purpose beyond borders: state-based, firm-based, and organization-based "global corporate law and governance". It demonstrates that the failure to understand these three key pillars of global corporate law and governance overlooks one of the most powerful forces driving sustainable corporate governance of our time. Despite the enormous potential of corporate purpose beyond borders to help save our planet, this article also illuminates the potential dark side of this watershed development. When powerful-states, powerful-firms, and powerful-organizations shape the purpose of corporations beyond jurisdictional borders a troubling new question arises: For whom is the new, ostensibly "global", purpose of the corporation being created? The democratic accountability issue Milton Friedman identified over half a century ago, which is inherent in the classic, jurisdictionally bound, corporate purpose debate, still exists in each jurisdiction. However, this Friedman era insight is myopic to a critical feature that defines the world in which we now live: the environmental (and societal) problems that corporations and governments increasingly see as first order issues are now global, but political structures and legal systems are primarily local. This suggests that we are merely at the beginning of history for understanding the colossal potential and enormous pitfalls of corporate purpose beyond borders.

Keywords: Corporate Purpose, Transnational/Multijurisdictional Corporate Governance, Climate Change, ESG, CSRD, CSDDD, SEC, Nonfinancial Disclosure, Stakeholderism, Shareholderism

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Corporate Purpose Beyond Borders:
A Key to Saving Our Planet or Colonialism Repackaged?

[Working Draft: 15 Jan 2024]

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The "corporate purpose" debate, while extremely important, has largely been built on an understanding of corporate law and governance that is local – jurisdiction bound – while the issue of climate change is global; pollution does not respect jurisdictional borders. Despite this, in practice, states, multinational corporations, and transnational organizations are increasingly using formal and informal mechanisms to shape sustainable corporate governance beyond jurisdictional borders – a colossal development that has been hiding in plain sight.

This article develops a taxonomy for identifying and analyzing the forces driving corporate purpose beyond borders: state-based, firm-based, and organization-based "global corporate law and governance". It demonstrates that the failure to understand these three key pillars of global corporate law and governance overlooks one of the most powerful forces driving sustainable corporate governance of our time.

Despite the enormous potential of corporate purpose beyond borders to help save our planet, this article also illuminates the potential dark side of this watershed development. When powerful-states, powerful-firms, and powerful-organizations shape the purpose of corporations beyond jurisdictional borders a troubling new question arises: For whom is the new, ostensibly "global", purpose of the corporation being created?

The democratic accountability issue Milton Friedman identified over half a century ago, which is inherent in the classic, jurisdictionally bound, corporate

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[±] The authors would like to thank Tim Bowley, Brian Cheffins, George Dallas, Luca Enriques, Hisashi Harata, Chistian Hofmann, Kon Sik Kim, Amir Licht, Curtis Milhaupt, Mariana Pargendler, Martin Petrin, Elizabeth Pollman, Stefanie Schacherer, Holger Spamann, Umakanth Varottil, Zhou Chun and the participants of a seminar organized by the Duke's Fuqua School of Business, particularly James Anton and Jon Fjeld, for their helpful feedback on earlier drafts of this article and Toh Ding Jun for his exceptional research assistance. We would also like to thank the Singapore Management University, Yong Pung How School of Law, Centre for Commercial Law in Asia (CCLA) for supporting this research. Any errors remain our own.

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I. INTRODUCTION

The "corporate purpose" debate has captured the attention of academics, lawyers, policymakers, and entrepreneurs around the world. Leading corporate governance scholars see it as one of the "hottest public policy issues" of our time.[1] Governments have embraced legislation to make corporations more purposeful[2] and financial titans have pledged over 100 *trillion* dollars under their management to foster corporate purpose globally.[3] The realization that climate change is likely the issue of the century and that any chance of successfully addressing it will require a change in the way corporations are governed, seems to justify the attention that the corporate purpose debate is receiving. And yet, the corporate purpose debate, while extremely important, has largely been built on an understanding of corporate law and governance that is *local* – jurisdiction bound – while the issue of climate change is *global*; pollution does not respect jurisdictional borders.

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[1] Edward Rock, *For Whom is the Corporation Managed in 2020?: The Debate Over Corporate Purpose*, ECGI LAW WORKING PAPER 515/2020, 1 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951; Elizabeth Pollman & Robert B. Thompson, *Corporate Purpose and Personhood: An Introduction*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD ix (Elizabeth Pollman & Robert B. Thompson eds., 2021) ("Purpose has become the frontline of a wide-ranging debate over shareholder vs. stakeholder primacy and profit maximization vs. broader social purposes."); Dan W. Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-American "Discovery" of Corporate Purpose*, 4 RED 14, 14 (2022) [hereinafter Puchniak, *No Need for Asia to be Woke*]; Holger Spamann & Jacob Fisher, *Corporate Purpose: Theoretical and Empirical Foundations/*Confusions, ECGI LAW WORKING PAPER 664/2022, 1, https://ssrn.com/abstract=4269517.

[2] This can be seen in legislation around the world promoting the expansion of directors' duties to allow for considerations other than maximizing shareholder value, the global proliferation of stewardship codes that focus on ESG, and the global emergence of non-financial disclosure. *See* for stewardship, Dionysia Katelouzou & Dan W. Puchniak, *Global Shareholder Stewardship: Complexities, Challenges and Possibilities*, in GLOBAL SHAREHOLDER STEWARDSHIP (Dionysia Katelouzou & Dan W. Puchniak eds., 2022), 3-4.

[3] The United Nations Principles for Responsible Investing (PRI) were established in 2005 by a group of institutional investors and experts who developed a set of principles for responsible investment. Signatories of the PRI voluntarily commit to follow six principles that prioritized ESG considerations in their investor engagement strategies and encourage institutional investors to collaborate in promoting ESG practices in their investee companies. Extraordinarily, the PRI now counts over 4,000 institutional investors as signatories, from more than 60 countries, representing a staggering US$120 trillion in assets under management. *See* PRI, *Principles for Responsible Investment*, https://www.unpri.org/download?ac=10948, 6 (2021); Dan W. Puchniak & Umakanth Varottil, *Rethinking Acting in Concert: Activist ESG Stewardship is Shareholder Democracy*, ECGI LAW WORKING PAPER 731/2023, 2-9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565395

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The ostensibly new corporate purpose debate is, in fact, centuries old.[4] It has long been settled that the goal of corporate law is to maximize social welfare.[5] The classic debate is whether corporate law will be more successful in maximizing social welfare if it focuses narrowly on protecting shareholders' interests or broadly on protecting the interests of a wider array of corporate stakeholders. Those who believe that corporate law should narrowly focus on protecting shareholders posit that this increases corporate governance efficiency, and that non-shareholder-stakeholders are better protected by other areas of the law.[6] Those who believe that corporate law should broadly focus on protecting stakeholders posit that the prominence of corporations in the economy and their potential to produce negative externalities requires corporate law itself to protect stakeholders to maximize social welfare.[7] In short, the classic corporate purpose debate is about whether stakeholders – including the environment – should be protected inside *or* outside the corporate law in *each jurisdiction*.[8]

While this debate is important in *each jurisdiction*, it overlooks a troubling *global* aspect of corporate law and governance and climate change, which has been hiding in plain sight. To illuminate this problem, let us undertake a thought experiment. Assume that there are two countries: Polluter Country (PC) and Reducer Country (RC), which share a common border. PC's companies are RC's major suppliers of oil and gas, which RC relies on to fulfill most of its energy needs. RC's economy is wealthier and larger than PC's, but PC's companies produce considerably more Greenhouse Gases (GHGs) than RC's, and PC's companies rank among the world's largest GHG emitters. RC needs PC's companies to keep supplying it with oil and gas to maintain its economy in the short-term as it transitions to clean energy in the long-term. As such, RC desperately wants PC's companies to keep producing oil and gas, but in a more sustainable way that reduces their GHG emissions.

The classic corporate purpose debate provides no answers to solve RC's problem. RC does not have the legal power to *directly* change PC's corporate law, nor can it *directly* change other areas

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[4] Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE LAW JOURNAL 948, 950-957 (2014); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, 63-64 (1991).
[5] John Armour, Luca Enriques et al., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 22-24 (3rd ed. 2017).
[6] *Id.* at 22.
[7] *Id.* at 23.
[8] *Id.* at 22-24.

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of PC's law to reduce the GHG emissions of PC's companies. Thus, the critical question that arises – which escapes the classic corporate purpose debate – is: What mechanisms does RC have at its disposal to incentivize corporations in PC to adopt more sustainable corporate governance?

A rising number of countries around the world see addressing this question as a first-order issue. However, as we explain in Part II, the EU's recent and forthcoming sustainability initiatives are the boldest attempts to create legal mechanisms specifically designed to change the governance and purpose of companies to promote sustainability beyond jurisdictional borders.[9] These legal mechanisms, which we label "state-based extraterritorial corporate law and governance", can broadly be categorized into two forms: those that directly target corporate regulations to drive sustainable corporate governance extraterritorially (e.g., the EU Corporate Sustainability Due Diligence Directive) and those that target non-corporate regulations to indirectly drive sustainable corporate governance extraterritorially (e.g., the EU Carbon Border Tax).[10]

These bold EU initiatives demarcate a new era of corporate law and governance defined by the "globalization of corporate purpose" – which currently has US law firms scrambling to advise their corporate clients about the impact of EU law on their corporate governance[11] and the Chinese government blasting the EU for turning the corporate governance of climate change into "an excuse for geopolitics".[12] Based on our analysis, this issue is clearly global and extends well beyond the current focus on the extraterritorial impact of the new EU sustainability regulations on

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[9] *Comparison of New California "Climate Accountability Package" Disclosures Against ISSB Standard, SEC Proposed Rules on Climate Disclosures and EU CSRD/ESRS Requirements*, FRESHFIELDS BRUCKHAUS DERINGER, 4-5, https://www.freshfields.us/4ace1b/globalassets/noindex/documents/comparison-of-new-ca-standards-against-issb-eu-esrs-and-draft-sec-standards.pdf (last visited Nov. 26, 2023) [hereinafter Freshfields, *New California Climate Disclosures*] (despite California and SEC intending to introduce new climate-related disclosures for companies, these proposed regimes nevertheless continue to use the test of single materiality and none of them go as far as the EU's initiatives, which is intentionally extraterritorial globally; in fact, the SEC proposed regime may include a carve-out for foreign listed firms, and California's proposed regime limits its application only to US business entities that do business in California).

[10] *See infra* Part II.B. Another example of such indirect mechanisms is consolidated accounting that has extraterritorial effects by capturing information relating to foreign subsidiaries operating in foreign jurisdictions. Mariana Pargendler, *The New Corporate Law of Corporate Groups*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE - LAW WORKING PAPER NO. 702/2023, https://ssrn.com/abstract=4412997 or http://dx.doi.org/10.2139/ssrn.4412997 (Apr. 7, 2023).

[11] Kristy Balsanek et al., *EU's Proposed Directive on Corporate Sustainability Due Diligence: What US Companies Need to Know*, DLA PIPER (Sep. 25, 2023), https://www.dlapiper.com/en/insights/publications/global-esg-alert/2023/eus-proposed-directive-on-corporate-sustainability-due-diligence-what-us-companies-need-to-know.

[12] Karl Mathiesen, *China's Xi Slams EU Carbon Border Levy Plans*, POLITICO (Apr. 16, 2021), https://www.politico.eu/article/chinas-xi-seeks-macron-merkel-climate-change-co2-cop26-emisions/.

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US corporate governance. There is evidence that state-based extraterritorial corporate law and governance may provide the answer to incentivizing companies in some of the world's largest polluting countries to implement more sustainable corporate governance in a way that may be a watershed moment for addressing climate change.

However, using extraterritorial corporate law and governance to promote sustainable corporate governance globally is not all roses. It raises the thorny issue of whether extraterritorial corporate law and governance is merely colonialism repackaged. Climate activists in the Global North may applaud the EU's use of state-based extraterritorial corporate law and governance to address climate change, human rights, and other sustainability-related issues. However, a recent study by the African Climate Foundation and the London School of Economics' Firoz Lalji Institute for Africa estimates that one of these well-meaning EU initiatives alone – the EU Border Carbon Tax – will wipe out 0.91% of Africa's GDP.[13] This loss to the African economy would be three times the amount of the development cooperation budget that the EU committed to Africa in 2021.[14] This raises a novel question in this new era in which corporate purpose is determined beyond jurisdictional borders: Which country's (or countries') purpose is served when the corporate purpose of companies is shaped extraterritorially?

As we explain in Part III, however, the state is not the only actor driving corporate purpose beyond borders. The increase in political, economic, and social power of multinational corporations has defined the post-WWII era. Today, the most predominant global economic entities are corporations, not states.[15] Recently, many multinational corporations have used (or claimed to use) their immense economic power to promote sustainable corporate governance globally. The way these multinational corporations transmit and influence policies that affect sustainable corporate governance around the world is what we call "firm-based multi-jurisdictional corporate governance".

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[13] *Id.*

[14] David Luke, *EU's Carbon Border Tax: A New Report Shows Africa Stands to Lose US$25 Billion Every Year*, THE CONVERSATION (Jul. 2, 2023), https://theconversation.com/eus-carbon-border-tax-a-new-report-shows-africa-stands-to-lose-us-25-billion-every-year-208331.

[15] *69 of the Richest 100 Entities on the Planet are Corporations, Not Governments, Figures Show*, GLOBAL JUSTICE NOW (Oct. 17, 2018), https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/.

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Broadly, there are two categories of companies which use firm-based multi-jurisdictional corporate governance to drive companies to adopt sustainable corporate governance as their purpose beyond jurisdictional borders. First, there are multinational companies that have uniform global sustainability policies that require firms across multiple jurisdictions to alter their corporate governance to promote sustainability to do business with them – what we coin the "IKEA Effect".[16] Second, there are multinational investors who set global sustainability standards for their investments in companies, and they drive sustainable corporate governance through their shareholder power across multiple jurisdictions – what we coin the "BlackRock Effect".[17] As we explain in Part III, there is evidence that firm-based multi-jurisdictional corporate governance can incentivize companies around the world to adopt sustainable corporate governance beyond what domestic corporate and environmental laws require.

However, the use of multi-jurisdictional firm-based corporate governance has a risk of devolving into greenwashing on a global scale – something which could jeopardize our very existence given the existential threat of climate change and the immense power of multinational corporations to destroy (or save) our planet.[18] Moreover, the IKEA Effect and Blackrock Effect, as their names suggest, have traditionally been driven by companies in the Global North.[19] The obvious concern is that the globalization of corporate purpose through multi-jurisdictional firm-based corporate governance may ultimately result in repurposing the corporate form to serve the Global North at the expense of the Global South. However, with the rise of massive multinational state-controlled Chinese companies, a new concern may be that multi-jurisdictional firm-based corporate governance results in shifting the governance of companies in markets that China dominates to be driven by the purpose of Chinese state-owned enterprises, at the expense of global sustainability issues.[20]

In addition to states and firms, as we explain in Part IV, international organizations have become significant conduits for transmitting sustainable corporate governance globally. In recent groundbreaking research, Mariana Pargendler illuminates this third major force of global corporate

[16] *See infra* Part III.B.
[17] *See infra* Part III.C.
[18] *See infra* Part III.A.
[19] *See infra* Part III.B.
[20] *See infra* Part IV.B.

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governance by highlighting how international organizations – such as the IMF, OECD, World Bank, and United Nations – have increasingly become major drivers of corporate law and governance beyond jurisdictional borders.[21] With the rise of the global ESG movement, this phenomenon – which we call "transnational organization-based corporate governance" has come to the fore in driving sustainable corporate governance around the world.[22] Again, this may be viewed as a positive development by those pushing for green initiatives in the Global North.

However, the legitimacy of the major international organizations that have driven transnational organization-based corporate governance in the past is in flux. The IMF, OECD, World Bank, and even United Nations are increasingly seen as perpetuating the Western-based world order for the benefit of the Global North.[23] In this vein, the recent BRICS+ initiative suggests that the future of transnational organization-based corporate governance may be less global and more bifurcated between the Global North versus the Global South. This may be especially true with respect to climate and corporate governance issues where the Global North and Global South have different, even conflicting, interests. The rise of China's Belt and Road Initiative (BRI), which more than 150 countries have now signed up to, creates a new type of internationally focused organization that has the potential to blend the power of state-based and organization-based extraterritorial/transnational corporate governance.[24] An important question for the future of corporate purpose beyond borders is: Will China use the BRI as a conduit to drive corporate governance extraterritorially or will China abdicate its extraterritorial corporate governance power to perpetuate a race to the bottom in sustainable corporate governance globally?

In addition to the rise of the BRI and BRICS+, particularly in Asia, there are regional corporate governance organizations that seek to promote a more regional view of corporate governance and corporate purpose beyond borders.[25] As explained in Part IV, the Asian Development Bank and Stewardship Asia are primary examples of such transnational organizations, which appear to be gaining traction and which increasingly promote corporate governance practices that are bespoke for the Asian context.[26] This portends a future for sustainable corporate governance where

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[21] Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765 (2021).
[22] *See infra* Part IV.A.
[23] *Id.*
[24] *See infra* Part IV.B.
[25] *See infra* Part IV.C.
[26] *Id.*

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transnational organizations may promote concepts that are more regional and less global. Combined with the rise of the BRI and BRICS+, it suggests that the future of transnational organization-based corporate governance will be more complex and regional in our increasingly multipolar world.

As we conclude in Part V, taken together, the role that is being played – and the increasing role that will be played – by state-based, firm-based, and organization-based global corporate law and governance in promoting sustainability as the purpose of corporations globally is extraordinary. The failure to understand these three key pillars of global corporate law and governance overlooks one of the most powerful forces driving sustainable corporate governance of our time.

However, the potential for powerful-states, powerful-firms, and powerful-organizations to shape the purpose of corporations beyond jurisdictional borders raises a troubling question: for whom is the new, ostensibly "global", purpose of the corporation being created? The democratic accountability issue Milton Friedman identified over half a century ago, which is inherent in the corporate purpose debate, still exists in *each jurisdiction*.[27] However, this Friedman era insight is myopic to a critical feature that defines the world in which we now live: the societal and environmental problems that corporations and governments increasingly see as first order issues – planet and people – are now *global*, but political structures and legal systems are primarily *local*.[28] This suggests that we are merely at the beginning of history for understanding the colossal potential and enormous pitfalls of corporate purpose beyond borders.

II. STATE-BASED EXTRATERRITORIAL CORPORATE LAW AND GOVERNANCE: CLIMATE, COLONIALISM AND CORPORATE PURPOSE BEYOND BORDERS

II.A. The Classic Corporate Purpose Debate: Myopic to Our Globalized World

Milton Friedman's 1970s *New York Times* article – "The Social Responsibility of Business Is to Increase Its Profits"[29] – has played a central role in defining the terms of the classic corporate

[27] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sep. 13, 1970).
[28] Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 INDIANA LAW JOURNAL 533 (2020).
[29] *See* Friedman, *supra* note 27.

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purpose debate.[30] Whether loved or loathed, Friedman's conceptualization of the corporate purpose debate was entirely domestic.[31] In Friedman's jurisdictionally bound world, local elections and each country's democratic process are the linchpins holding together his theory that policy decisions related to social responsibility should be left to governments – not the management of companies – justifying his core argument that the focus of companies should be maximizing shareholder value.[32] The idea that externalities, such as pollution, may cross jurisdictional borders and that, in turn, those impacted by extraterritorial externalities would not be part of the democratic process, was not contemplated in Friedman's seminal article.[33]

[30] For an excellent analysis of how Friedman's theory relates to the current corporate purpose debate, *see* Spamann & Fisher, *supra* note 1, at 4. According to the leading business school professor Colin Mayer "the Friedman Doctrine "has been a powerful concept that has defined business practice and government policies around the world for half a century". *See* COLIN MAYER, PROSPERITY, 2 (2018). For an analysis of how the corporate purpose debate has overlooked the fact that Asia's corporate miracles were built on corporate law and governance systems that did not follow the Friedman doctrine, *see* Puchniak, *No Need for Asia to be Woke*, *supra* note 1. For an insightful view on how Friedman *should not* be seen as the genesis of the shareholder maximization movement, *see* Brian R. Cheffins, *Stop Blaming Milton Friedman!*, 98 WASH. U. L. REV. 1607 (2021). *See also*, Amir Licht's excellent history of the corporate purpose debate noting that Friedman's New York Times article "has been cited in over 20,000 scholarly works by the fall of 2020, according to Google Scholar". Amir Licht, *Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 387, 387-389 (Elizabeth Pollman & Robert B. Thompson eds., 2021) [hereinafter Licht, *Varieties of Shareholderism*].

[31] Friedman's article clearly assumes that all the problems and solutions in play are contained within a single country's market and government (i.e., his logical and theoretical frameworks are jurisdictionally bound). He pontificates about "*a* free society" "rules of *the* society", and "*his* country" [emphases added]. Although Friedman mentioned pollution several times, the implicit assumption in his article is that the pollution was created within a single country and could be dealt with within the country that it was created, by the same country's government and/or market. *See* Friedman, *supra* note 27.

[32] In Friedman's words: "We have established elaborate constitutional, parliamentary and judicial provisions to control these functions, to assure that taxes are imposed so far as possible in accordance with the preferences and desires of the public— after all, "taxation without representation" was one of the battle cries of the American Revolution. We have a system of checks and balances to separate the legislative function of imposing taxes and enacting expenditures from the executive function of collecting taxes and administering expenditure programs and from the judicial function of mediating disputes and interpreting the law…. If they are to be civil servants, then they must be selected through a political process. If they are to impose taxes and make expenditures to foster "social" objectives, then political machinery must be set up to guide the assessment of taxes and to determine through a political process the objectives to be served. This is the basic reason why the doctrine of "social responsibility" involves the acceptance of the socialist view that political mechanisms, not market mechanisms, are the appropriate way to determine the allocation of scarce resources to alternative uses…. What it amounts to is an assertion that those who favor the taxes and expenditures in question have failed to persuade a majority of their fellow citizens to be of like mind and that they are seeking to attain by undemocratic procedures what they cannot attain by democratic procedures…The individual may have a vote and a say in what is to be done, but if he is overruled, he must conform…. There are some respects in which conformity appears unavoidable, so I do not see how one can avoid the use of the political mechanism altogether". *See id*. Friedman did not consider that when pollution (or other social problems cross jurisdictional borders) those affected will not be part of the political process in the country of origin of the pollution (or other social problems) that cross jurisdictional borders.

[33] *See id.*

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A domestic, jurisdictionally bound, focus continues to define the corporate purpose debate. *The Anatomy of Corporate Law*, which is widely considered to be the world's leading comparative corporate law treatise, frames its discussion of corporate purpose around "local communities" and the interests of "society".[34] The primary tension in the corporate purpose debate – whether to protect non-shareholder stakeholders inside or outside the corporate law – presupposes that the company in question is within the jurisdiction of the government making this policy decision. In sum, the extraterritorial effects of companies, and the role of states in mitigating those effects extraterritorially, have almost entirely escaped the classic corporate purpose debate.[35]

This issue, however, is at the forefront of legislative initiatives to tackle climate change (and other important issues related to sustainable corporate governance).[36] The negative externalities produced by companies that impact climate change are inherently global – jurisdictionally unbound. For a variety of political, economic, and social reasons, climate change is not a first order issue in some countries. In fact, some countries may benefit from allowing companies, within their borders, to focus solely on the short-term goal of maximizing shareholder value, to avoid the short-term costs of adopting sustainable corporate governance.

This is especially the case in states where their most important companies produce extraterritorial externalities.[37] In this context, Friedman's accountability theory may produce a democratic process which rationally supports *domestic* government legislation to incentivize companies to focus on

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[34] Armour et al., *supra* note 5, at 22-23.

[35] It is noteworthy that Spamann and Fisher in their recent article on corporate purpose hint at the importance of the extraterritorial effects of companies in the corporate purpose debate by highlighting an example in one paragraph – but do not analyze the issue in any detail: "Finally, what we might call substitution in purpose itself means that some purposes are not even well-defined, and hence implementable, at the level of an individual corporation. The prime example is reducing carbon emissions. Even if the world agreed on a percentage target of net emissions reduction (possibly 100%, i.e., net zero), this would not mean that every individual firm should reduce their net output by this percentage. Some particularly carbon-efficient firms or industries might even have to increase their activity and thus emissions to reach this global goal. Individual firms are unlikely to be able to coordinate in this way, whatever their purpose. Even if they tried, they would hardly know how to do so without the guidance of a carbon tax or the prices of traded emissions certificates. Substitution effects are a major reason why most major environmental and other issues are most effectively addressed through regulation. That said, to the extent substitution happens across national borders, large multinational companies may sometimes have an advantage over a national regulator." Spamann & Fisher, *supra* note 1, at 6-7.

[36] *See infra* Parts II.B and Part II.C.

[37] Mariana Pargendler discusses distributional implications of corporate law rules, such as limited liability for environmental harm caused by corporate subsidiaries, which tend to enrich Global North companies and investors at the expense of Global South victims. Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism* ECGI LAW WORKING PAPER 718/2023, https://ssrn.com/abstract=4495515 or http://dx.doi.org/10.2139/ssrn.4495515 (Jun. 29, 2023).

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maximizing shareholder value to the detriment of the *global* environment, which may increase a *jurisdiction's* overall *domestic* social utility – *if* the corporate environmental externalities are exported beyond the jurisdiction's borders. This may also be the case in non-democratic states where the authoritarian government has an incentive to improve its *domestic* environment to meet the needs of *its* citizens – but *not foreigners* beyond its jurisdictional border – to maintain its authoritarian control.[38]

Relatedly, citizens in developing countries may see economic development as *the* first-order issue. This may result in strong support for government policies that incentivize companies to focus on short-term developmental goals by maximizing shareholder value. In this context, long-term global environmental goals may be seen as luxuries that can be afforded by companies in developed countries – as such countries have already developed. This transforms the purpose of the corporation from being less about sustaining the global environment in the long-term and more about domestic economic development in the short-term. [39]

Our goal is not to resolve the normative claims embedded in these arguments. Rather, it is to illuminate the complexities that arise when we try to define corporate purpose in our globalized world where the balance between sustainability and economic development varies in different countries and there can be a tension between local and global effects. In this context, some states – particularly developing ones – may rationally not see sustainable corporate governance as a first-order issue, while the opposite reality may exist in other states – particularly developed ones. This provides an incentive for some states to design a regulatory regime that incentivizes (or, perhaps, from the perspective of other countries, forces) corporations extraterritorially to adopt sustainable corporate governance – changing their corporate purpose beyond borders.

This is the current reality which has driven one of the most remarkable corporate governance developments of our time. It has increasingly become apparent that countries in the European Union (EU) have moved faster than countries in other parts of the world in building a regulatory architecture to promote sustainable corporate governance.[40] While EU companies incur the short-

[38] *See infra* Part IV.
[39] *Id.*
[40] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism, 2023 O.J. (L 130) 52, https://eur-lex.europa.eu/legal-

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term costs of adopting sustainable corporate governance, the EU may not reap the long-term benefits of addressing climate change through legally imposed state-based regulations, *if* companies in countries outside of the EU are permitted by their domestic governments to gain a competitive advantage by focusing solely on maximizing shareholder value to benefit their *domestic* economies.[41] As such, the EU has moved aggressively to create legal mechanisms to put pressure on companies outside of the EU to adopt sustainable corporate governance – bold initiatives to drive corporate purpose beyond borders to incentivize (force) non-EU companies to adopt an EU-cum-global understanding of corporate purpose.[42]

Before explaining the EU's colossal push to change the purpose of companies beyond its borders, it is necessary to explain how one jurisdiction can use its law to change the corporate purpose of

content/EN/TXT/PDF/?uri=CELEX:32023R0956. *See also*, Karen Lobdell, *Breaking Down the EU Carbon Border Tax for Global Trade Professionals*, THOMSON REUTERS (Aug. 3, 2023), https://www.thomsonreuters.com/en-us/posts/international-trade-and-supply-chain/eu-carbon-border-tax/.

[41] *See, e.g.*, Directive 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, 2022 O.J. (L 322) 15, 15, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464 (last visited Nov. 25, 2023) (where, among other things, the rationale for the Corporate Sustainability Reporting Directive states that it "aims to protect, conserve and enhance the Union's natural capital, and *protect the health and well-being of Union citizens from environment-related risks and impacts*"; in addition, the new directive "aims to decouple economic growth from resource use, and ensure that *all* regions and Union citizens *participate in a socially just transition* to a sustainable economic system whereby no person and no place is left behind" [emphases in italics added]); Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism, 2023 O.J. (L 130) 52, 54, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0956 (last visited Nov. 25, 2023) (clearly stating that "[a]s long as a significant number of the Union's international partners have policy approaches that do not achieve the same level of climate ambition, there is a risk of carbon leakage … [a]s the Union increases its climate ambition, that risk of carbon leakage could undermine the effectiveness of Union emission reduction policies"; thus, "[t]he CBAM is expected to … *contribute to promoting decarbonisation in third countries*" [emphasis added in italics]).

[42] It is worth mentioning that the sustainable corporate purpose movement is not the first and only example of the extraterritorial application of domestic law. Among other established examples of laws with extraterritorial reach are anti-corruption, data protection, and financial regulation laws. The most recent case includes the legislation passed by the US Congress aiming at criminalizing the "demand side" of foreign bribery. This legislation seeks to extend the reach of US prosecutors by creating criminal liability for foreign government officials. This includes officials whose conduct occurs within a U.S. territory, who make demands of companies that are issuers of U.S. securities, and who make demands of those considered U.S. domestic concerns. *See*, *Congress Passes Landmark Law to Criminally Prosecute Corrupt Foreign Leaders,* TRANSPARENCY INTERNATIONAL US (Dec. 14, 2023), https://us.transparency.org/news/congress-passes-landmark-law-to-criminally-prosecute-corrupt-foreign-leaders/#:~:text=Congress%20Passes%20Landmark%20Law%20to%20Criminally%20Prosecute%20Corrupt%20Foreign%20Leaders,-12%2F14%2F2023&text=A%20statement%20from%20Transparency%20International%20U.S.&text=Today%20the%20U.S.%20Congress%20approved,Defense%20Authorization%20Act%2C%20or%20NDAA (last visited Jan. 13, 2024). The text of the bill is available here: Foreign Extortion Prevention Act, S. 2347, 118th Congress (2023-2024), https://www.congress.gov/bill/118th-congress/senate-bill/2347/text?s=1&r=99 (last visited Jan. 13, 2024).

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companies in another jurisdiction. Comparative corporate law scholarship and empirical research demonstrate that the purpose that corporations serve is best understood by measuring that purpose along a continuum – with shareholderism and stakeholderism at opposing ends of the continuum.[43] All companies, in all jurisdictions, have shareholders and other stakeholders (i.e., creditors, employees, suppliers, customers, the environment and society).[44] All jurisdictions have laws that protect both shareholders and other stakeholders. The difference among countries is the extent to which their laws prioritize the interests of shareholders over other stakeholders. As laws require companies to focus more on either shareholders or stakeholders this shifts the purpose of companies along the shareholder/stakeholder continuum. As we demonstrate below, the EU has intentionally crafted laws to capture non-EU corporations to require them to focus less on shareholders and more on other stakeholders – a powerful force shifting corporate purpose beyond borders.[45]

II.B. The EU's Colossal Legislative Push to Drive Sustainable Corporate Governance Extraterritorially

The scope and scale of the EU's recent and forthcoming legislative initiatives to promote sustainable corporate governance extra-territorially are "on a level never seen before".[46] In April 2023, the *Wall Street Journal* ran a story entitled "At Least 10,000 Foreign Companies to Be Hit

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[43] Litch, *Varieties of Shareholderism*, *supra* note 30, at 390-91; Puchniak, *No Need for Asia to be Woke*, *supra* note 1, at 21. On the evolution of comparative corporate governance over time see, Dan W. Puchniak, 'The Japanization of American Corporate Governance? Evidence of the Never Ending History for Corporate Law' (2007) 9 ASIAN-PACIFIC LAW & POLICY JOURNAL 7; Ronald J. Gilson & Curtis J. Milhaupt, *Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling,* 12 HARV. BUS. L. REV. 1, 49 (2022).

[44] There are non-profit corporations that do not have shareholders. However, these make up a small minority of companies, which fall outside of the scope of this research.

[45] It should also be noted that given the wide range of discretion that directors have in company laws around the world, even without changing directors' fiduciary duties, directors still have to comply with other corporate and non-corporate laws, the changes of which alter the incentives of directors to focus more on shareholders or stakeholder shifting corporate purpose as it will cause directors to make decisions, within their wide discretion, that are more focused on shareholders or stakeholders. However, empirical research has found that directors may rely more on their personal views than the law and therefore it may be the case that all law – both domestic and foreign – may do less in defining corporate purpose than legal scholars often assume. This is an interesting observation that is beyond the scope of this paper – but deserves further analysis. For an excellent analysis of this issue see, Litch, *Varieties of Shareholderism*, *supra* note 30, at 398-401.

[46] Emma Bichet et al., *EU's New ESG Reporting Rules Will Apply to Many US Issuers*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Nov. 23, 2022), https://corpgov.law.harvard.edu/2022/11/23/eus-new-esg-reporting-rules-will-apply-to-many-us-issuers/.

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by EU Sustainability Rules".[47] Major global law firms have established entire practice groups devoted to advising clients on the extraterritorial effect of the EU's recent and forthcoming legislative initiatives which, at the time of writing in late 2023, are just beginning to take effect and will be rolled out with increasing bite over the next 5 years.[48] The impact and scale of this corporate governance development is highlighted by the fact that consulting firms devoted entirely to ESG and sustainability advisory work have targeted the extraterritorial corporate governance effect of the EU's sustainability initiatives as a core focus of their practice – especially in the United States.[49]

Although the EU has developed a panoply of measures that aim to incentivize (or force) companies beyond the EU's borders to adopt sustainable corporate governance, three of them have attracted the most attention for their extraterritorial effects: the Corporate Sustainability Reporting Directive (CSRD),[50] the Corporate Sustainability Due Diligence Directive (CSDDD),[51] and the Carbon Border Adjustment Mechanism (CBAM).[52]

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[47] Dieter Holger, *At Least 10,000 Foreign Companies to Be Hit by EU Sustainability Rules*, WSJ PRO (Apr. 5, 2023), https://www.wsj.com/articles/at-least-10-000-foreign-companies-to-be-hit-by-eu-sustainability-rules-307a1406 (last visited Nov. 22, 2023).

[48] *Global ESG Regulations: What US Companies Need to Know*, DLA PIPER, https://www.dlapiper.com/en-us/insights/publications/global-esg-alert (last visited Nov. 22, 2023) (stating that many international ESG rules may implicate public and private US companies due to their extraterritorial effect); Bichet, *supra* note 46 (highlighting that the new EU rules will require ESG reporting on a level never seen before).

[49] New consulting firms full of lawyers created just to handle this problem. *See, e.g.*, *ESG & Sustainability Advisory*, COOLEY, https://www.cooley.com/services/practice/esg-and-sustainability-advisory (last visited Nov. 22, 2023); *ESG and Sustainability*, FRESHFIELDS BRUCKHAUS DERINGER, https://www.freshfields.com/en-gb/capabilities/services/esg-and-sustainability/ (last visited Nov. 26, 2023); *Environmental, Social and Governance*, ALLEN & OVERY, https://www.allenovery.com/en-gb/global/expertise/practices/environmental-social-and-governance (last visited Nov. 26, 2023).

[50] Directive 2022/2464, *supra* note 41.

[51] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM(2022) 71 FINAL (Feb. 23, 2022), art. 2, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF (last visited Nov. 26, 2023). Although the European Council and the European Parliament have announced that they have reached a provisional agreement on the new CSDDD, the full text of this agreement does not appear to have been published at the time of this publication. See, Seher Budak & Matilda Nyman, *Corporate Sustainability Due Diligence: The European Council and the European Parliament Have Finally Reached a Provisional Agreement with the Aim to Protect the Environment and Human Rights, Baker McKenzie* (Dec. 27, 2023), https://supplychaincompliance.bakermckenzie.com/2023/12/27/corporate-sustainability-due-diligence-the-european-council-and-the-european-parliament-have-finally-reached-a-provisional-agreement-with-the-aim-to-protect-the-environment-and-human-rights/#:~:text=On%2014%20December%202023%2C%20the,rights%20and%20the%20environment%2C%20around (last visited Jan. 13, 2024).

[52] Regulation (EU) 2023/956, *supra* note 40.

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First, the EU's *Corporate Sustainability Reporting Directive* (CSRD) aims to shift the purpose of companies away from a focus on shareholder wealth maximization towards sustainability by mandating a higher level of mandatory disclosure on GHGs, as well as other environmental issues like pollution entering waterways and social issues such as gender pay differences.[53] The scope of disclosure on these environmental and social issues explicitly goes beyond reporting on things that significantly impact corporate value (single materiality) to include things that significantly impact the economy, environment, and people (double materiality).[54] More specifically, double materiality requires disclosure from a "financial perspective" (i.e., information that would be material to investors and creditors) *and* from an "impact perspective" (i.e., information that would be material to employees, customers, vendors, and the community).[55] Thus, the double materiality standard expands the scope of disclosure beyond a focus on shareholder wealth maximization linked to corporate value, towards a focus on stakeholders linked to society as a whole – moving the focus of corporate purpose from shareholderism towards stakeholderism.

The double materiality standard in the CSRD distinguishes the EU's approach from other disclosure regimes being rolled out to address climate change by the US Securities and Exchange Commission (SEC)[56] and the International Sustainability Standards Board (ISSB).[57] Specifically, the CSRD's double materiality standard will "require companies to include information important from a sustainability perspective, even if it is financially immaterial"[58] – something the SEC will almost certainly not include in its forthcoming climate disclosure rules, which in their proposed form employ a single materiality standard.[59]

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[53] Directive 2022/2464, *supra* note 41, at 15-16; Holger, *supra* note 47; Bichet, *supra* note 46.
[54] Directive 2022/2464, *supra* note 41, art. 1(2)(b); Bichet, *supra* note 46.
[55] Directive 2022/2464, *supra* note 41, art. 1(4); *Technical Line: A Closer Look at California's Recently Enacted Climate Disclosure Laws*, EY (Oct. 12, 2023), 8, ey-tl21228-231us-10-12-2023.pdf (last visited Nov. 25, 2023).
[56] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 FED. REG. 21334 (Apr. 11, 2022), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf (last visited Nov. 25, 2023).
[57] *IFRS S1 General Requirements for Disclosure of Sustainability-Related Financial Information*, IFRS, https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s1-general-requirements/#about (last visited Nov. 25, 2023); *IFRS S2 Climate-Related Disclosures*, IFRS, https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s2-climate-related-disclosures/ (last visited Nov. 25, 2023); Freshfields, *New California Climate Disclosures*, *supra* note 9, at 7 (observing that the EU CSRD/ESRS requirements are the only set of requirements which apply the double materiality standard).
[58] Holger, *supra* note 47.
[59] *Id.*; George S. Georgiev, *The SEC's New Proposal on Climate Disclosure: Critiquing the Critics*, OXFORD BUSINESS LAW BLOG (Mar. 29, 2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/03/secs-new-proposal-climate-

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In June 2023, the ISSB – a nonprofit organization with the mandate of developing comprehensive global sustainability reporting standards – issued model sustainability and climate disclosure standards that clearly adopt a single materiality approach as they "only require businesses to report on the risks and opportunities posed by sustainability and climate change to the business, but not vice versa".[60] Although the ISSB Standards are voluntary, many major economies around the world plan to incorporate them into their domestic regulatory regimes – which is likely to make single materiality the standard used in most countries outside of the EU.[61] As such, the adoption of the CSRD will continue the EU's history of standing out globally in terms of the broad scope of its mandatory corporate sustainability disclosure and, especially, for its use of the double materiality standard.[62]

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disclosure-critiquing-critics (last visited Nov. 25, 2023) (stating that the entire concept of 'double materiality' is a EU-generated and EU-centric approach where the term 'materiality' has a different meaning from the United States). *See also*, Allison Handy, *The SEC's Climate Proposal: Where Did We Wind Up with "Materiality"?*, PUBLIC CHATTER (Mar. 24, 2022), https://www.publicchatter.com/2022/03/the-secs-climate-proposal-where-did-we-wind-up-with-materiality/; *The Challenge of Double Materiality: Sustainability Reporting at a Crossroad*, DELOITTE, https://www2.deloitte.com/cn/en/pages/hot-topics/topics/climate-and-sustainability/dcca/thought-leadership/the-challenge-of-double-materiality.html (last visited Nov. 22, 2023) [hereinafter Deloitte, *Sustainability Reporting at a Crossroad*].

[60] *IFRS Sustainability Disclosure Standards Have Been Released*, PWC (Jun. 26, 2023), https://viewpoint.pwc.com/dt/us/en/pwc/in_briefs/2023/2023/ifrssustaindiscstandards.html (last visited Nov. 26, 2023).

[61] Gabrielle See, *Singapore Among the First in Asia to Propose Mandatory Climate Reporting for Non-Listed Companies*, ECO BUSINESS (Jul. 7, 2023), https://www.eco-business.com/news/singapore-among-the-first-in-asia-to-propose-mandatory-climate-reporting-for-non-listed-companies/ (last visited Nov. 26, 2023) (stating that Singapore could make its listed companies make mandatory disclosures from FY2025, followed by large non-listed companies from FY2027); Song Yihang, *Sustainability Reporting in Singapore: Setting the Boundaries for What is "Material"*, 39 SING. L. REV. 58, 62-69 (2022). Singapore, with its aim to be a hub for sustainability and corporate governance in Asia, is developing a non-financial disclosure regime for listed and non-listed companies which will likely incorporate the IFRS SDS, adopting a single materiality approach – with Hong Kong, mainland China, and Japan considering similar regimes. *See also*, George Murray, *Final ISSB Sustainability and Climate Standards Are Here: Likely to Set New Global Baseline, but Interoperability Remains Key*, SLAUGHTER AND MAY (Jul. 3, 2023), https://sustainability.slaughterandmay.com/post/102iihp/final-issb-sustainability-and-climate-standards-are-here-likely-to-set-new-globa (last visited Nov. 25, 2023).

[62] *"Double Materiality": What Does it Mean for Non-Financial Reporting?*, NORTON ROSE FULBRIGHT (May 2023), https://www.nortonrosefulbright.com/en-af/knowledge/publications/bc2d7d3f/double-materiality-what-does-it-mean-for-non-financial-reporting (last visited Nov. 25, 2023) (the EU Non-Financial Reporting Directive, or NFRD, which came into effect in 2017, requires large-listed companies, banks, and insurance firms in the EU to disclose on ESG-related matters applying the standard of double materiality; the Corporate Sustainability Reporting Directive, to be implemented starting from 2024, is largely an effort to extend the NFDR to small and medium enterprises and to further increase the quality of disclosure on a broader range of sustainability matters than the NFRD; the Sustainable Finance Disclosure Regulation, or SFDR, which was phased in from 2021 to 2023, extended ESG disclosure requirements to EU financial services firms by requiring them to disclose information on how sustainability risk are integrated into their investment decisions – again using double materiality as its standard); Deloitte, *Sustainability Reporting at a Crossroad*, *supra* note 59 (the SFDR requires investors to disclose not only risks to themselves, but

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Given that the EU adopted sustainability disclosure regulations almost a decade ago and that it has consistently applied a double materiality standard, the fact that the CSRD aims to further expand the scope of sustainability disclosure and reinforce the double materiality standard – *within the EU* – is unsurprising.[63] However, the reason why the CSRD is grabbing headlines around the world is due to its bold attempt to make the EU's broad scope of corporate sustainability disclosure, based on a double materiality standard, *the* global standard – an aggressive move to change the corporate purpose of non-EU companies beyond the EU's borders.[64]

This attempt by the EU to use the CSRD to transform the purpose of non-EU companies is reported to be "on a level never seen before".[65] The CSRD has been designed to capture non-EU companies in its regulatory web by being drafted in a way that makes it explicitly apply to non-EU companies that meet one or more of the following criteria: (1) having listed securities, such as stocks or bonds, on a regulated market in the EU; (2) having an annual EU revenue of more than €150 million and an EU branch with net revenue of more than €40 million; or (3) having an EU subsidiary that is a "large company" as defined by the CSRD.[66]

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also their adverse impacts on both the planet and society; double materiality recognizes that companies and financial institutions must manage and take responsibility for the actual and potential adverse impacts of their decisions on people, society and the environment; the EU Green Taxonomy and Guidelines on Reporting Climate-Related Information both confirm double materiality as the basis for comprehensive non-financial information disclosure); Freshfields, *New California Climate* Disclosures, *supra* note 9.

[63] *Id.*

[64] Iris H-Y Chiu, *The EU Sustainable Finance Agenda: Developing Governance for Double Materiality in Sustainability Metrics*, 23 EUROPEAN BUSINESS ORGANIZATION L. REV. 87, 88 (2022) (in particular, policymakers embrace double materiality in measuring investment outcomes); Brian Tomlinson & Lucy Godshall, *Doubling Down: ESG Regulation Gives Materiality a Bigger Stake*, EY (Aug. 22, 2022), https://www.ey.com/en_us/assurance/esg-regulation-gives-materiality-a-bigger-stake (last visited Nov. 25, 2023) (stating that companies scoped into the CSRD will have to report against the EU's Sustainability Reporting Standards (ESRS) that address an unprecedently extensive set of qualitative and quantitative ESG disclosures; the extent of a company's reporting required will largely be determined by the outcome of a "double materiality" assessment).

[65] Bichet, *supra* note 46; Eu-Lin Fang et al., *The European Union's Far-Reaching Directive on Sustainability Reporting Isn't Only About Disclosure. Here is How Executives Can Use the Mandate to Bring Sustainability into the Heart of Strategy – and Uncover Opportunities for Value Creation*, PWC (Jul. 11, 2023), https://www.pwc.com/gx/en/issues/esg/csrd-is-resetting-the-value-creation-agenda.html (last visited Nov. 25, 2023) (stating that the CSRD requires corporates to report more about their sustainability performance than any other piece of regulation to date, beginning with the 2024 fiscal year in some cases).

[66] Defined as meeting at least two of these three criteria: more than 250 EU-based employees, a balance sheet above €20 million or local revenue of more than €40 million. *See*, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182) 19, art. 3(4), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0034 (last visited Nov. 25, 2023).

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An empirical study designed to measure the extraterritorial impact of the CSRD demonstrates its colossal global extraterritorial effect. According to the study, almost 10,300 foreign companies that have an EU stock listing and more than 100 companies that are not listed in the EU, but have more than €150 million in local revenue, will be bound by the CSRD.[67] These companies are incorporated in 60 different countries with the bulk coming from 15 non-EU countries: United States (31%), Canada (13%), the United Kingdom (11%), Japan (8%), Australia (6%), Cayman Islands (5%), Bermuda (3%), Mainland China (2%), Switzerland (2%), Turkey (2%), Norway (2%), Hong Kong (1%), Indonesia (1%), Israel (1%), and South Africa (1%).[68]

ESG consulting firms warn that as the CSRD is rolled-out over the next five years,[69] non-EU companies – especially unlisted private-companies – may be shocked to find that they are bound by it.[70] For many non-EU companies, this may be the first time that they have been subject to mandatory nonfinancial reporting requirements. For these companies, it is likely to transform ESG from a communications and PR exercise into a regulatory disclosure requirement.[71] Even those non-EU companies not explicitly bound by the CSRD will also likely "feel the impact of these requirements if [their] business is part of the value chain of an entity that is required to report" – further increasing the CSRD's extraterritorial bite.[72]

In terms of its corporate governance impact, the CSRD will require companies caught in its regulatory web – including non-EU companies – to disclose the mandate, roles, and responsibilities of the board, governance committees, and management regarding their qualifications and strategy for developing and implementing sustainable corporate governance.[73] To ensure that this is hardwired into the corporate purpose and governance of companies the CSRD requires companies within its scope to integrate sustainability strategies and related performance into executive

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[67] Holger, *supra* note 47.
[68] Elena Philipova, *How Many Companies Outside the EU Are Required to Report Under its Sustainability Rules?*, LSEG (Jun. 2, 2023), https://www.lseg.com/en/insights/risk-intelligence/how-many-non-eu-companies-are-required-to-report-under-eu-sustainability-rules/ (last visited Nov. 25, 2023).
[69] Foreign companies with EU listings will need to start reporting these disclosures in 2025 if they have more than 500 employees in the EU. The rules go into effect in 2026 for other large non-EU companies with EU listings and in 2027 for small and midsize enterprises with EU listings. Foreign companies not listed in the EU but subject under other criteria have until 2029 to make disclosures. *See*, Directive 2022/2464, *supra* note 41, art. 5.
[70] Bichet, *supra* note 46.
[71] Holger, *supra* note 47 (stating that the vast majority of US companies do not have experience with mandatory ESG disclosure requirements and still see ESG as a communication and PR exercise, rather than regulatory disclosure).
[72] Bichet, *supra* note 46.
[73] Freshfields, *New California Climate Disclosures*, *supra* note 9, at 11-12.

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compensation schemes and disclose it (something which is already required for EU listed companies under the EU Shareholder Rights Directive).[74]

As such, lawyers and consultants expect that the CSRD "will be an important topic for … board meetings and nominating and corporate governance committees" for EU and non-EU companies caught in the CSRD's regulatory web.[75] It has been suggested that the CSRD will require non-EU companies "to consider establishing dedicated board committees or integrating ESG-reporting experience into their director recruiting plans."[76] The EU's Corporate Sustainability Due Diligence Directive, discussed below, provides teeth to the CSRD, as it empowers authorities in member states to apply fines and compliance orders to non-EU companies who fail to meet sustainability disclosure standards and it also enables victim compensation claims.[77] These enforcement mechanisms aim to ensure that the CSRD will transform corporate boardrooms by shifting their focus towards non-financial disclosure and stakeholderism – molding corporate purpose beyond borders towards an EU-cum-global standard.

The EU's aim to change the corporate purpose of companies around the world may, at first blush, appear to be a lofty goal. However, history suggests otherwise. Professor Anu Bradford's research has documented the EU's extraordinary ability to use its market power to define global standards "in diverse areas such as competition regulation, data protection, online hate speech, consumer health and safety, or environmental protection".[78] This suggests that the EU's new aggressive use of hard law, combined with its historical market power, to shift the purpose of companies around the world to achieve the EU's environmental and social objectives must be taken seriously.

It is noteworthy that over 90% of non-EU companies caught in the web of the CSRD are bound by it because they are listed on a regulated securities market in the EU.[79] As such, it may be tempting for comparative corporate law scholars to think of the CSRD's impact on non-EU

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[74] *Id. See*, Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies, 2007 O.J. (L 184) 17, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0036.
[75] Bichet, *supra* note 46.
[76] *Id.*
[77] Peter Walsh, *The Brussels Effect Strikes Again: How the CSRD & Other EU ESG Regulations Impact U.S. Companies*, BENCHMARK GENSUITE (April 6, 2023), https://benchmarkgensuite.com/the-brussels-effect-strikes-again-how-the-csrd-other-eu-esg-regulations-impact-u-s-companies/.
[78] ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2019).
[79] Philipova, *supra* note 68.

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companies as something akin to the famous "bonding effect", which some scholars posit drives non-US firms to cross-list in the US and has caused US securities law to have an extraterritorial effect.[80]

However, when considered carefully, these two regulatory regimes, in fact, have the opposite effect – the EU's regulatory regime explicitly attempts to promote its approach to corporate governance extraterritorially, while the US regulatory regime explicitly seeks to limit its extraterritorial effect. US securities law creates a special regime to allow foreign issuers to largely follow the corporate governance standards of *their home country*[81] – which serves to limit the extraterritorial impact of US law on the corporate governance of cross-listed firms.[82] Presumably, the US has taken this approach to make listing in the US more attractive for foreign firms. There is some evidence suggesting that a similar carve out for foreign listed companies will be included in the SEC's forthcoming rules on climate disclosure – explicitly limiting their extraterritorial effect.[83] Conversely, the CSRD aims to force foreign firms to raise their level of disclosure beyond their home country's standards; perhaps with the view that listing and entering the EU market is like a lobster trap – easy to get into but difficult to escape – which may ultimately result in the EU standard becoming the *de facto* global standard – a regulatory design to shape corporate purpose beyond borders.[84]

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[80] Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 JOURNAL OF POLITICAL ECONOMY 615 (1981); Douglas W. Diamond, *Monitoring and Reputation: The Choice Between Bank Loans and Directly Placed Debt*, 99 JOURNAL OF POLITICAL ECONOMY 689 (1991); Rene M. Stulz, *Globalization, Corporation Finance, and the Cost of Capital*, 12 JOURNAL OF APPLIED CORPORATE FINANCE 8 (1999); John C. Coffee Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641 (1999); Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 JOURNAL OF FINANCIAL ECONOMICS (2005); G. Andrew Karolyi, *Corporate Governance, Agency Problems and International Cross-Listings: A Defense of the Bonding Hypothesis*, 13 EMERGING MARKETS REV. 516 (2012). *See also*, Amir N. Licht et al., *What Makes the Bonding Stick? A Natural Experiment Testing the Legal Bonding Hypothesis*, 129 JOURNAL OF FINANCIAL ECONOMICS 329 (2018) [hereinafter Licht, *What Makes the Bonding Stick?*].

[81] Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 141 (2003) [hereinafter Licht, *Bonding or Avoiding?*].

[82] Licht, *What Makes the Bonding Stick?*, *supra* note 80.

[83] Freshfields, *New California Climate Disclosures, supra* note 9, at 5.

[84] Licht, *Bonding or Avoiding?*, *supra* note 81, at 147 (citing Edward Rock, who argued that the American securities regulation regime has a characteristic "lobster trap" structure: easy to enter voluntarily, hard to exit). *See* Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675 (2002).

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The second EU directive that aims to transform the EU conception of corporate purpose beyond borders is the *Corporate Sustainability Due Diligence Directive* (CSDDD),[85] agreed on by the EU Parliament and member states on December 14, 2023.[86] Its goal is to foster sustainable and responsible corporate behavior by embedding sustainability considerations in companies' operations and corporate governance. Specifically, the CSDDD requires companies to implement due diligence measures to assess the adverse impacts of their actions on the environment and human rights along their value chains worldwide.[87]

The CSDDD directly imposes due diligence obligations on four groups of companies, including two groups of EU companies and two groups of non-EU companies.[88] With respect to the latter two groups, they include non-EU companies that generate a net turnover of more than EUR 150 million in the EU in the last financial year (Group Three),[89] and non-EU companies that generate a net turnover of more than EUR 40 million in the EU, provided at least 50% of worldwide turnover was generated in a high-impact sector (Group Four).[90] Although other companies would not be directly in scope, they could still be captured by the CSDDD as contractors or subcontractors to any of the abovementioned groups. In other words, all companies within the wide extraterritorial scope of the CSDDD will have to implement due diligence measures to identify, end, prevent, mitigate, and account for negative environmental and human rights impacts of their actions, not just regarding their own operations, but also regarding the activities of all entities in their value chains with which they have direct and indirect business relationships.[91]

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[85] *Corporate Sustainability Due Diligence*, EUROPEAN COMMISSION, https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en (last visited Nov. 23, 2023).

[86] *Corporate Due Diligence Rules Agreed to Safeguard Human Rights and Environment*, EUROPEAN PARLIAMENT PRESS RELEASE (Dec. 14, 2023), https://www.europarl.europa.eu/news/en/press-room/20231205IPR15689/corporate-due-diligence-rules-agreed-to-safeguard-human-rights-and-environment?xtor=AD-78-%5BSocial_share_buttons%5D-%5Blinkedin%5D-%5Ben%5D-%5Bnews%5D-%5Bpressroom%5D-%5Bcorporate-sustainability-due-diligence-trilogue-deal%5D&.

[87] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, *supra* note 51, at 32.

[88] *Id.*, art. 2.

[89] *Id.*, art. 2(2)(a).

[90] *Id.*, art. 2(2)(b). *See generally*, *The EU's Corporate Sustainability Due Diligence*, KPMG, https://kpmg.com/xx/en/home/insights/2023/02/the-eu-corporate-sustainability-due-diligence-directive.html (last visited Nov. 23, 2023).

[91] *Sustainability Rulebook: The Corporate Sustainability Due Diligence Directive*, EUROPEAN BROADCASTING UNION (Jun. 15, 2023), https://www.ebu.ch/case-studies/open/legal-policy/the-future-of-eu-sustainability-regulation-ii-the-corporate-sustainability-due-diligence-directive-csddd (last visited Nov. 23, 2023).

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As an enforcement mechanism, directors of EU companies would be responsible for setting up and overseeing due diligence requirements, incorporating considerations of "human rights, climate change and environmental consequences" to their existing fiduciary duties which would be reflected in their variable remuneration.[92] In other words, directors would have to focus on the interests of a broad range of stakeholders rather than focus on shareholder value, which would change corporate purpose. In addition, the CSDDD establishes civil liability for companies' failure to carry out due diligence obligations to prevent, bring to an end, or mitigate any potential adverse impacts, including where any failure subsequently leads to an adverse impact that could have been avoided. In this regard, the CSDDD aims to oppose the traditional shield of limited liability by extending the coverage to the company's operations within the group and throughout its value chains that include the company itself, its subsidiaries and business partners.[93] Such far-reaching due diligence obligations and their extraterritorial effect make the CSDDD "the most ground-breaking" legislative initiative proposed by the EU.[94] Academics and experts suggest that the implications of the CSDDD for US companies would be particularly intense, given the global nature of value chains in US multinational companies.[95]

It is worth mentioning that individual EU members had embarked on incorporating sustainability due diligence elements in their national legislation before the CSDDD's announcement in February 2022. In 2017, France became the first EU Member State to adopt a cross-sectoral pioneering law on Corporate Sustainability Due Diligence (more formally known as the *loi sur le devoir de vigilance* or the duty of care law).[96] Netherlands' Child Labor Due Diligence Act of

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[92] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, *supra* note 51, art. 25.

[93] Alessio M Pacces, *Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal*, OXFORD BUSINESS LAW BLOG (Sep. 22, 2023), https://blogs.law.ox.ac.uk/oblb/blog-post/2023/09/civil-liability-eu-corporate-sustainability-due-diligence-directive-proposal.

[94] Luca Enriques & Matteo Gatti, *The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention*, OXFORD BUSINESS LAW BLOG (Apr. 21, 2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate (by indirectly imposing the EU-accepted standards in a number of key areas of a firm's operations, including environmental obligations and worker rights, on any firm being part of an EU-connected value chain, the Proposed Directive would expand the extraterritorial reach of EU law in areas that are both highly politically sensitive and key to any country's choices on how to ensure its firms' international competitiveness).

[95] *Id.*; Balsanek, *supra* note 11; Ruth Kilsby & Magda Puzniak-Holford, *What is the European Corporate Sustainability Due Diligence Directive?*, DELOITTE (Sep. 12, 2023), https://www2.deloitte.com/uk/en/blog/emea-centre-for-regulatory-strategy/2023/what-is-the-european-corporate-sustainability-due-diligence-directive.html.

[96] Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1) [Law No. 2017-399 of 27 March 2017 on the Duty of Vigilance of Parent Companies and Contracting

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2019 mandates companies selling or supplying to Dutch consumers to investigate whether child labor has been involved in the production process.[97] Germany's Supply Chain Due Diligence Act requires large companies operating in Germany to carry out environmental and human rights due diligence on their business and that of their suppliers.[98] However, the CSDDD has a more ambitious and aggressive global coverage.

To justify the CSDDD's aggressive extraterritorial reach, it claims to produce several benefits for citizens, companies, and developing countries. It is suggested that developing countries would obtain better protection of the environment and human rights, improved sustainability-related practices, and increased application of international standards, which, in this case, means EU "global" standards.[99] The CSDDD's rollout might still be subject to clarification, but it is evident that the EU is committed to incorporating sustainability due diligence to corporate activities within and outside its jurisdiction expanding corporate purpose beyond borders in accordance with the EU's conception of corporate purpose.

Both the CSRD and CSDDD are corporate law and governance measures that directly target corporate regulations to drive corporate purpose extraterritorially. However, there is another category of legal measures also designed to change the governance and purpose of companies beyond jurisdictional borders, but it targets non-corporate regulations to indirectly drive

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Companies (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, https://www.legifrance.gouv.fr/download/pdf?id=9aawcYcwvkntYs2UUCMWL4iX_erjixoTD_Jy3AVXRFk=; Thomas Delille & Maximilien Pallu, *Corporate Sustainability Due Diligence: How the EU Proposal Could Impact France's Existing Due Diligence Law*, MAYER BROWN (Apr. 6, 2022), https://www.eyeonesg.com/2022/04/corporate-sustainability-due-diligence-how-the-eu-proposal-could-impact-frances-existing-due-diligence-law/ (stating that the Proposal of the EU Commission for a Directive on Corporate Sustainability Due Diligence requires large French companies or French-based subsidiaries to identify risks and prevent severe impacts on human rights and the environment from the company and its suppliers).

[97] Child Labor Due Diligence Act 2019 (Official Gazette of the Kingdom of Netherlands 2019, 401), art. 5, https://zoek.officielebekendmakingen.nl/stb-2019-401.html.

[98] Act on Corporate Due Diligence Obligations in Supply Chains 2021, https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile#linkicon; *Global Trend Towards Mandatory Human Rights Due Diligence Accelerates as German Law Comes Into Force*, LEXIS NEXIS (Mar. 15, 2023), https://internationalsales.lexisnexis.com/news-and-events/global-trend-towards-mandatory-human-rights-due-diligence-accelerates-as-german-law-comes-into-force#:~:text=The%20law%20requires%20these%20companies,to%20identifying%20and%20mitigating%20risks (Germany's Supply Chain Due Diligence Act does not only apply to German-headquartered companies; it covers any company with a large branch in Germany and German subsidiaries of foreign companies who exceed certain employee thresholds).

[99] *Corporate Sustainability Due Diligence*, *supra* note 91.

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sustainable corporate governance extraterritorially. An example of non-corporate measures that aim to indirectly incentivize (or force) companies beyond the EU's borders to adopt sustainable corporate governance is the *Carbon Border Adjustment Mechanism* (CBAM),[100] which becomes effective on 1 January 2026. The CBAM is another part of the EU Green Deal that has two goals: (1) to put a fair price on the carbon emitted during the production of carbon-intensive goods that are entering the EU; and (2) to encourage cleaner industrial production outside the EU – in other words, to impact and even regulate sustainability practices of non-EU companies.[101]

The CBAM will initially apply to certain carbon-intensive goods produced in non-EU countries, including goods wholly produced outside the EU and goods that underwent their substantial production phase outside the EU (in case production involves more than one country) – shifting the purpose of corporations outside of the EU towards producing sustainable goods.[102] Then, the EU aims to gradually apply the CBAM to the import of all goods covered by the EU Emissions Trading System (ETS) by 2030.[103]

The CBAM will ensure the carbon price of imports is equivalent to the carbon price of EU domestic production by forcing importing companies to purchase CBAM certificates to pay the difference between the carbon price in the country of production and the EU.[104] Simultaneously, the EU plans to phase out free emissions allowances for domestic industries under the EU ETS to level the playing field between EU and non-EU companies. In this regard, the CBAM complements the EU ETS that sets annual caps on allowable greenhouse gas emissions from industries and distributes these EU allowances (EUAs) domestically. Companies that import covered goods to the EU must report the volume of emissions generated in their production and

[100] Regulation (EU) 2023/956, *supra* note 40; Pieter Pauw, Louise van Schaik & Giulia Cretti, *The CBAM Effect: How the World is Responding to the EU's New Climate Stick*, CLINGENDAEL (May 2022), 2, https://www.clingendael.org/sites/default/files/2022-05/Alert_CBAM_effect.pdf (carbon border taxes or levies have been discussed in the academic literature for more than 15 years; historically, they have been sponsored by countries like France and are now in place in some regions of the world, such as California, where a levy is applied to certain imported electricity; in the EU, the climate ambitions of the Von der Leyen Commission brought CBAM back to the political table).
[101] Regulation (EU) 2023/956, *supra* note 40; *Carbon Border Adjustment Mechanism*, EUROPEAN COMMISSION, https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en (last visited Nov. 23, 2023).
[102] For instance, iron and steel, cement, aluminium, fertilizers, electricity, hydrogen, and some downstream products containing iron and steel (such as screws and bolts).
[103] Regulation (EU) 2023/956, *supra* note 40, art. 30(2)(b); *Carbon Border Adjustment Mechanism*, *supra* note 101.
[104] *Id.*

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buy a corresponding number of CBAM certificates tied to the EUA price. The calculation of carbon emissions includes both direct and indirect emissions.[105]

As a climate policy tool designed to change corporate behavior, the CBAM is positioned to have at least three major benefits. First, it targets the risk of "carbon leakage" – when EU manufacturers seek to avoid paying for their emissions by outsourcing the production of carbon-heavy goods to countries where carbon prices are lower or absent.[106] The aim is to incentivize EU and non-EU companies to either adopt more sustainable corporate governance practices or be priced out of the market. Second, the CBAM would improve the visibility of countries' carbon pricing policies and expand data on companies' emissions across different markets.[107] This aims to achieve more transparency and put pressure on non-EU countries to amend their domestic laws to incentivize (or force) companies to decarbonize their production and operations. Third, the CBAM would encourage EU trading partners to adopt their own carbon pricing regulation to capture a portion of the carbon tax-base (the EU's so-called new climate stick).[108] This mechanism means that once third countries introduce a carbon tax system linked to an emission trading system (ETS), their exporter may deduct the corresponding cost, meaning that their goods might be exempt from the EU carbon tax. Once non-EU countries set up carbon tax systems it will incentivize their companies to implement cleaner industrial production and focus on climate change and, as a result, adopt sustainable corporate governance – driving corporate purpose beyond borders.[109]

However, there might be an adverse effect on countries – and, in turn, their domestic companies – that export goods to the EU, particularly developing ones. Experts warn that the extent of the CBAM's impact or effectiveness is hard to estimate given that many details still need to be worked out. Also, many countries, especially developing ones that do not have a carbon-pricing system, raise concerns that the CBAM will place an unfair burden on their companies – making their

[105] Regulation (EU) 2023/956, *supra* note 40, at 60; Maryla Maliszewska et al., *How Developing Countries Can Measure Exposure to the EU's Carbon Border Adjustment Mechanism*, WORLD BANK BLOGS (Jun. 13, 2023), https://blogs.worldbank.org/trade/how-developing-countries-can-measure-exposure-eus-carbon-border-adjustment-mechanism (stating that certain sectors – aluminium, as well as iron and steel, where scrap metal processing is electricity-intensity – will receive compensation in the EU for their indirect emissions, so that only their scope 1 emissions will be covered until that compensation is phased out).
[106] *Id.*
[107] Pieter Pauw, *supra* note 100, at 2.
[108] *Id.*
[109] Sean Bray, *What the EU's Carbon Border Adjustment Mechanism Means for Europe and the United States*, TAX FOUNDATION (Apr. 26, 2023), https://taxfoundation.org/cbam-eu-carbon-border-tax/.

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current profitmaking (shareholder wealth maximizing) business models unviable and exacerbating global income inequality.[110] In this regard, the CBAM is perceived as a protectionist measure that aims to secure the international competitiveness of European companies in violation of global trading rules[111] – while unfairly forcing companies in developing countries to focus on sustainability at the expense of their current (domestic) shareholder wealth maximizing, business models.[112] In particular, the BRICS countries (Brazil, Russia, India, China, and South Africa) called the CBAM discriminatory[113] and Australian Minister for Trade, Dan Tehan, said it "would be detrimental to global growth and to free trade globally".[114] A Boston University study revealed that the CBAM could result in annual gains of up to US$141 billion in the Global North, while countries of the Global South would lose a total of US$106 billion.[115] African lower-income countries particularly worry that the CBAM would undermine their right to development by making their companies shift their purpose from economic development within their borders to EU-cum-global sustainability goals – colonialism repackaged.[116]

The three legal initiatives described above aim to promote (or force) companies beyond the EU's borders to adopt an EU-cum-global understanding of corporate purpose. They fall into two categories of state-based extra-territorial corporate law and governance: legal mechanisms that directly target corporate regulations to drive sustainable corporate governance extraterritorially; and those that target non-corporate regulations to indirectly drive sustainable corporate governance

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[110] Thieß Petersen & Peter Walkenhorst, *The EU Carbon Border Adjustment Mechanism. What Does it Mean for the Rest of the World?*, BERTELSMANN STIFTUNG (May 16, 2023), https://globaleurope.eu/europes-future/the-eu-carbon-border-adjustment-mechanism-what-does-it-mean-for-the-rest-of-the-world/.

[111] Finbarr Bermingham, *China Asks EU to Justify Upcoming Carbon Tax at World Trade Organization*, SOUTH CHINA MORNING POST (Mar. 16, 2023), https://www.scmp.com/news/china/article/3213676/china-asks-eu-justify-upcoming-carbon-tax-world-trade-organization.

[112] Alice Hancock, *EU's Trading Partners Accuse Bloc of Protectionism Over Carbon Tax Plan*, FINANCIAL TIMES (Dec. 17, 2022), https://www.ft.com/content/67c1ea12-7495-43ff-9718-7189cef48fd6.

[113] Vishwa Mohan, *BRICS Nations Join India in Opposing EU Carbon Tax*, THE TIMES OF INDIA (Aug. 28, 2021), https://timesofindia.indiatimes.com/india/brics-nations-join-india-in-opposing-eu-carbon-tax/articleshow/85704371.cms.

[114] Sarah Anne Aarup & Barbara Moens, *Australia Attacks EU Carbon Border Levy Plans*, POLITICO (Jun. 29, 2021), https://www.politico.eu/article/cbam-detrimental-to-growth-australian-trade-minister-says/.

[115] He Xiaobei et al., *The Global Impact of a Carbon Border Adjustment Mechanism*, BU GLOBAL DEVELOPMENT POLICY CENTER (March 2022), https://www.bu.edu/gdp/2022/03/11/the-global-impact-of-a-carbon-border-adjustment-mechanism-a-quantitative-assessment/#:~:text=At%20its%20broadest%20implementation%2C%20the,compared%20to%20a%20baseline%20scenario.

[116] Myriam Douo, *Climate Colonialism and the EU's Green Deal*, AL JAZEERA (Jun. 23, 2021), https://www.aljazeera.com/opinions/2021/6/23/the-eus-green-deal-could-propagate-climate-colonialism.

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extraterritorially.[117] Both categories compel directors and executives of non-EU companies to consider the interest of a broad range of stakeholders, rather than focus on shareholder value maximization – changing corporate purpose. Whether these legal measures represent the EU's attempt to address the climate crisis globally, or are colonialism repackaged, is subject to debate. However, what is clear is that these initiatives demonstrate the EU's willingness to use its market power and regulatory capacity to mold corporate purpose beyond borders, with the aim of creating EU-cum-global standards for sustainable corporate governance.

II.C. The Global Impact of State-Based Extraterritorial Corporate Law and Governance on Corporate Purpose Beyond Borders

The EU is currently the global forerunner in aggressively using state-based extraterritorial corporate law and governance to drive corporate purpose beyond borders.[118] Although international law firms have so far tended to highlight the impact of the EU's use of state-based extraterritorial corporate law and governance on the US, as illustrated above, its impact on the developing world will be significant. Also, other powerful economies beyond the EU increasingly appear to be considering utilizing extraterritorial corporate law and governance to try to mold corporate purpose in their own image beyond borders – magnifying the influence of this new driver of global corporate law and governance.

As mentioned above, in the US, the SEC recently proposed a new climate disclosure rule, which would apply to companies listed in the United States. However, as highlighted earlier, it is possible that when the SEC's proposal is finalized there may be a carveout for foreign issuers[119] – making the EU further stand out for its use of state-based extraterritorial corporate law and governance to drive sustainable corporate governance beyond borders.[120] Even if there is a carve out for foreign

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[117] *See* Aneil Kovvali, *Stakeholderism Silo Busting,* 90 U. CHI. L. REV. 203, 206 (2023) (arguing that major problems, such as inequality and climate change, require systemic solutions; therefore, the siloed approach denies reformers the benefit of insights and mechanisms developed in parallel areas of law, and it can result in proposals in one area that would have unfortunate consequences in another).

[118] Pierre-Henri Conac, *Sustainable Corporate Governance in the EU*, GROUPE D'ÉTUDES GÉOPOLITQUES, https://geopolitique.eu/en/articles/sustainable-corporate-governance-in-the-european-union-eu-reasonable-global-ambitions/# (last visited Nov. 26, 2023) (stating that the EU is aiming at establishing global standards in sustainable governance through extra-territorial application and to influence international standards).

[119] Freshfields, *New California Climate Disclosures*, *supra* note 9.

[120] *SEC Proposes Climate Disclosure Regime*, DAVID POLK (Mar. 22, 2022), https://www.davispolk.com/insights/client-update/sec-proposes-climate-disclosure-regime.

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issuers, the SEC's proposal may require US issuers to make extensive disclosure on climate-related issues, including emissions produced in their supply chains (Scope 3), which would have some extra-territorial effects (even if the regulations are limited to US companies as their supply chains would extend beyond US borders). However, it appears that disclosure of Scope 3 emissions will likely be optional or even left out of the final version of the law – which would make the SEC's disclosure rules effectively limited to having an effect in the US, assuming there is a carveout for foreign listed companies.[121] Moreover, the SEC proposal is almost certain to require disclosure on a single materiality standard. As single materiality tethers climate disclosure to what is material for the company's investors, it maintains a focus on shareholder primacy, which has been a hallmark of US corporate governance for decades.[122] However, some US states have recently chosen to go further than the proposed SEC rule – the most important of which is the state of California, which is the largest economy in the US and one of the largest in the world.

On October 7, 2023, California's Democratic Governor, Gavin Newsom, signed two climate disclosure bills, SB253 (The Climate Corporate Data Accountability Act)[123] and SB261 (The Climate-Related Financial Risk Act),[124] into law which are sure to have extraterritorial effects as they apply to large private and public companies that "do business in California" and require the disclosure of emissions in qualifying companies' supply chains. On the same date, California adopted another law, AB-1305 (the Voluntary Carbon Market Disclosures Act (VCMDA)),[125] that targets "greenwashing" by requiring detailed disclosure of the methodology that tracks and verifies claims made within California by entities operating within California regarding their net zero, carbon neutrality or emissions reductions, as well as disclosure regarding their voluntary carbon offsets (VCOs) purchased, used, marketed or sold within California.[126] The VCMDA applies to

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[121] Jon McGowan, *SEC Climate Disclosure Rule Most Likely Not Final Until 2024, Effective 2026* (Oct 25, 2023), https://www.forbes.com/sites/jonmcgowan/2023/10/26/sec-climate-disclosure-rule-most-likely-not-final-until-2024-effective-2026/?sh=cdc2d803434b

[122] Puchniak, *No Need for Asia to be Woke*, *supra* note 1, at 14 ("modern corporate law and governance in the United Kingdom and United States has, in theory and practice, been defined by shareholder primacy").

[123] Senate Bill No. 253 (Chapter 382), CALIFORNIA LEGISLATIVE INFORMATION (Sep. 10, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB253.

[124] Senate Bill No. 261 (Chapter 383), CALIFORNIA LEGISLATIVE INFORMATION (Oct. 9, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB261.

[125] Assembly Bill No. 1305 (Chapter 365), CALIFORNIA LEGISLATIVE INFORMATION (Oct. 9, 2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1305.

[126] Loyti Cheng et al., *California Enacts Anti-Greenwashing Requirements*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Nov. 18, 2023), https://corpgov.law.harvard.edu/2023/11/18/california-enacts-anti-greenwashing-requirements/.

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entities that operate and make claims, purchase or use VCOs within California, and sell or market VCOs within California.

Importantly, all three laws (the Climate Corporate Data Accountability Act, the Climate-Related Financial Risk Act and the VCMDA) are largely limited to *US business entities* that do business in California.[127] This illustrates how the California laws are intended to have extraterritorial effects *within* the United States by forcing companies from other *US states*, that do business in California, to comply with California's more extensive climate disclosure rules.[128] The California laws will have some global extraterritorial impact as they require US incorporated subsidiaries of non-US companies to disclose and US business entities to disclose emissions produced throughout their supply chains (Scope 3 emissions). However, unlike the EU legislation described above, they do not explicitly target non-US companies – as the primary target of the legislation is *US business entities*.[129] Also, it must be noted that unlike the EU's CSRD, California's disclosure laws appear to mostly employ a single materiality standard and are limited to climate related disclosure (while the EU's CSRD requires disclosure on a double materiality standard on a wide array of environmental and social issues).[130] In this sense, California's laws primarily aim to project California's conception of corporate purpose across the United States by setting a new national standard, but not globally.[131] They also are less forceful than the EU legislation in driving the conception of corporate purpose away from a shareholder primacy model, while attempting to mitigate the effects of climate change by mostly requiring climate related disclosure that is financially material to investors.[132]

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[127] Senate Bill No. 253, *supra* note 123; Senate Bill No. 261, *supra* note 124; Assembly Bill No. 1305, *supra* note 125; Freshfields, *New California Climate Disclosures*, *supra* note 9, at 1.
[128] Freshfields, *New California Climate Disclosures*, *supra* note 9, at 4-5.
[129] *Id.*, 9-10.
[130] *Id.*, 6-7, 11-12. The Climate Corporate Data Accountability Act (or SB 253) does not require a materiality threshold; while the Climate-Related Financial Risk Act (or SB 261) currently does not include a materiality threshold, although TCFD recommendations include the concept of materiality that is defined consistently with an entity's determination of materiality of other information included in annual financial filings. *See*, *A Closer Look at California's Recently Enacted Climate Disclosure Laws*, *supra* note 55, at 8.
[131] William J. Stellmach, Adam Aderton & William L. Thomas, *California's Comprehensive Climate Accountability Regime: Setting an Aggressive New National Standard*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Nov. 25, 2023), https://corpgov.law.harvard.edu/2023/11/25/californias-comprehensive-climate-accountability-regime-setting-an-aggressive-new-national-standard/?utm_content=buffere33ee&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer.
[132] Cheng, *supra* note 126.

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California's attempt to expand climate disclosure and force companies from other states to adopt its approach to sustainable corporate governance – albeit mainly on a single materiality basis – is destined to be challenged in court. The California Chamber of Commerce has already publicly stated that California has "no authority to regulate emissions beyond the California border".[133] Although many of the implementation details of the new California laws are yet to be decided before the initial reporting deadline, if they survive a legal challenge, they will drive California's conception of corporate purpose beyond its state borders – shifting corporate purpose in the United States towards a model where addressing climate change becomes a focal point (albeit while not fundamentally disrupting America's shareholder primacy corporate governance model).[134]

However, the future of corporate purpose in the United States is complicated by the country's deep political divide.[135] As of mid-2023, 15 Republican-controlled states had passed "Anti-ESG Laws" aiming to prevent corporate purpose in these states from being redefined from beyond their borders.[136] Many of these laws are also designed to have their own extraterritorial effect, reorienting the purpose of the corporation towards shareholder wealth maximization and away from a stakeholder approach.[137] How this battle for defining corporate purpose plays out in the US will likely be determined by court challenges and the outcome of political elections. Unlike the EU, with these countervailing forces in the US and the high level of legislative uncertainty, it would be imprudent to try to predict an outcome or its effects. However, what is certain is that in

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[133] Cydney Posner, *California's Proposed Climate Corporate Accountability Act Goes Belly Up*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Sep. 5, 2022), https://corpgov.law.harvard.edu/2022/09/25/californias-proposed-climate-corporate-accountability-act-goes-belly-up/.

[134] It should be mentioned that it is not California's first attempt to regulate beyond its borders. Other attempts include a board diversity law and an animal welfare law, which were intended to have national effects. The latter has been upheld by the US Supreme Court, while the former was challenged in Los Angeles Superior Court. Sarah Fortt et al., *California Gender Board Diversity Law Is Held Unconstitutional*, HARVARD LAW SCHOOL FORUM OF CORPORATE GOVERNANCE, https://corpgov.law.harvard.edu/2022/06/12/california-gender-board-diversity-law-is-held-unconstitutional/ (last visited Dec. 13, 2023); Lawrence Hurley, *California Law on the Humane Raising of Pigs Survives Supreme Court*, NBC NEWS (May 11, 2023), https://www.nbcnews.com/politics/supreme-court/supreme-court-rejects-challenge-california-pork-industry-restriction-rcna64623.

[135] *Anti-ESG Legislation*, MORGAN LEWIS, https://www.morganlewis.com/-/media/files/document/2022/anti-esg-legislation-standalone-state-chart.pdf (last visited Nov. 23, 2023).

[136] Vandana Gombar, *Anti-ESG Crusade in US Sweeps 15 States with More Laws in Works*, BLOOMBERGNEF (Jun. 9, 2023), https://about.bnef.com/blog/anti-esg-crusade-in-us-sweeps-15-states-with-more-laws-in-works/.

[137] *Id.* (Oklahoma, for example, has released a list of 13 financial institutions that it has determined boycott oil and gas companies and threatened that such companies "may be excluded from doing business with the state"; such companies include BlackRock, Wells Fargo, JPMorgan Chase, and Bank of America; Texas has also released a similar "blacklist").

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the United States defining corporate purpose beyond *intra-state* borders will be a focal point for corporate executives, lawyers, and politicians for the foreseeable future. It has also created a corporate governance and regulatory environment in the US that is treacherous to navigate for companies that do business across state borders.[138]

Asian countries are also joining the race to define corporate purpose in their own jurisdictions and, as they move from voluntary to mandatory standards for sustainability disclosure, the regulatory regimes that they are creating are likely to have some extraterritorial corporate governance effects. In Singapore, all companies listed on the Singapore Exchange (including foreign issuers) have been required to provide climate-related disclosures in a "comply or explain" manner, meaning that issuers must either comply with disclosure standards or justify their non-compliance.[139] However, Singapore could be the first jurisdiction in Asia to introduce ISSB-aligned mandatory climate reporting for listed and large non-listed companies (NLCos).[140] With two of Singapore's top regulatory agencies – the Accounting and Corporate Regulatory Authority (ACRA) and Singapore Exchange Regulation (SGX RegCo) – overseeing the process, the recommendations are planned to be finalized by 2024, making climate reporting mandatory for listed companies by the financial year 2025 and large NLCos with SG$1 billion (US$0.74 billion) revenue from FY2027. When adopted, these requirements would affect approximately 1,000 companies, including foreign entities.[141] However, given that they are modeled on the ISSB, they are likely to employ a single materiality standard – and, therefore, will be less aggressive than the EU in pushing corporate purpose away from a shareholder maximization focus towards stakeholderism beyond borders.[142]

Other Asian jurisdictions are tagging along by introducing sustainability regulations that drives corporate purpose beyond borders. In November 2021, Hong Kong Exchanges and Clearing Limited (HKEX), following the Taskforce on Climate-related Financial Disclosures (TCFD) framework, published guidance on climate disclosures that would require all HKEX-listed

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[138] *Id.* (stating that things are getting very tricky for global financial institutions active in these states, as well as for the states pursuing an anti-ESG agenda).
[139] SGX Mainboard Rules, rules 711A & 711B, https://rulebook.sgx.com/rulebook/mainboard-rules (last visited Nov. 25, 2023). *See also*, Song, *supra* note 61.
[140] See, *supra* note 61.
[141] Tsubasa Suruga, *Singapore to Require Climate reporting by Unlisted Companies*, NIKKEI ASIA (Jul. 6, 2023), https://asia.nikkei.com/Spotlight/Environment/Climate-Change/Singapore-to-require-climate-reporting-by-unlisted-companies.
[142] See, *supra* note 61.

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companies (local and foreign) to report annually in line with TCFD no later than 2025.[143] The Hong Kong Monetary Authority (HKMA) also issued the TCFD-aligned reporting guidance requesting financial institutions to disclose their climate risk management no later than 2025, with initial disclosures occurring no later than mid-2023.[144]

In Japan, all companies listed on the Tokyo Stock Exchange (local and foreign) are expected to produce sustainability reports to disclose opportunities and risks related to climate change. In June 2021, the Tokyo Stock Exchange, Inc. (TSE) revised the Corporate Governance Code by obliging Prime Market-listed companies to report TCFD disclosures and address social matters on a "comply-or-explain" basis.[145] In March 2023, Japan's Financial Services Agency made another step towards mandatory sustainability disclosure, requiring all listed companies (including foreign companies listed in Japan) to disclose sustainability-related information using the TCFD framework. The final step would be the development of prescriptive sustainability disclosure standards by the newly established Sustainability Standards Board of Japan (SSBJ) which would be aligned with the ISSB and be made effective no later than April 2025.[146]

Finally, China follows similar disclosure trends, but its approach remains less interventionist compared to other jurisdictions. China's Ministry of Ecology and Environment (MEE) issued new rules effective in February 2022, introducing mandatory environmental disclosures for *domestic* enterprises on an annual basis "in a timely, truthful, accurate, and complete manner".[147] The rules apply solely to market entities engaged in the production and/or finance of projects with a high

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[143] Schneider Electric, *ESG Disclosure Regulations are Strengthening the Asia Pacific*, 3BL CSRWIRE (Dec. 8, 2022), https://www.csrwire.com/press_releases/752196-esg-disclosure-regulations-are-strengthening-asia-pacific.
It should be mentioned that the IFRS Foundation's International Sustainability Standards Board (ISSB) will take over responsibility for monitoring progress of companies' climate-related disclosures from the Financial Stability Board's (FSB) Task Force on Climate-related Financial Disclosures (TCFD) as of next year. See Mark Segal, *IFRS to Take Over Responsibilities of the TCFD*, ESG TODAY (Jul. 10, 2023), https://www.esgtoday.com/issb-to-take-over-responsibilities-from-tcfd/.

[144] *Supervisory Policy Manual, GS-1: Climate Risk Management*, HONG KONG MONETARY AUTHORITY, https://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/GS-1_for_consultation_20Jul2021.pdf (last visited Nov. 26, 2023).

[145] *Japan's Corporate Governance Code*, JPX (Jun. 11, 2021), https://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jdy-att/20210611.pdf.

[146] Kyle Lawless et al., *What's Next for Japanese Sustainability Disclosure Standards*, EY (Oct. 13, 2023), https://www.ey.com/en_jp/sustainability/whats-next-for-japanese-sustainability-disclosure-standards.

[147] Arendse Huld, *China ESG Reporting – New Measures on Disclosure of Enterprise Environmental Information*, CHINA BRIEFING (Feb. 23, 2022), https://www.china-briefing.com/news/china-esg-reporting-disclosing-enterprise-environmental-information/.

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environmental impact.[148] At the same time, China's Securities Regulatory Commission approved the voluntary disclosure rules applicable to listed companies to strongly encourage them to disclose carbon reduction in their annual and half-year reports, which is expected to be transformed into compulsory disclosure for all firms listed on domestic markets in the future.[149]

In sum, it is evident that the EU stands out for its aggressive use of state-based extraterritorial corporate law and governance to drive its conception of corporate purpose globally. The EU's extraterritorial regulatory push seeks to use the double materiality disclosure standard, combined with other regulatory measures, to define the purpose of the corporation broadly as an organizational form to benefit stakeholders and to directly address a wide array of environmental and social issues. California also seems to be using its regulatory and market power to shape corporate purpose extraterritorially through expanded disclosure. However, California's ambitions appear to be primarily focused within the United States and are limited to climate change. Also, by focusing on a single materiality disclosure standard, California's conception of the corporation is still tethered to a shareholder primacy view of the corporation, which predominates in the United States. As Asian jurisdictions move to more mandatory climate disclosure regimes, the cross-border impact on the corporate purpose of foreign-listed companies may be felt. Finally, as one of us explained elsewhere, China has enormous economic power and renewable energy capacity to drive corporate purpose beyond borders – but seems to have little ambition to do so.[150] China has also made clear that it will not bend under outside pressure on climate change. Speaking of the country's goal to achieve carbon neutrality, President Xi stressed that "the path, method, pace and intensity to achieve this goal should and must be determined by ourselves, and will never be influenced by others."[151] At the same time, critics raise the concern of "carbon colonialism" when

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[148] *China Introduces New Rule on Mandatory Environmental Disclosures*, XBRL (Jan. 21, 2022), https://www.xbrl.org/news/china-introduces-new-rule-on-mandatory-environmental-disclosures/.

[149] *China Considers Mandatory ESG Disclosures Framework*, ESG Investor (Feb. 23, 2023), https://www.esginvestor.net/live/china-considers-mandatory-esg-disclosures-framework/; Mark Uhrynuk et al., *China Proposes New Environmental and Social Disclosures for Listed Companies*, MAYER BROWN (May 14, 2021), https://www.eyeonesg.com/2021/05/china-proposes-new-environmental-and-social-disclosures-for-listed-companies/.

[150] Roza Nurgozhayeva, *The Belt and Road Initiative and Sustainability. A Driving Force for Change and a Missed Opportunity.*, SSRN (Oct. 23, 2023), 12-14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4609954 [hereinafter Nurgozhayeva, *The Belt and Road Initiative and Sustainability*].

[151] *Will China save the Planet or Destroy it? China's Belt and Road Initiative Will Keep Testing the West*, THE ECONOMIST (Nov. 27, 2023), https://www.economist.com/china/2023/11/27/will-china-save-the-planet-or-destroy-it.

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rich countries would continue to exploit low-income states in the name of climate.[152] As these issues are unfolding in real-time, their effects on climate are uncertain. However, what is certain is that extraterritorial corporate law and governance is an issue that will define corporate governance for years to come – an overlooked feature of corporate governance that has been hiding in plain sight.

III. Multi-Jurisdictional Firm-Based Corporate Governance: Illuminating the Firm as a Driver of Corporate Purpose Beyond Borders

III.A. Multinational Firms as Major Drivers of Corporate Purpose Beyond Borders: An Overlooked Reality

As explained above, whether corporate law should focus narrowly on maximizing shareholder value or, more broadly, on advancing stakeholders' interests is the core issue in the classic corporate purpose debate.[153] Those who believe that corporate law should focus on maximizing shareholder value argue that other laws, such as environmental regulation, should set the rules of the game within which the corporation can fulfill its purpose of maximizing shareholder value.[154] Those who believe that corporate law should include protections for stakeholders, such as the environment, believe that provisions to protect the environment should be included in the corporate law itself. A point that is almost entirely overlooked, is that both sides in the classic corporate purpose debate, view *the law* (whether it is the corporate law or other law that regulates corporations externally) as defining corporate purpose.[155] In turn, the state, as the creator of the law, is seen as the major driver of corporate purpose (whether within or beyond its borders).

However, in this new era of sustainability, a new driver of corporate purpose has emerged: the firm. It is now ubiquitous around the world for companies to claim that they go beyond the law to

[152] The article refers to the case of Blue Carbon (UAE) and its initial agreements with Tanzania, Liberia, Zambia and Zimbabwe to manage forests across a total land area nearly as large as Britain. Though no deal has been formally agreed, critics call it "carbon colonialism". See *Could Carbon Credits be Africa's Next Big Export*, THE ECONOMIST (Nov. 30, 2023), https://www.economist.com/middle-east-and-africa/2023/11/30/could-carbon-credits-be-africas-next-big-export.
[153] *See supra* Part I.
[154] *See supra* Part I.
[155] Katelouzou & Puchniak, *supra* note 2, at 22-23.

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ensure their businesses promote sustainability.[156] When a large firm goes beyond what is legally required and defines its purpose as advancing sustainability, it redefines the corporate purpose within its corporate governance ecosystem. Given the wide range of discretion afforded to directors in corporate laws around the world, directors' focus can shift along the shareholder-stakeholder continuum and, as a result, significantly alter the corporate purpose they serve even without changing laws creating a powerful firm-based mechanism that drives corporate purpose across borders.[157]

This "firm-based corporate governance effect" can broadly occur in one of two ways, which is contingent on the type of firm involved. First, in large commercial firms, companies in the firm's supply chain will often be required to meet the sustainability standards set by the large commercial firm they are supplying, even if those standards go beyond what is required by the law. Second, in large investment firms, standards for sustainable investment will often require the investee company to go beyond what the law requires to meet the terms of the investment agreement (debt) or to shift their governance towards sustainability in response to the investor's shareholder power (equity).[158]

The emergence of colossal multinational corporations, which define their purpose as promoting sustainability throughout their global operations, has created a powerful force driving supply chain

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[156] *See*, e.g., *People & Planet*, IKEA, https://www.ikea.com/global/en/our-business/people-planet/ [hereinafter *People & Planet*] (last visited Nov. 24, 2023); *Responsible Business Resources*, META, https://investor.fb.com/esg-resources/default.aspx (last visited Nov. 24, 2023); *Lindt & Sprüngli Sustainability*, LINDT & SPRÜNGLI, https://www.lindt-spruengli.com/sustainability (last visited Nov. 24, 2023).

[157] As insightfully pointed out by Amir Licht, "it is well known that under the Business Judgment Rule, directors have ample discretion with regard to the ways in which the company can achieve its purpose, which may include bestowing benefits on non-shareholder stakeholders beyond their legal entitlements. First, as noted, corporate leaders contrast shareholder interests with those of all other stakeholders, such that they exhibit a personal principled approach on such matters that ranges between two extreme end-points. We dubbed this approach "shareholderism" to denote its ideology-like Second, directors' and CEOs' shareholderism levels exhibited robust correlations with their personal value preferences. quality. Nevertheless, these authors found that an overwhelming majority of directors (94.3 percent) believed that the law of directors' duties was broad enough to allow them to consider the interests of non-shareholder stakeholders. To put things more bluntly, implementing legal reform with a view to changing corporate purpose might be an exercise in futility." Amir Licht, *Varieties of Shareholderism*, *supra* note 30, at 398.

[158] *Update to Green Finance Strategy – Call for Evidence*, BLACKROCK, https://www.blackrock.com/corporate/literature/publication/beis-call-for-evidence-on-update-to-green-finance-strategy-072722.pdf (last visited Nov. 24, 2023) (stating that the company has joined the Lowering Emissions by Accelerating Forest Finance (LEAF) and is actively involved in the TNFD, the Principles for Responsible Investment (PRI) Sustainable Commodities Working Group, Global Canopy Aligned Accountability project, and the World Economic Forum (WEF) Biodiversity Finance Working Group).

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companies to be governed in a way that meets this globally defined purpose.[159] The emergence of global investment firms, which define their purpose as promoting sustainability throughout their global investment portfolios, has created a powerful force driving investee firms to meet these globally defined sustainability standards.[160] Both multinational corporations and global investment firms normally set their sustainability standards at a global – not jurisdictional – level. This has resulted in multinational companies and global investment firms, through their supply chains and investments respectively, to be major drivers of corporate purpose beyond borders in this new age of sustainability.

We realize that "firm-based corporate governance" goes beyond what corporate law scholars normally consider as a driver of corporate governance. However, as we demonstrate below, the sustainability standards set by multinational companies can drive their supply chain companies to adopt a sustainable corporate purpose, which goes beyond what the corporate law or other domestic laws require in many jurisdictions around the world – what we coin the "IKEA effect". The ability of global investment firms to drive their investee companies to adopt sustainable corporate governance – what we coin the "BlackRock" effect – can be a greater driver of

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[159] See, for example, *The Lindt & Sprüngli Farming Program*, LINDT & SPRÜNGLI, https://www.lindt-spruengli.com/sustainability/farming-program (last visted Nov. 24, 2023) (the company states that its program seeks to "create decent and resilient livelihoods for cocoa farmers and their families and to encourage more sustainable farming practices"; in this regard, the program "deploys measures to facilitate higher productivity, support diversification of household incomes, improve community infrastructure, reduce the risk of child labor, and address deforestation"); *People & Planet*, *supra* note 156 (where the company emphasizes that "all wood in IKEA products is deforestation-free and comes from responsibly managed forests").

[160] Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARVARD BUSINESS REVIEW, https://hbr.org/2019/05/the-investor-revolution (last visited Nov. 24, 2023) (citing the fact that, in 2006, when the UN-backed Principles for Responsible Investment was launched, 63 investment companies with $6.5 trilling in assets under management signed a commitment to incorporate ESG issues into their investment decisions; however, by April 2018, the number of signatories had grown to 1,715 and represented $81.7 trillion in assets under management); Robert G. Eccles, *Why an Activist Hedge Fund Cares Whether Apple's Devices are Bad for Kids*, HARVARD BUSINESS REVIEW (Jan. 16, 2018), https://hbr.org/2018/01/why-an-activist-hedge-fund-cares-whether-apples-devices-are-bad-for-kids (highlighting how JANA Partners, a New York-based activist hedge fund, and the California State Teachers' Retirement System (CalSTRS) sent a letter to Apple's board of directors stating that "there is a clear need for Apple to offer parents more choices and tools to help them ensure that young consumers are using [Apple's] products in an optimal manner"); *BlackRock: Focus on Society and Profits*, THE NEW YORK TIMES (Jan. 16, 2018), https://www.nytimes.com/interactive/2018/01/16/business/dealbook/document-BlackRock-s-Laurence-Fink-Urges-C-E-O-s-to-Focus.html (where BlackRock informed some of the biggest companies in the world that they need to do more than make profits – they need to contribute to society as well if they want to receive the support of BlackRock). *See also*, Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, THE NEW YORK TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html.

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sustainable corporate governance than the corporate law, securities regulations, or other domestic laws that aim to regulate companies.

Equally as important, when multinational companies claim to promote sustainability in their supply chains, but fail to do so, greenwashing can occur in the corporate governance ecosystem on a global scale.[161] Similarly, when global investment firms claim to promote sustainability through their global investments, but fail to do so, "faux green investor activism" can emerge which risks exacerbating existential environmental and social issues that must be addressed on a global scale.[162] As such, an understanding of multijurisdictional firm-based corporate governance is essential for understanding how the corporate purpose of companies has been shaped – for better or worse – across borders by the global sustainability movement, which is the subject to which we now turn.

III.B. Multinational Companies and Sustainable Corporate Purpose: The Solution or Problem?

Multinational companies (MNCs) possess enormous resources and capacity to push sustainable corporate governance and to drive the climate agenda globally. Recently, a group of over 130 companies, including such multinational giants as IKEA, Nestlé, and Unilever, issued an open letter to governments, urging them "to seek outcomes that will lay the groundwork to transform the global energy system towards a full phase-out of unabated fossil fuels and halve emissions this decade."[163] Those MNCs are responsible for approximately US$1 trillion in global revenue, making them more wealthy than some sovereign states.[164] In 2017, London-based Global Justice Now reported that 157 of the top 200 global economic entities were corporations that accrued more

[161] Katharina Weghmann, *How Good Governance Can Keep Corporates Clean from Greenwashing*, EY (May 23, 2023), https://www.ey.com/en_sg/assurance/how-good-governance-can-keep-corporates-clean-from-greenwashing; Silvia Pellegrino, *Explainer: Household Brands Accused of Greenwashing*, CAPITAL MONITOR (Mar. 10, 2023), https://capitalmonitor.ai/sector/consumer/explainer-household-brands-accused-of-greenwashing/.
[162] James Tapper, *'Sustainable' Pension Funds Accused of Greenwashing Over Billions Held in Oil and Gas Firms*, THE GUARDIAN (May 14, 2023), https://www.theguardian.com/business/2023/may/14/sustainable-pension-funds-accused-of-greenwashing-over-billions-held-in-oil-and-gas-firms (reporting that asset managers have invested $376 billion in oil and gas companies, despite publicly pledging to back efforts to limit global temperature rises to 1.5˚C); Puchniak & Varottil, *supra* note 3, at 2-9.
[163] Mark Segal, *$1 Trillion Business Coalition Calls for Plans to Phase Out Fossil Fuels at COP28*, ESG TODAY (Oct. 23, 2023), https://www.esgtoday.com/1-trillion-business-coalition-calls-for-plans-to-phase-out-fossil-fuels-at-cop28/.
[164] *Id.*

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wealth than countries such as Russia, Belgium, or Sweden.[165] Cross-border investment by MNCs amounted to 50% of the gross domestic product (GDP) of OECD countries in 2017.[166] Such corporate giants as Walmart and Amazon each had 2.3 and 1.5 million employees worldwide as of December 2022.[167] These numbers suggest MNCs have a colossal influence on sustainability globally.

Due to their enormous wealth and geographical presence, MNCs have been able to transmit sustainability standards and practices across different markets by incorporating sustainability considerations in their by-laws, operations, and supply chains. Responding to the changing regulatory and market environment, many MNCs have transformed from primarily shareholder wealth-maximizing organizations to organizations that develop global policies beyond jurisdictional borders and uplift local laws to their sustainability and corporate governance standards.[168] Although MNCs do not have the power to issue and enforce legally binding norms and instead are submitted to the legislative power of states, their massive wealth and multi-jurisdictional presence have allowed them to transition from multinationals to metanationals that do not belong to one single jurisdiction and self-impose sustainable corporate purpose throughout their global value chains.[169]

The paradigm example of an MNC that has uniform global sustainability policies that require firms across multiple jurisdictions to alter their corporate governance in line with its sustainability standards is IKEA. The IKEA sustainability strategy "People & Planet Positive" was launched in 2012 with the ambition "to transform the IKEA business, the industries in the IKEA value chain

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[165] *69 of the Richest 100 Entities on the Planet are Corporations, supra* note 15.

[166] Itzhak Ben-David et al., *Exporting Pollution: Where Do Multinational Firms Emit CO2?*, ECGI FINANCE WORKING PAPER 717/2020, 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252563.

[167] *Leading 500 Fortune Companies Based on Number of Employees in 2022*, STATISTA, https://www.statista.com/statistics/264671/top-50-companies-based-on-number-of-employees/ (last visited Nov. 24, 2023).

[168] Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE, 4 (Rodney Bruce Hall & Thomas J. Biersteker eds., Cambridge University Press 2002); James N. Rosenau, *Governance in the Twenty-First Century*, 1 GLOBAL GOVERNANCE 13, 13–22 (1995); GLOBAL CORPORATE GOVERNANCE (Donald H. Chew & Stuart L. Gillan eds., Columbia University Press 2009).

[169] YVES DOZ, JOSÉ SANTOS & PETER WILLIAMSON, FROM GLOBAL TO METANATIONAL: HOW COMPANIES WIN IN THE KNOWLEDGE ECONOMY (Harvard Business Press 2001); Parag Khanna, *These 25 Companies Are More Powerful Than Many Countries*, FOREIGN POLICY, https://foreignpolicy.com/2016/03/15/these-25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power/ (last visited Nov. 24, 2023) (stating how, in the 1950s, General Motors President Charles Wilson declared that "what was good for our country was good for General Motors, and vice versa"; this is no longer the case).

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and life at home for people all across the world".[170] The strategy has a clear extraterritorial reach to achieve sustainable corporate purpose "for everyone in the IKEA franchise system" and "the entire IKEA ecosystem."[171] The company defines sustainable corporate purpose as "a positive impact on people and the planet" that balances "economic growth and positive social impact with environmental protection and regeneration."[172]

IKEA has identified three focus areas to help fulfill its sustainable corporate purpose: healthy and sustainable living, fair and equal environment, and circular and climate positive business.[173] The latter sets the target to become climate positive and regenerate resources by 2030 while growing the IKEA business.[174] As part of this goal, the company pledges to reduce the greenhouse gas emissions from the IKEA value chain in absolute terms compared to 2016, including the footprints of materials, food ingredients, transport, production at suppliers, and the use of IKEA products in customers' homes. The company is also committed to becoming positive and promoting sustainable forest management to eliminate forest degradation and deforestation. To support this goal, IKEA has secured innovative approaches to forest management, protection, restoration, and regeneration to safeguard ecosystems around the world.[175]

As one of the largest users of wood in the world, IKEA has been active in shaping the world's forest industry in line with its sustainable corporate purpose.[176] Since 2000, IKEA has adopted a supplier code of conduct (IWAY) that establishes standards and expectations for the IKEA value chains.[177] In September 2016, IKEA announced that all suppliers must use 100% Forest Stewardship Council (FSC) or FSC Mix Credit certified wood products, imposing the standard throughout the entire supply chain.[178] In 2020, the company introduced the Forest Positive Agenda

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[170] *The IKEA Sustainability Strategy*, IKEA, https://www.ikea.com/us/en/this-is-ikea/climate-environment/the-ikea-sustainability-strategy-pubfea4c210 (last visited Nov. 24, 2023).
[171] *People & Planet Positive*, IKEA (Jun. 2018), 2, https://www.ikea.com/us/en/files/pdf/7e/58/7e58334c/ikea_sustainability_strategy_people_planet_positive_v3.pdf.
[172] *Id.*, 3.
[173] *Id.*, 11.
[174] *Id.*, 14.
[175] *Id.*, 15.
[176] *Good for the Forest*, IKEA, https://ikeamuseum.com/en/explore/the-story-of-ikea/good-for-the-forest/ (last visited Nov. 24, 2023).
[177] *People & Planet Positive*, *supra* note 171, at 18.
[178] *Good for the Forest*, *supra* note 176 (stating that the goal was achieved by the end of 2020).

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for 2030, which aims to improve global forestry practices, enhance biodiversity, mitigate climate change, and drive deforestation-free innovation.[179]

Addressing this agenda, IKEA launched multiple projects around the world to make forest management practices more sustainable. For instance, in Vietnam, one of the top wood markets for IKEA's suppliers, IKEA has partnered with a local forestry cooperative and the Forest Owners Sustainable Development Association (FOSDA) to reduce carbon footprints, establish native forest restoration areas, and improve local management practices.[180] In the Central and Eastern European (CEE) region, IKEA has been promoting responsible and sustainable forest management practices and climate-resilient forests in partnership with the World Wide Fund for Nature (WWF). As one of the outcomes of that work, "over 50 major legislative amendments in Romania & Bulgaria have been brought into line with responsible forest management principles, EU legal provisions, and FSC forest management standards."[181]

In pre-invasion Russia, IKEA actively promoted the forest certification program through its representatives in the FSC. The Russian market gained particular importance for IKEA as a global manufacturer, as Russia was IKEA's second-largest source of wood after Poland.[182] Moreover, Russia possesses more than 20% of the world's forests, which are essential for the planet's ecology.[183] Together with the World Wildlife Fund and the FSC, IKEA lobbied for including responsible forest management principles in Russia's legislation and the national forest policy.[184] IKEA also focused on developing a new national risk assessment methodology for forest management in Russia.[185] The company encouraged better forest management practices

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[179] *People & Planet*, *supra* note 156.

[180] *Climate-Oriented Forest Management*, IKEA, https://www.ikea.com/global/en/our-business/people-planet/forest-management/#:~:text=In%202020%20Inter%20IKEA%20Group,which%20need%20to%20be%20restored (last visited Nov. 24, 2023).

[181] *WWF & IKEA Partnership*, WWF (Dec. 27, 2019), https://wwf.panda.org/wwf_news/?357044/WWF-IKEA-Partnership.

[182] *The Illegal Russian Wood Hidden Inside Ikea Children's Furniture*, EARTHSIGHT (Jul. 15, 2021), https://www.earthsight.org.uk/news/press-release-illegal-russian-wood-hidden-inside-ikea-children-furniture.

[183] Hannah Ritchie, *Forest Area*, OUR WORLD IN DATA (Feb. 4, 2021), https://ourworldindata.org/forest-area#article-citation.

[184] Marina Katys, *Partnering with IKEA to Promote Responsible Forest Management*, [*Partnerstvo s IKEA dlya sodeistviya razvitiyu otvetsnvennogo losopolzovaniya*], RADIO SVOBODA (Oct. 25, 2002), https://www.svoboda.org/a/24197703.html.

[185] *WWF-IKEA Partnership: New Tasks for the Benefit of Forests*, [Partnerstvo WWF-IKEA: Novie zadachi na blago lesov], https://csrjournal.com/8008-partnerstvo-wwf-ikea-novye-zadachi-na-blago-lesov.html (last visited Nov. 26, 2023).

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throughout its supply chain and assisted suppliers and key sub-suppliers with the FSC certification.[186]

The IKEA case study illustrates how an MNC can use its economic power to impose its understanding of sustainable corporate governance on companies in its supply chain globally and, thus, define corporate purpose beyond borders – what we coin the "IKEA effect". Those who embrace IKEA's vision of corporate purpose will likely applaud IKEA's initiatives to define corporate purpose globally. However, there is a risk to IKEA being the purveyor of corporate purpose – especially when it comes to the issue of climate change. What if IKEA claims to pursue all these lofty purposes, but fails to do so? The risk of "greenwashing" on a global scale becomes obvious.

In July 2021, notwithstanding IKEA's standards and control measures, the company became involved in an environmental scandal that erupted. The British non-profit organization Earthsight published an investigation report that claimed that "the world's biggest furniture retailer has for years sold children's furniture made from wood linked to vast illegal logging in protected forests in Russia."[187] Earthsight also found other Western firms were linked to the case.[188] This showcases a dual effect of MNCs on sustainability. On the one hand, MNCs might create the "pollution halo" effect when they produce positive environmental spillovers in the host countries by pursuing corporate purpose beyond borders.[189] On the other hand, MNCs might choose to expand and lower their cost of production in host states by harming the environment or refusing to transfer green technologies (a so-called "pollution haven" effect).[190] In their quest to attract investments, developing countries may prefer to relax environmental regulation standards to lower costs for

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[186] Svetlana Tulayeva, *State and Non-State Regulation in Russia's Forestry Sector: Confrontation or Cooperation (The Example of FSC Certification in Russia)*, [Gosudarsvennoe I negosudartvennoe regulirovaniye v Rossiiskom lesnom sectore: Konfrontatsiya ili sotrudnichestvo? (Na primere vnedreniya certificatsii FSC v Rossii)] (2010) 5 JOURNAL SOCIOLOGII I SOCIALNOI ANTROPOLOGII [JOURNAL OF SOCIOLOGY AND SOCIAL ANTHROPOLOGY] 126, 134, https://cyberleninka.ru/article/n/gosudarstvennoe-i-negosudarstvennoe-regulirovanie-v-rossiyskom-lesnom-sektore-konfrontatsiya-ili-sotrudnichestvo-na-primere (in 2002, a joint WWF-IKEA project provided professional training for Russian certification specialists; some of the graduates became auditors and others set up commercial consulting centres for certification in different regions (Arkhangelsk, Kirov, Novgorod, Komi Republic, Pskov); these efforts were implemented with money from Western funds, and helped create interest in companies to attain certification).

[187] *Horrors: The Stolen Russian Forests Being Greenwashed into Kids' Furniture*, EARTHSIGHT, https://www.earthsight.org.uk/news/investigations/ikea-house-of-horrors (last visited Nov. 24, 2023).

[188] *Id.*

[189] Renuka Mahadevan & Yanyan Sun, *Effects of Foreign Direct Investment on Carbon Emissions: Evidence from China and its Belt and Road Countries*, 276 JOURNAL OF ENVIRONMENTAL MANAGEMENT 111321 (2020), 8.

[190] *Id.*

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foreign investors at the expense of long-term environmental sustainability.[191] Differences in national environmental standards and market conditions between home and host countries contribute to the "pollution haven" effect of MNCs and cause the risk of "carbon leakage".[192] In other words, MNCs may opt for locations with less strict environmental policies putting them in the position of sustainability bystanders.[193] According to the Climate Accountability Institute study, the top 20 MNCs contributed to 35% of all energy-related carbon dioxide and methane worldwide since 1965.[194] Those companies included investor-owned firms such as Chevron, Exxon, BP and Shell and state-owned companies such as Saudi Aramco and Gazprom, but all of them represented the fossil fuel sector.[195]

Another factor that undermines the ability of MNCs to drive sustainable corporate purpose beyond borders is the lack of consensus among firms on how to assess corporate purpose fulfillment and sustainability-related performance.[196] Most companies are still not prepared for managing sustainability risks, including the effect of their activities on climate. A recent KPMG study argued that "75% of companies were still in the early stages of ESG assurance preparedness."[197] Even companies-ESG leaders had "significant work ahead to become ESG assurance ready."[198] The

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[191] In particular, researchers observe the potential pollution haven effect associated with Chinese investments through the BRI. The BRI may drive these countries to establish less ambitious environmental regulations to improve investment climate. With the relaxation of environmental regulations, investment flows to less-developed BRI countries may compromise environmental sustainability. *See generally*, Thiri Shwesin Aung, Thomas B. Fischer & Luan Shengji, *Evaluating Environment Impact Assessment (EIA) in the Countries Along the Belt and Road Initiatives: System Effectiveness and the Compatibility with the Chinese EIA*, 81 ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 106361 (2020). In support of that argument, another study showed that the lower-middle-income countries were the only group adversely affected by China's investments. *See id*.
[192] Ben-David, *supra* note 166.
[193] In their insightful study, Ben-David et al. found that the effects of "carbon leakage" were economically significant: "a one-standard-deviation increase in the strictness of environmental policies in the home country is associated with a 29% reduction of CO2 emissions at home, but it is also associated with up to a 43% increase in emissions abroad". *See id.*, 2.
[194] Matthew Taylor & Jonathan Watts, *Revealed: The 20 Firms Behind a Third of All Carbon Emissions*, THE GUARDIAN (Oct. 9, 2019), https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions.
[195] *Id.*
[196] We prefer to use the term sustainability rather than ESG to address the recent ESG backlash in the US that has politicized the acronym. Specifically, Larry Fink of BlackRock announced that he stopped using the "weaponized" term ESG to avoid political attacks. There is no mention of ESG in Finks' recent annual letter to investors – instead it refers to sustainability. *Larry Fink's Annual Chairman's Letter to Investors*, BLACKROCK (Dec. 31, 2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter. See also Isla Binnie, *BackRock's Fink Says He's Stopped Using 'Weaponised' Term ESG*, REUTERS (Jun 27, 202), https://www.reuters.com/business/environment/blackrocks-fink-says-hes-stopped-using-weaponised-term-esg-2023-06-26/.
[197] Segal, *supra note* 163.
[198] *Id.*

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same study demonstrated that North American and European companies outperformed their peers in the Asia Pacific and Latin America. However, companies in the US and the EU also struggle to address sustainability considerations meaningfully. The new US-focused Annual Corporate Directors Survey conducted by PwC showed that "more than two-thirds of corporate boards lack a strong understanding of the ESG risks affecting their companies, including only a quarter that reports having a strong grasp of carbon emissions and even fewer on their companies' climate risk or strategy."[199] In August 2023, a study in Science journal suggested that 94% of the carbon credits associated with a sample of 26 projects in developing countries were not linked to real reductions in emissions.[200] In November 2023, the CEO of the world's largest offsetting firm, South Pole, had to step down amid accusations of "greenwashing".[201] Therefore, the problem of "greenwashing" or "impact washing" could significantly weaken the effect of multi-jurisdictional firm-based corporate governance to drive sustainable corporate purpose globally.

Finally, MNCs might fall victim to the geopolitical and economic agendas of powerful states – until recently, primarily in the US.[202] States can exercise their influence and extend their jurisdictional power through corporate headquarters and subsidiaries registered on their territory. The Investment Monitor's data showed that about 33% of the top MNCs were based in the US.[203] According to the same data source, the US was the dominant destination for subsidiaries, with 28% of the total number of subsidiaries linked to the top MNCs.[204]

However, the rise of Chinese MNCs is a game changer, producing a watershed shift in global corporate power. The latest Fortune Global 500 list revealed that the US and China were "the twin

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[199] Mark Segal, *Less Than 1 in 3 Boards Have a Strong Understanding of ESG Risks Affecting Their Companies: PwC Survey*, ESG TODAY (Oct. 12, 2023), https://www.esgtoday.com/less-than-1-in-3-boards-have-a-strong-understanding-of-esg-risks-affecting-their-companies-pwc-survey/ (the survey revealed that barely one-third of respondents understand ESG risks "very well"; PwC surveyed more than 600 directors of public companies in the U.S., across more than 12 industries; 73% of those surveyed represent companies with revenues greater than $1 billion, and 64% have served on their boards for more than 5 years).
[200] Thales A. P. West et al, *Action Needed to Make Carbon Offsets from Forest Conservation Work for Climate Change Mitigation*, 381 SCIENCE 873 (2023), https://www.science.org/doi/10.1126/science.ade3535.
[201] *Id.*
[202] Enriques & Gatti, *supra* note 94 (making a similar point that such an aspiration looks particularly precarious given the nationalistic spree in modern-day geopolitics).
[203] Using its multinational companies database, Investment Monitor analyzed 2,188 of the top multinational companies (MNCs) by revenue, detailing how many subsidiaries they have and where they are located. *See*, Glenn Barklie, *Where Are the Global Hotspots for MNC Subsidiaries?*, INVESTMENT MONITOR (Jan. 28, 2021), https://www.investmentmonitor.ai/uncategorized/where-are-the-global-hotspots-for-mnc-subsidiaries/.
[204] *Id.*

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engines" of global business – with the EU share declining, despite Germany maintaining its position.[205] Although the US had more Fortune 500 companies than any other country from 2000 to 2019, the situation drastically changed in 2020, when China surpassed the US with 124 companies.[206] In 2021, China had 136 companies on the Fortune 500 list – the most of any country, with the U.S. ranked second (124 companies) and Japan ranked third (47 companies).[207]

These recent trends reveal a major geopolitical shift in global business. This shift suggests that the future of firm-based corporate governance may be shaped more by how Chinese firms choose to define corporate purpose beyond borders – rather than the past where primarily MNCs from the Global North were the purveyors of firm-based corporate governance globally. As explained below, these Chinese firms either formally or informally tend to be linked to the Chinese state – blurring the line between state-based and firm-based extraterritorial/transnational corporate governance. They also tend to abide by the Chinese mantra of non-interference in the domestic affairs of other states – suggesting that Chinese MNCs are unlikely to push for sustainable corporate governance beyond borders. In the future, perhaps the IKEA Effect will be supplanted in some industries or regions by the "Haier Effect" or "PetroChina Effect" – which given China's non-interference policy, may be more noteworthy for having no effect at all. The result may be that more companies in developing countries, where Chinese firms dominate, may – for better or worse – be left to define their corporate purposes within borders.

III.C. Powerful Multijurisdictional Investors: The "BlackRock Effect" as a Driver of Corporate Purpose Beyond Borders

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[205] Peter Vanham & Nicholas Gordon, *Fortune's New Global 500 List Shows Europe's Decline, the U.S.'s Rise*, YAHOO! FINANCE (Aug. 3, 2023), https://finance.yahoo.com/news/fortune-global-500-list-shows-094510640.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAACPBrjXH0KIGDkDcAOs4SO9THkDwNVF5zD5LXvlyTKGsmpU_pLRBqZROUA_jHk6mszQZeqZwmhAIxDM-oqDP8Te1MfwO5un5JbMXNKjdkjLAJdiCj167lFVSIDLEa7brbEIxgqRdQMfATSAyMU-RbU3mqGuwzbVTZ7k_fWMeUIkc (in the past decade, Italy dropped from eight companies on the list to five, France from 31 to 24, and Britain from 26 to 15. Only Germany held steady, inching up from 29 to 30; the Swiss and Dutch, two non-G7 strongholds, dipped from 14 to 11 and 11 to 10, respectively; the number of companies from Japan plummeted from 62 to 41).

[206] This is an impressive increase, as there were only 10 Fortune 500 companies in China in 2000. *See*, *Number of Fortune 500 Companies in Selected Countries Worldwide from 2000 to 2023*, STATISTA, https://www.statista.com/statistics/1204099/number-fortune-500-companies-worldwide-country/ (last visited Nov. 24, 2023).

[207] Megan Cerullo, *China Now Has the Most Companies on the Fortune 500 List*, CBS NEWS (Aug. 3, 2022), https://www.cbsnews.com/news/walmart-tops-fortune-500-list-of-biggest-companies-for-ninth-consecutive-year/.

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The rising power of institutional investors as a defining force of corporate governance has become a focal point for many of the world's leading corporate law scholars. In 2013, Ronald Gilson and Jeffery Gordon illuminated how the increasing percentage of shares of US listed companies owned by institutional investors had created a new corporate governance problem – the "agency costs of agency capitalism" – placing institutional investors at the core of US corporate governance.[208] In 2018, Lucian Bebchuk, Alma Cohen, and Scott Hirst extended on this idea by explaining how understanding the agency problems of investment managers, who control the institutional investors, is a key to understanding corporate governance.[209] Relatedly, a small cottage industry of academics has recently analyzed how the rise of a specific type of institutional investor, index funds, is a new defining feature of corporate governance.[210]

Most of this research focuses on the impact that the rise of institutional investors has on corporate governance *within* a jurisdiction. However, as institutional investors have increased in size, the largest ones have become significant shareholders in a wide swath of companies in countries around the world. With the rise of ESG, these behemoth global institutional investors have developed *global* policies for exercising their shareholder power with respect to sustainability issues, regardless of the jurisdiction that they are acting in around the world – transforming these global institutional investors into powerful engines driving corporate purpose beyond borders.

Tim Bowley and Jennifer Hill's recent research insightfully illuminates how large international institutional investors are a powerful force driving sustainable corporate governance globally. They document "how globally-focused institutional investors may act as 'importers' of ESG stewardship norms and practices"[211] into myriad jurisdictions and "exert significant influence on

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[208] Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013).
[209] Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 JOURNAL OF ECONOMIC PERSPECTIVES 89 (2017).
[210] Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029 (2019); Jill E. Fisch, Asaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019); Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders be Shareholders* 100 BOSTON UNIVERSITY L. REV. 1771 (2020); Dorothy Shapiro Lund, *The Case Against Passive Shareholder Voting*, 43 JOURNAL OF CORPORATION LAW 493 (2018); Bernard S. Sharfman, *Opportunism in the Shareholder Voting and Engagement of the "Big Three" Investment Advisers to Index Funds*, 48 JOURNAL OF CORPORATION LAW 463 (2022).
[211] Tim Bowley & Jennifer G. Hill, *The Global ESG Stewardship Ecosystem*, ECGI LAW WORKING PAPER 660/2022, 35, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4240129.

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local ESG stewardship norms and practices"[212] using their shareholder power to transmit sustainability initiatives globally.[213] As Hill and Bowley highlight[214] this appears to be driven by their desire to advertise their commitment to be "good stewards" by actively using their shareholder power to drive sustainable corporate governance globally.[215]

BlackRock, as the world's largest institutional investor with $10 trillion of assets under management, is the paradigm example.[216] Its 2022 Investment Stewardship Report outlines its *global* position with respect to climate risk, board diversity, sustainability reporting, ESG in executive compensation, and changes in the corporate form. [217] BlackRock explicitly advertises that it takes a uniform global position on each of these important corporate governance issues, which lay at the heart of defining corporate purpose. In the markets where BlackRock and other major institutional investors have significant shareholder power, the use of that shareholder power to shape corporate purpose beyond borders in myriad jurisdictions, in line with their singular global standard, is what we coin the "BlackRock Effect".

Empirical evidence suggests that the most powerful global institutional investors come from a small handful of Western countries: Canada, the Netherlands, the United Kingdom, and the United States.[218] As such, the BlackRock Effect is likely to be a conduit for exporting a Western conception of corporate purpose globally. An illustration of this is the Canada Pension Plan Investment Board's explicit mission to shape the corporate purpose of companies in emerging markets to comply with its understanding of the role that companies should play in advancing

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[212] *Id.*
[213] *Id.*, 2, 6, 30.
[214] *Id.*, 22-23.
[215] Katelouzou & Puchniak, *supra* note 2.
[216] Rebecca Ungarino, *BlackRock is Wrestling with Succession Planning. Here's the Latest News on the Biggest Money Manager*, BUSINESS INSIDER (Sep. 4, 2023), https://www.businessinsider.com/blackrock-news-updates#:~:text=BlackRock%20oversees%20%249.4%20trillion%20in,executive%20and%20cofounder%2C%20Larry%20Fink (as of June 2023, BlackRock oversees $9.4 trillion in assets as the world's largest money manager).
[217] *Investment Stewardship: 2022 Policies Updates Summary*, BLACKROCK, https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global-summary.pdf (last visited Nov. 26, 2023).
[218] Elroy Dimson et al., *Coordinated Engagements*, ECGI FINANCE WORKING PAPER 721/2021, 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209072 ("[p]rojects in our sample involve a total of 224 different investment organizations from 24 countries, with the majority headquartered in the UK, the US, the Netherlands, and Canada").

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societal issues.[219] For those who believe that the Western conception of corporate purpose should become the *de facto* global standard, the Blackrock Effect may seem to be an unambiguous and powerful force for good. However, at least three aspects of the BlackRock Effect should give pause to even the most ardent supporters of advancing sustainable corporate governance and stakeholderism globally.

First, there is persuasive evidence that, when it comes to defining corporate purpose, *local* context matters – a lot.[220] In 2020, Larry Fink, founder and chief executive of BlackRock, issued a letter to CEOs *around the world* imploring them to govern corporations to embrace "purpose and [serve] all stakeholders".[221] However, as one of us has demonstrated elsewhere, in countries which already have a purposeful stakeholder-based system of corporate governance, pushing companies to embrace more purposes and to focus even more on stakeholders, may have deleterious consequences.[222] This "one size fits all" global approach to corporate purpose is likely to unwittingly produce the opposite of what is intended for the advancement of corporate governance, climate, and development.[223]

Second, having a handful of institutional investors, from a small number of Western countries, exercising their shareholder power to define the purpose of companies – and, in turn, social issues from climate to gender – in culturally diverse countries around the world raises the specter of colonialism repackaged. For example, it seems appropriate for the *Japanese* people to debate, whether *Japanese* institutional investors or the *Japanese* government, should be the force determining the pace and level of gender diversity in *Japanese* boardrooms in *Japan*. Such a debate would fall squarely within the realm of the classic, jurisdictionally bound, corporate purpose debate.[224] However, whether a handful of Western institutional investors should be determining these societal and cultural norms in Japan raises issues that entirely escape the classic,

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[219] *2023 Report on Sustainable Investing*, CPP INVESTMENTS, https://www.cppinvestments.com/wp-content/uploads/2023/10/SI-Report-2023-EN.pdf (last visited Nov. 26, 2023); *Policy on Sustainable Investing*, CPP INVESTMENTS (Mar. 31, 2023), https://www.cppinvestments.com/wp-content/uploads/2023/04/cpp-investments-policy-on-sustainable-investing-mar-2023-en_vF.pdf.
[220] Puchniak, *No Need for Asia to be Woke*, *supra* note 1, at 21.
[221] Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK, https://www.blackrock.com/us/individual/larry-fink-ceo-letter (last visited Nov. 26, 2023).
[222] Puchniak, *No Need for Asia to be Woke*, *supra* note 1, at 21.
[223] *Id.*
[224] For a detailed explanation of the classic corporate purpose debate, *see supra* Part II.A.

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jurisdictionally bound, corporate purpose debate.[225] These considerations reveal the complexity of the BlackRock Effect, making it less of an unambiguous force for good than it may appear at first blush, when viewed through a jurisdictionally bound lens.

Third, as one of us has explained elsewhere, the United Kingdom and United States are the only jurisdictions in the world where institutional investors own a majority of the shares in listed companies.[226] There are several other countries in which institutional investors hold a significant minority of shares in listed companies and, thus, have some power to exercise significant influence over corporate governance.[227] However, in many important economies, particularly in Asia, the shareholder power of institutional investors is scant.[228] In these economies, the influence of the BlackRock Effect will be limited.

However, if we expand our lens beyond institutional investors and consider other types of powerful multijurisdictional investors, it appears that firm-based extraterritorial corporate governance may be playing an even larger role than anticipated. Blackstone, the world's largest private equity firm with almost $1 trillion of assets under management, proclaims that as a global investor it "believes that Environmental, Social and Governance (ESG) principles help develop strong, resilient companies and assets that deliver long-term value for [its] investors."[229] Singapore-based Temasek, which is the largest Sovereign Wealth Fund in South East Asia and a major investor in the region, claims to "embed Environment, Social and Governance (ESG) considerations throughout [its] investment decision-making process'".[230] As such, these different types of

[225] Winnie Hsu & Yasutaka Tamura, *Norway Fund Joins Goldman in Voting Against Japan's Male Board*, BLOOMBERG (May 17, 2023), https://www.bloomberg.com/news/articles/2023-05-17/norway-fund-joins-goldman-in-voting-against-japan-s-male-boards#xj4y7vzkg; Winnie Hsu, *Japan Boards May Struggle Amid Pressure for Diversity*, BLOOMBERG (Nov. 20, 2023), https://www.bloomberg.com/news/articles/2023-11-20/japan-boards-may-struggle-amid-pressure-for-diversity-msci-says#xj4y7vzkg.
[226] Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit*, ECGI LAW WORKING PAPER 589/2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3858339# [hereinafter Puchniak, *The False Hope of Stewardship*].
[227] *Id.*
[228] *Id.*, 10-11.
[229] *An Integrated Approach to ESG*, BLACKSTONE, https://www.blackstone.com/our-impact/an-integrated-approach-to-esg/ (last visited Nov. 26, 2023).
[230] *Sustainability in Our Investments*, TEMASEK, https://www.temasek.com.sg/en/sustainability/sustainability-in-our-investments#embedding-esg (last visited Nov. 26, 2023).

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multinational investors may also be significant drivers of corporate purpose beyond borders – the "Blackstone Effect" and "Temasek Effect" deserve further attention.

The scope and scale of powerful private equity firms, sovereign wealth funds, and other types of multijurisdictional investors, who proclaim to promote sustainability beyond jurisdictional borders suggests that multijurisdictional firm-based corporate governance is driven by a much larger scope of investors than the current institutional investor focused corporate law and governance literature suggests. In fact, the large-block shareholder positions, which many of these multijurisdictional investors take in their investee companies, may provide them with a greater ability to define corporate purpose beyond borders than large institutional investors who often have small minority positions in listed companies.

An additional complicating factor is that multijurisdictional investors may profess to have a uniform global approach to sustainability but may not follow through on this rhetoric. There is a considerable amount of research that must be done to determine whether this rhetoric has translated into action – although some actions like Western institutional investors voting against all Japanese boards with no female directors are easy to observe.[231] Other actions like claims of lawyers in Indonesia that their corporate governance has been defined by Temasek due to its requirements for ESG clauses in its investments will take more research to uncover.[232] Also, some multijurisdictional investors like Temasek focus primarily on environmental sustainability whereas Western institutional investors appear to be interested in driving a wider array of social issues beyond borders – further complicating the effect of multijurisdictional investors on corporate purpose.

Another interesting observation is that China, which is the world's second largest economy, has seen a dramatic rise in the percentage of its listed companies owned by institutional investors over the last two decades.[233] However, almost all of the shares owned by institutional investors in Mainland China are Chinese institutional investors.[234] Non-Chinese institutional investors play

[231] Hsu & Tamura, *supra* note 225; Hsu, *supra* note 225.
[232] Dan W Puchniak's discussions with Indonesian lawyers in October 2022 (notes on file with author).
[233] Lin Lin & Dan W. Puchniak, *Institutional Investors in China: Corporate Governance and Policy Channelling in the Market Within the State*, 35 COLUMBIA JOURNAL OF ASIAN LAW 74, 80 (2022).
[234] *Id.*, 95-103.

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almost no role in defining corporate purpose within Mainland China's borders.[235] Relatedly, large Chinese investment companies also appear to take a non-interventionist approach in driving corporate purpose in their investments overseas.[236] This suggests that China has largely insulated itself from the BlackRock Effect and despite the behemoth size of its largest investment firms – which increasingly are major shareholders in companies across multiple jurisdictions – Chinese multinational investment firms seem largely uninterested in creating a "BlackRock Effect" of their own.

Ultimately, this suggests that the power of firm-based multijurisdictional corporate governance is a force driving corporate purpose beyond borders – but the extent of this force and its effects will require an enormous amount of future research to unpack. At this point, it seems far too complex and opaque to label it unambiguously as a force for good or bad. However, what is clear is that it is a driver of corporate governance around the world that can no longer be ignored.

IV. TRANSNATIONAL ORGANIZATION-BASED CORPORATE LAW AND GOVERNANCE: COMPLEXITY IN AN INCREASINGLY MULTIPOLAR AND REGIONALIZED WORLD

IV.A. The Rise of New Transnational Organizations: Shaping the Future of Corporate Purpose Beyond Borders

The third pillar – what we coin "transnational organization-based corporate governance" – is the product of a wide range of transnational organizations and their coordinated lawmaking efforts to advance corporate purpose beyond jurisdictional borders. Mariana Pargendler, in her recent watershed research, highlights how underappreciated this rising force has been in shaping corporate law and governance globally.[237] As Pargendler explains, this force, which she refers to as "international corporate law", comprises "the body of corporate governance rules and standards produced by international organizations, standard setters, and international agreements."[238]

[235] *Id.*, 90-94.
[236] Nurgozhayeva, *The Belt and Road Initiative and Sustainability*, *supra* note 150.
[237] Pargendler, *supra* note 21.
[238] *Id.*, 1772.

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Pargendler convincingly shows how, over the past several decades, UN institutions, the International Monetary Fund (IMF), the World Bank, and the Organization for Economic Cooperation and Development (OECD) have been the "source of institutional innovation" for corporate law and governance around the world.[239] Specifically, Pargendler explains how international organizations have been responsible for such corporate governance reforms as enhanced investor protection, corporate governance codes, and independent directors policies around the world.[240] She also highlights how international standard setters, such as the International Organization of Securities Commissions (IOSCO), the Basel Committee on Banking Supervision (Basel), and the Financial Stability Board, have been responsible for global corporate governance developments in areas such as public disclosure, executive compensation, capital requirements, board structure, and related-party transactions.[241] As we mentioned above, the TCFD framework has been particularly influential in Asia providing a solid reference point for such developed countries as Singapore and Japan. In terms of sustainable corporate governance, Pargendler demonstrates that international organizations have been the basis for the global dissemination of ESG, human rights policies, and corporate governance initiatives to address climate change.[242]

Taking a step back, Pargendler's identification of international organizations as a major driver of global corporate law and governance adds a third "organization-based" pillar to the "state-based" and "firm-based" pillars we illuminate above. Pargendler's research makes it clear that this organization-based pillar has been central to the rise of the global ESG movement – a powerful force shaping corporate purpose beyond borders.[243] However, it is questionable whether, in the future, these same international organizations, which are increasingly viewed as part of the Western world order, will be as impactful as they were in the past.

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[239] It is worth mentioning that Mariana Pargendler identified four potential shortcomings of international corporate law. First, the so-called "undoing regulatory diversity" can be summarized as an adverse effect of legal harmonization that would omit "different benefits of multiple regulatory regimes." Second, the "one-size-fits-all" nature of international standards might sacrifice the needs of one jurisdiction in the interest of the other. Third, international corporate law has to operate within existing enforcement constraints since it lacks the legitimacy of "hard" law. Finally, international corporate law might fall victim to powerful states and their protectionist agenda.
[240] Pargendler, *supra* note 21, at 1778-1803.
[241] *Id.*, 1804-1811.
[242] *Id.*, 1778-1803.
[243] *Id.*

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As explained below, the rapid rise and increasing influence of BRICS+ and China's Belt and Road Initiative (BRI) are diversifying and complicating global corporate law and governance. These transnational initiatives present themselves as alternatives to the Western-dominated organizations, which Pargendler identifies as the main drivers of corporate law beyond borders in the past. BRICS+ and the BRI advocate a different model of sustainability, which they claim fits the developing world better.[244] What does this mean for the future of sustainable corporate governance and corporate purpose beyond borders?

As described below, the rise in the influence of BRICS+ and BRI is extraordinary. The BRI's rhetoric about promoting sustainability beyond borders is increasing. However, the combination of a focus on development first and respect for national sovereignty suggests that BRICS+ and BRI are unlikely to forcefully push corporate sustainability and corporate purpose beyond borders.[245] This will likely leave states that are involved in BRICS+ and BRI with more autonomy over their local sustainable corporate governance standards as these transnational organizations specifically advocate for such state-based autonomy.[246] If this occurs, it will reinforce a more jurisdiction-based approach to corporate purpose and less of a move towards globalized uniform standards driving corporate purpose beyond borders.

Skeptics may see this "developmental approach" as allowing jurisdictions to claim they are focusing on sustainable development, while creating a global "race to the bottom" for sustainable corporate governance. This stands in contrast to the approach by the Western-aligned international organizations in the past which attempted to create uniform "global standards" for ESG and sustainable corporate governance.[247] It also cuts in the opposite direction of the EU's efforts to forcefully promote its understanding of sustainability and corporate purpose extraterritorially as a uniform global standard. Supporters may see the BRICS+ and BRI focus on development first as promoting global equality, while ensuring that developed countries account for the pollution

[244] Roza Nurgozhayeva, *Rule-Making, Rule-Taking or Rule-Rejecting Under the Belt and Road Initiative: A Central Asian Perspective*, 8 THE CHINESE JOURNAL OF COMPARATIVE LAW 250, 253 (2020) [hereinafter Nurgozhayeva, *Rule-Making, Rule-Taking or Rule-Rejecting*]; Jiangyu Wang, *China's Governance Approach to the Belt and Road Initiative (BRI): Relations, Partnership, and Law*, 14 GLOBAL TRADE & CUSTOMS JOURNAL 222 (2019).
[245] *Id.*, Nurgozhayeva, *Rule-Making, Rule-Taking or Rule-Rejecting*, 253.
[246] *Id.*
[247] Pargendler, *supra* note 21, 1778-1811.

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related to their historical development.[248] Either way, the rise of BRICS+ and the BRI portends a more complicated, multipolar, world order where there is more diversity in the organizations that drive corporate purpose beyond borders.

In addition to conventional international organizations, BRICS+ and the BRI, there has been a significant surge of new associations, partnerships and alliances that tackle climate change since the signing of the Paris Agreement in 2015. The World Resource Institute report identified more than 90 initiatives of a different size and scale.[249] The Global Climate Action portal lists over 34,000 actors engaged in reducing emissions and enhancing carbon resilience.[250] The Global Climate Action Ecosystem covers a growing stakeholder map of over 500 initiatives leading cooperative climate action across the world.[251] The Climate Initiatives Platform shares and tracks information on non-state cooperative climate projects and includes more than 280 initiatives in its database.[252]

Most of the initiatives are driven by collaborative efforts of non-state actors to create an additional institutional infrastructure aiming to overcome two major issues: information asymmetry and collective action problems. The rise of ad hoc transnational initiatives often driven by investors has transformed them into a robust mechanism that responds to sustainability concerns. Bowley and Hill illuminate in detail how investors employ different coalitions, networks, and alliances to leverage their ESG stewardship.[253] Their comprehensive overview identifies international agencies, advocacy organizations, engagement firms, proxy advisers, data providers and

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[248] This argument stems from the well-known public international law principle of "common but differentiated responsibilities" which was first formalized in the United Nations Framework Convention on Climate Change 1992. *See* United Nations Framework Convention on Climate Change 1992, art. 3(1), https://unfccc.int/resource/docs/convkp/conveng.pdf ("[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities"; thus, "the developed country Parties should take the lead in combating climate change and the adverse effects thereof").

[249] Claudio Forner & Mario Julien Diaz, *A Review of Intergovernmental Cooperation on the Mitigation of Climate Change,* WORLD RESOURCES INSTITUTE WORKING PAPER 2023, https://www.wri.org/research/review-intergovernmental-cooperation-mitigation-climate-change.

[250] A list is available on the Global Climate Action portal. *The Global Climate Action Portal,* https://climateaction.unfccc.int/ (last visited Dec. 8, 2023).

[251] A list of cooperative initiatives is available on the Global Climate Action Ecosystem. *See The Global Climate Action Ecosystem,* https://kumu.io/FCC/global-climate-action-ecosystem (last visited Dec. 8, 2023).

[252] *The Climate Initiatives Platform,* https://climateinitiativesplatform.org/index.php/Welcome (last visited Dec. 8, 2023).

[253] Tim Bowley & Jennifer G. Hill, *The Global ESG Stewardship Ecosystem*, ECGI LAW WORKING PAPER 660/2022, 35, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4240129

Electronic copy available at: https://ssrn.com/abstract=4652012

consultants – all of which are the integral elements of what they call the "Global ESG Ecosystem".[254] Their research particularly mentions the International Corporate Governance Network (ICGN), the European Fund and Asset Management Association (EFAMA), Investors Against Slavery and Trafficking APAC, the PRI's Collaboration Platform, and Climate Action 100+, which pursue a slightly different range of sustainability-related issues but seek to promote sustainable corporate purpose across borders.[255]

Recent studies, building on Elinor Ostrom's groundbreaking theory of collaborative governance,[256] focus on Climate Action 100+, launched in 2017, to convincingly argue that investor alliances represent a systemic and institutionalized collective stewardship effort of investors to address climate risk.[257] However, the issue of fragmentation and the lack of consistency in terms of objectives, interests, perceived benefits, and costs still exists with the representatives of developed countries dominating the landscape.[258]

Amid clearly global institutional efforts to tackle sustainability concerns, there has been a rise in the power and ambition of regional organizations to create models of corporate governance that are bespoke for a region – particularly in Asia. As explained below, the Asian Development Bank and Stewardship Asia have advanced initiatives to improve the governance and sustainability of corporations in Asia.[259] The rise of regional organizations, promoting regional corporate governance solutions, suggests that the future of corporate governance and purpose beyond borders may be more regional – rather than global – in the future. It seems clear that the future of corporate governance and purpose beyond borders will be more complex and diverse than in the past.

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[254] *Id.*

[255] *Id. See also*, *The Shareholder Activism Annual Review 2023,* INSIGHTIA & OLSHAN, https://www.olshanlaw.com/assets/htmldocuments/Insightia_Shareholder%20Activism%20Annual%20Review%202023.pdf (last visited Dec. 8, 2023).

[256] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTIONS (Cambridge Univ. Press 2015); Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641 (2010).

[257] Amelia Miazad, *Investor Alliances: The Infrastructure for Climate Stewardship,* SSRN (Sep. 22, 2023). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4580556.

[258] Claudio Forner & Mario Julien Diaz, *A Review of Intergovernmental Cooperation on the Mitigation of Climate Change,* WORLD RESOURCES INSTITUTE WORKING PAPER 2023, https://www.wri.org/research/review-intergovernmental-cooperation-mitigation-climate-change.

[259] *See infra* Part IV.C.

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IV.B. Transnational Organization-Based Corporate Law and Governance in a Multipolar World: A Race to the Top or Bottom?

The COVID-19 pandemic, Russia's invasion of Ukraine, and now the Israel-Hamas war have eroded trust in many parts of the world in the Western-dominated international organizations that have defined the post-World War II world order.[260] A growing number of countries have been challenging the dominant reliance on Western-based international organizations to lead the design and implementation of transformative norms and policies.[261] Pushed by rising geopolitical tensions, developing and emerging markets, including the BRICS bloc, have gradually departed from their dependence on the West to embark on their own political, economic, and institutional course.[262] Most recently, more than forty countries expressed their interest in joining the BRICS+ initiative, with its headquarters in Shanghai.[263] Twenty-two countries have reportedly applied to be BRICS+ members.[264] What does this power shift mean for corporate law and governance beyond borders?

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[260] Experts and world leaders share the call for significant structural reforms to address international organizations' dysfunction. See: *United to Reform*, UNITED NATIONS, https://reform.un.org/ (last visited Nov. 24, 2023); Anthony Pahnke, *Op-Ed: The U.N. Has to Reform Itself to Bring Peace to Ukraine*, LOS ANGELES TIMES (Apr. 17, 2022), https://www.latimes.com/opinion/story/2022-04-17/united-nations-russia-ukraine-security-council-reform; *The UN Turns Seventy-Five. Here's How to Make it Relevant Again*, COUNCIL OF COUNCILS (Sep. 14, 2020), https://www.cfr.org/councilofcouncils/global-memos/un-turns-seventy-five-heres-how-make-it-relevant-again (Quoting Joel Ng, Research Fellow, S. Rajaratnam School of International Studies (Singapore): "The world looks vastly different economically, socially, and technologically than it did when it emerged from the ashes of World War II. The distribution of power has also shifted considerably. Global institutions need to reflect these changes or lose legitimacy in the eyes of the emerging players, whether governments or their people"). In a recent opinion piece, Kishore Mahbubani argues that although "the west captured the imagination and respect of the rest of the world for centuries", it is now "losing this respect". *See* Kishore Mahbubani, *Op-Ed: It's Time for the West and the Rest to Talk to Each Other as Equals*, FINANCIAL TIMES (Dec 12, 2023), https://www.ft.com/content/ed18d1a2-59b9-42e2-a4e1-b26d6f0e5e9e.

[261] Martin Mühleisen, *The Bretton Woods Institutions Under Geographical Fragmentation*, ATLANTIC COUNCIL (Oct. 9, 2023), https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/the-bretton-woods-institutions-under-geopolitical-fragmentation/ (stating that the Bretton Woods institutions clearly lost influence in recent years; with many emerging markets enjoying stable market access even during the COVID-19 pandemic, the IMF and World Bank have been left to work mostly with low-income countries and a few larger countries with chronic economic problems). Also see Mark Malloch-Brown, *The UN can no longer protect human rights by itself*, FINANCIAL TIMES (Dec. 27, 2023), https://www.ft.com/content/a3660760-d672-4d24-90a3-63fd75a420da?shareType=nongift (stating that today the UN often finds itself on the back foot as the geopolitical tensions stymie common actions and although "naming and shaming" human rights abusers sometimes worked during the post-1989 unipolar heyday of the western-led order, that approach is rarely relevant in today's more multipolar world).

[262] *BRICS Information Portal*, BRICS, https://infobrics.org/ (last visited Nov. 24, 2023).

[263] Antony Sguazzin & S'thembile Cele, *BRICS Expansion Plan Draws Interest from More than 40 Nations*, BLOOMBERG (Jul. 20, 2023), https://www.bloomberg.com/news/articles/2023-07-20/brics-expansion-plan-draws-interest-from-more-than-40-nations.

[264] *Id.*

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This shift has created space for the rise of new development models and cooperation formats, such as China's BRI, as alternatives to the unipolar world order that existed when the United States was the sole global economic superpower.[265] Despite geopolitical concerns about the real intentions behind the BRI, it has gained substantial influence and reached an impressive scale.[266] While Western-based international organizations have not sufficiently addressed the developing world's demand for funding to support human capital and infrastructure, China has been able to do so without a "financing against reforms" condition.[267] The BRI's vision aims to strengthen mutual economic cooperation without any compulsory institutional reforms, creating more space for various institutional arrangements.[268] The BRI is presented as a program that benefits all as opposed to "a traditional Western framework of winner takes all".[269] In the BRI, all members allegedly are equal participants, contributors, and beneficiaries who do not have to obey strict requirements, rules, or official membership to obtain access to BRI investments, which appear attractive to many developing states.[270]

The BRI's overarching philosophy, which dovetails with that of China, is built on an ideology that claims to respect jurisdictional autonomy. This suggests that China is unlikely to use the leverage it has through the BRI to push transnational initiatives with corporate governance bite, like the EU's state-based extraterritorial corporate governance measures to promote a uniform, ostensibly global, idea of corporate purpose beyond borders. It also stands in contrast to initiatives by the UN, IMF, OECD, and World Bank to promote "good" corporate governance standards and sustainability initiatives globally. In this respect, despite the BRI's meteoric rise as a global force

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[265] Experts and world leaders share the call for significant structural reforms to address international organizations' dysfunction. *See*, *United to Reform*, *supra* note 260; *The UN Turns Seventy-Five. Here's How to Make it Relevant Again*, *supra* note 260 (Quoting Joel Ng, Research Fellow, S. Rajaratnam School of International Studies (Singapore): "The world looks vastly different economically, socially, and technologically than it did when it emerged from the ashes of World War II. The distribution of power has also shifted considerably. Global institutions need to reflect these changes or lose legitimacy in the eyes of the emerging players, whether governments or their people.").

[266] James McBride, Noah Berman & Andrew Chatzky, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELATIONS (Feb. 2, 2023), https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative.

[267] As a decade ago, poor countries face an enormous shortfall in funding for needed construction. If China and its friends are the only ones making an offer, they will shape the future. *See*, *China's Belt and Road Initiative Will Keep Testing the West*, THE ECONOMIST (Sep. 7, 2023), https://www.economist.com/leaders/2023/09/07/chinas-belt-and-road-initiative-will-keep-testing-the-west.

[268] *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, BELT AND ROAD FORUM FOR INTERNATIONAL COOPERATION (Apr. 10, 2017), http://2017.beltandroadforum.org/english/n100/2017/0410/c22-45.html.

[269] CHINA'S BELT AND ROAD INITIATIVE: CHANGING THE RULES OF GLOBALIZATION (Wenxian Zhang et al. eds., Springer International Publishing 2018).

[270] Nurgozhayeva, *Rule-Making, Rule-Taking or Rule-Rejecting*, *supra* note 244, at 253.

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in its first decade, the lack of any forceful effort to standardize sustainable corporate governance across BRI members states speaks volumes.

In this context, China's ambition to be seen as a global leader in sustainability may seem surprising. However, increasingly, China has wanted to paint itself as a leader in sustainability through the BRI and as a benevolent champion of the environment. The concept of the Green BRI rhetorically seeks to integrate green development and environmental protection into the cooperation among BRI states, including policy communication, connectivity, trade, industry, investment, people-to-people exchange, and Sustainability Development Goals (SGDs).[271] To support this narrative, Beijing adopted a series of policy documents to enhance environmental protection and responsible corporate behavior across all aspects of the BRI and to include climate considerations in investment decisions. In particular, the Guidelines on Environmental Protection of Overseas Investment and Cooperation, jointly released by the Ministry of Commerce (MOFCOM) and the Ministry of Environmental Protection (Ministry of Ecology and Environment) in 2013, encourage *Chinese* companies to observe the environmental laws, conduct environmental impact assessments, mitigate negative environmental and social impacts, and engage with local communities.[272]

However, these past green and sustainability initiatives must be viewed within the overarching core concepts of the BRI: an uncompromising stance on state sovereignty and the right for each state to reach its developmental goals. These core principles were on full display in the October 2023 Belt and Road Cooperation and Partnership Model Agreement.[273] The Model Agreement, drafted by scholars and experts from more than 30 countries on five continents, emphasizes the

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[271] *Green BRI and 2030 Agenda for Sustainable Development*, CHINA COUNCIL FOR INTERNATIONAL COOPERATION ON ENVIRONMENT AND DEVELOPMENT, https://cciced.eco/research/special-policy-study/green-bri-and-2030-agenda-for-sustainable-development/ (last visited Nov. 24, 2023).

[272] Christoph Nedopil Wang, *Interpretation of the 2022 "Guidelines for Ecological Environmental Protection of Foreign Investment Cooperation and Construction Projects"*, GREEN FINANCE & DEVELOPMENT CENTER (Jan. 18, 2022), https://greenfdc.org/interpretation-2022-guidelines-ecological-environmental-protection-of-foreign-investment-cooperation-and-construction-projects/. In 2017, China also adopted the Belt and Road Ecological and Environmental Cooperation Plan that seeks to "integrate the concepts of ecological civilization and green development" into the BRI by 2025 and "promote cooperation on eco-environmental protection with higher standards and at deeper levels" by 2030. *See also*, *The Belt and Road Ecological and Environmental Cooperation Plan*, MINISTRY OF ECOLOGY AND ENVIRONMENT, THE PEOPLE'S REPUBLIC OF CHINA (Jun. 28, 2017), https://english.mee.gov.cn/Resources/Policies/policies/Frameworkp1/201706/t20170628_416869.shtml/

[273] Guiguo Wang and Rajesh Sharma (eds.), The Belt and Road Cooperation and Partnership Model Agreement, Joint Publishing (H.K.) Co., Ltd., Hong Kong (2023)

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principle of sovereignty and the right to development. It has 15 chapters, including sustainable development, public health, environment, infrastructure, and dispute resolution – but, importantly, these are all specifically designed to meet the needs of the developing world.[274]

This demonstrates a critical difference with the BRI and the Western-based organizations that have historically been pushing for a global approach to sustainability and corporate governance. The rhetoric suggests that the BRI may be serious about advancing environmental and sustainability issues – but in a context where state sovereignty and development take precedence. In such a context, it is unlikely that there will be anything like a push for corporate governance and purpose initiatives that attempt to forcefully shape sustainable corporate governance across borders globally – like the EU's hard-law backed initiatives to drive sustainable corporate governance extraterritorially or the soft-law initiatives by Western-based international organizations to promote sustainable corporate governance globally.

The absence of such initiatives by the BRI will have consequences on corporate purpose globally. The leverage it wields over global sustainability is substantial and growing. BRI countries account for approximately 50% of the world's energy consumption, almost 75% of the world's population, and more than 50% of the world's GDP.[275] Most BRI states demonstrate an extensive economic growth pattern with significantly higher energy and water consumption and carbon emissions than the global average, escalating global warming.[276] However, notwithstanding its effort and ambition to push the global green agenda, China has been criticized for "exporting" its polluting model to BRI countries[277] and outsourcing emissions to those with less stringent environmental regulations

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[274] Guiguo Wang, *Towards A Rule-Based Belt and Road Initiative – Necessity and Directions*, 6 JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 29 (2019); Guiguo Wang and Rajesh Sharma (ed.), The Belt and Road Cooperation and Partnership Model Agreement, Joint Publishing (H.K.) Co., Ltd., Hong Kong (2023).

[275] Jianhui Jian et al., *The Green Incentives and Green Bonds Financing Under the Belt and Road Initiative*, 58 EMERGING MARKETS FINANCE AND TRADE 1430 (2021); *China's Belt and Road Initiative Will Keep Testing the West*, *supra* note 267.

[276] Shaozhou Qi et al., *Is Energy Efficiency of Belt and Road Initiative Countries Catching Up or Falling Behind? Evidence from Panel Quantile Regression Approach*, 253 APPLIED ENERGY 113581 (from 50% to twice as much as the global average).

[277] Isabel Hilton, *How China's Big Overseas Initiative Threatens Global Climate Progress*, YALE ENVIRONMENT 360 (Jan. 3, 2019), https://e360.yale.edu/features/how-chinas-big-overseas-initiative-threatens-climate-progress (quoting Nicholas Stern, the prominent British economist, "The more than 70 countries that are signed up to the Belt and Road Initiative," he said, "have an average GDP of around one-third of that of China. If they adopt China's development model, which resulted in a doubling of China's GHG [greenhouse gas] emissions in the first decade of the century, it would make the emissions targets in the Paris Agreement impossible").

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(a so-called "pollution haven effect").[278] Experts also mention poor and inconsistent application and enforcement of the Green BRI policies.[279]

More generally, China, along with other BRICS states, has been lambasted for promoting a "democracy-free model of development" with a lack of attention to liberal values and the rule of law.[280] These countries also have been criticized for opposing the pace of green transition proposed by the West, particularly the EU.[281] In July 2021, energy and environment ministers of the G20 nations failed to agree on climate change commitments, with Russia, China, and India blocking a final communiqué.[282] Two years later, in July 2023, the G20 economies failed to reach a consensus on phasing down fossil fuels despite the push from the EU.[283] Finally, the COP28 in Dubai ended in a historic commitment to depart from all fossil fuels for the first time.[284] The pace and scale of this shift, however, will be determined by national governments, which makes sceptics claim that the world remains very unlikely to limit warming to the Paris Agreement's target of 1.5C.[285] This portends a world in which countries heavily dependent on the BRI are left free to define their own sustainable corporate governance standards – perhaps creating safe havens for those companies which find the EU's extraterritorial hard-law approach for promoting uniform standards for

[278] *Id.*, Hilton (since 2000, Chinese-led policy banks have invested $160 billion in overseas energy projects, almost as much as the World Bank and regional development banks; unlike the World Bank, 80 percent of China's overseas energy investments went to fossil fuels); Paulina Garzón & Leila Salazar-López, *China's Other Big Export: Pollution*, THE NEW YORK TIMES (Jul. 21, 2017), https://www.nytimes.com/2017/07/21/opinion/china-climate-pollution-global-warming.html; Francis Fukuyama, *China's Economic Model Will Take a Different Road*, IRISH EXAMINER (Dec. 28, 2015), https://www.irishexaminer.com/opinion/commentanalysis/arid-20373286.html.
[279] Tyler Harlan, *Green Development or Greenwashing? A Political Ecology Perspective on China's Green Belt and Road*, 62 EURASIAN GEOGRAPHY AND ECONOMICS 202 (2021).
[280] *China's Belt and Road Initiative Will Keep Testing the West*, *supra* note 267 (stating that increasingly, the BRI has been used "to rally the Global South around China's democracy-free model of development).
[281] *G20 Environment Meeting Ends Without Agreement on Climate Crisis*, AL JAZEERA (Jul. 28, 2023), https://www.aljazeera.com/news/2023/7/28/g20-environment-meeting-ends-without-agreement-on-climate-crisis (Saudi Arabia, Russia, China, South Africa and Indonesia are all known to oppose the goal of tripling renewable energy capacity this decade).
[282] Gavin Jones, *G20 Fails to Agree on Climate Goals in Communique*, REUTERS (Jul. 24, 2021), https://www.reuters.com/world/g20-loath-commit-climate-meeting-tussle-over-carbon-wording-2021-07-23/.
[283] *G20 Environment Meeting Ends Without Agreement on Climate Crisis*, *supra* note 281 (in particular, the European Union's environment commissioner on Friday criticized the outcome of the meeting of the world's largest economies in the Indian city of Chennai).
[284] The pledge calls for countries to quickly shift energy systems away from fossil fuels in a just and orderly way that contributes to a global transition effort. John Ainger et al, *COP28 Nations Reach First-Ever Deal to Move Away From Fossil Fuels,* BLOOMBERG (Dec. 13, 2023), https://www.bloomberg.com/news/articles/2023-12-13/cop28-ends-with-deal-on-transition-away-from-fossil-fuels?srnd=green.
[285] Olivia Rudgard and Kira Bindrim, *COP28's Success Marks Just a Tiny Upgrade on COP27 Results,* BLOOMBERG (Dec. 14, 2023), https://www.bloomberg.com/news/articles/2023-12-13/cop28-s-success-marks-just-a-tiny-upgrade-on-cop27-results.

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corporate sustainability too onerous. If this occurs, the BRI's approach, unwittingly, may result in a "race to the bottom" for states which hope to attract corporations who seek to determine their own corporate purpose within the borders of these BRI states.

IV.C. From Globalization to Regionalization: The Future of Transnational Organization-Based Corporate Law and Governance

We are living in an era that appears to be shifting from globalization to regionalization.[286] This trend is particularly acute in Asia. Regionalization has accelerated in Asia due to a shift in global economic power towards Asia, a boom in intra-Asian trade, and China/US tensions disrupting the post-World War II US-backed world order. What may transnational organization-based corporate law and governance look like in this new regionalized world?

The era of globalization saw Western-based transnational organizations promote Anglo-American-cum-global corporate governance solutions to solve Asia's corporate governance problems.[287] Following the 1997 Asian Financial Crisis, independent directors were promoted by the IMF as a solution to Asia's corporate governance maladies.[288] This development occurred even though independent directors were originally designed for Anglo-America's dispersed shareholder environment – which is the opposite of the concentrated shareholder environment that predominates in Asia.[289] The World Bank's now infamous Doing Business Report promoted the private enforcement of minority shareholder rights to regulate related party transactions as a key to good corporate governance in Asia.[290] However, as one of us has demonstrated elsewhere, the World Bank completely overlooked how the private enforcement of shareholder rights actually worked in practice in Asia in evaluating the success of this initiative.[291] Most recently, UK-style shareholder stewardship codes, which have been promoted by Western-based multijurisdictional

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[286] Walter Frick, *What the Next Era of Globalization Will Look Like*, HARVARD BUSINESS REVIEW (Nov. 3, 2022), https://hbr.org/2022/11/what-the-next-era-of-globalization-will-look-like (economic pendulums always shift, and ours is shifting right now from unfettered globalization to more regionalization and localization).

[287] *See generally*, Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER (Jennifer G. Hill & Randall S. Thomas eds., 2015).

[288] Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, in INDEPENDENT DIRECTORS IN ASIA (Dan W. Puchniak, Harald Baum & Luke Nottage eds., Cambridge University Press 2017), 116.

[289] *Id.*, 120.

[290] Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 BERKELEY BUSINESS LAW JOURNAL 1 (2020), 38-41.

[291] *Id.*

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corporate governance organizations, have proliferated throughout Asia.[292] This has occurred even though institutional shareholders, which are the sole focus of UK-style shareholder stewardship codes, have extremely limited shareholder power in most jurisdictions in Asia.[293]

In sum, the era of globalization saw Western-based transnational organizations promote the transplant of Anglo-American-cum-global corporate governance mechanisms throughout Asia. With the rise of ESG, stewardship codes have shifted their focus towards promoting sustainable corporate governance in Asia and globally.[294] As a result, Western-based transnational organizations have been a driver of corporate purpose beyond borders in Asia and beyond.

However, in 2018, a new organization emerged in Singapore: Stewardship Asia. As the name suggests, this organization was designed to make Singapore a hub for stewardship in Asia. One of Stewardship Asia's major initiatives was issuing a stewardship code that focuses on controlling shareholders in family firms – rather than on institutional investors – as the stewards of companies.[295] The family stewardship code encourages controllers of family companies to focus on corporate governance for the benefit of the wider community – shifting corporate purpose towards stakeholderism.[296] Stewardship Asia's mission is to have an impact throughout Asia – an example of a transnational organization driving corporate purpose beyond borders, but in a regional (not global) way.[297]

Another example of this can be seen in initiatives by the Asian Development Bank (ADB) to improve the governance and sustainability of corporations in Asia by promoting corporate governance solutions tailored to Asia's corporate governance landscape.[298] The ADB has aimed

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[292] Katelouzou & Puchniak, *supra* note 2.
[293] Puchniak, *The False Hope of Stewardship*, *supra* note 226, at 1-8.
[294] *Id.*; Katelouzou & Puchniak, *supra* note 2.
[295] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret*, 53 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 989, 1013-1018 (2021).
[296] *Id.*, 1015-1016.
[297] *Id.*
[298] See, for example: *People's Republic of China, Promoting Sustainability Disclosure Standards for High-Quality Development (Project 56062-001)*, ASIAN DEVELOPMENT BANK, https://www.adb.org/projects/56062-001/main (technical assistance will be provided by the ADB to China's Ministry of Finance in incorporating sustainability disclosure standards in the context of the PRC so as to facilitate Chinese firms' alignment with international practices to disclose consistent and comparable sustainability-related information) (last visited Nov. 26, 2023); *Pakistan: Supporting State-Owned Enterprise Corporate Governance and Performance (Project 55185-001)*, ASIAN DEVELOPMENT BANK, https://www.adb.org/projects/55185-001/main (last visited Nov. 26, 2023) (technical assistance

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to drive sustainable corporate purpose in the region by developing frameworks that are regionally focused and has zeroed in on corporate governance issues that plague state-owned enterprises and family firms, which are predominant in Asia's controlling shareholder dominated environment.[299] Thus, the ADB's efforts illustrate another clear example of transnational organization-based corporate governance being driven beyond borders, but in a way that is bespoke for Asia.

As explained above, the EU has aggressively promoted its stakeholder focused conception of corporate purpose globally. However, perhaps the most influential transnational organization for global corporate disclosure – the IFRS Foundation, which issued the ISSB – did not adopt the EU's core concept of double materiality. This suggests that at least in terms of corporate disclosure the ISSB will be promoting a standard that fails to comport with the EU's conception of corporate purpose – suggesting further regionalization. Finally, it appears that the United States and China, the world's two largest economies are setting the rules of their own game when it comes to defining corporate purpose – leaving less room for transnational organization-based corporate governance to play much of a role in defining corporate purpose within their borders. As such, it appears that in this new regionalized world transnational organization-based corporate governance may be more regionally focused and less influential than in the past.

PART V. CORPORATE PURPOSE BEYOND BORDERS: AN UNRECOGNIZED COLOSSAL FORCE FOR THE FUTURE

Despite the growing recognition of the transnational or extraterritorial application of domestic law, corporate law and governance has generally been perceived as jurisdictionally bound. This is especially so with the corporate purpose debate. We are unaware of any in-depth research that considers the forces driving corporate purpose beyond borders.

The jurisdictional perception of corporate purpose is fundamentally out of touch with reality and omits powerful trends that shape corporate behavior globally. This Article represents the first comprehensive attempt to offer a systemic analysis of the key pillars and mechanisms employed by a country, company, or organization to alter corporate governance across different jurisdictions.

will be provided in support of the following reforms: (i) the strategic policy framework for state-owned enterprises; (ii) the legal and regulatory framework for SOE reform improved; (iii) SOE corporate governance improved; and (iv) institutional capacity for SOE reform implementation and ownership monitoring improved).

[299] *Id.*

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Our taxonomy provides insight into the diverse nature and effects of such pillars, which appear crucial for defining the purpose that companies play in the success or failure of the global sustainability agenda in an increasingly divided world.

We name the key pillars as state-based extraterritorial, firm-based multi-jurisdictional, and organization-based transnational corporate governance. As we demonstrate in this Article, each pillar deserves distinct attention and has its own arsenal of corporate and non-corporate means and channels that it applies to achieve one goal – changing the purpose that companies fulfill beyond jurisdictional borders. State-based corporate governance is grounded on states' exclusive legislative capacity to pass laws and regulations and their economic might. Firm-based corporate governance is driven by the enormous wealth and the massive worldwide presence of MNCs and powerful multijurisdictional investors who are no longer bound by one single jurisdiction but have become meta-nationals. Organization-based corporate governance is the product of international organizations and initiatives that include multiple countries as their signatories.

At the same time, all three pillars do not exist in a vacuum. They interact, overlap, and engage with each other. Although corporate actors have impressive political and economic influence, states still exercise their exclusive legislative authority to incentivize firms' behavior for the sake of the state's political, economic, and environmental agenda. By adopting mandatory laws and regulations, states impose normative requirements on firms' headquarters, which are further translated via corporate subsidiaries and supply chains. The establishment of subsidiaries and supply chains is an important vehicle for cross-border expansion. This means that countries with the largest number of powerful MNCs have an enhanced capacity to disseminate their norms globally. While the home state's control over MNCs may be necessary to protect against violations and assure responsible behavior in host states, it is sometimes challenging to distinguish when an MNC fulfills its home state's agenda or simply pursues a market opportunity. It is particularly challenging in the case of state-owned enterprises (SOEs) that serve national purposes and potentially act as conduits of neo-colonialism and modern-day imperialism.[300] Then, the line between state-based and firm-based extraterritorial/multijurisdictional corporate governance blurs.

[300] Marcus Vinicius de Freitas, *The Impact of Chinese Investments in Africa: Neocolonialism or Cooperation*, POLICY CENTER FOR THE NEW SOUTH (Aug. 2, 2023), https://www.policycenter.ma/publications/impact-chinese-investments-

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Transnational organization-based corporate governance faces similar implications. The ability of international organizations to drive sustainable corporate governance around the world and influence the evolution of domestic corporate law depends on their state sponsors – the most influential of which are economically powerful countries. The G20 countries represent nearly 50% of the total performance gap for most sustainable development goals (SDGs).[301] They generate 80% of global energy-related carbon dioxide emissions and have granted more than US$3.3 trillion in subsidies for fossil fuels since they signed the Paris Agreement in 2015.[302] Increasingly, these countries disagree on their response to various global challenges, including climate change. This disagreement sabotages the international organizations they support and compromises the purpose of international law. Successful cooperation requires trust grounded in international agreements that are enforced reciprocally. The erosion of trust escalates a global collective action problem and results in the failure of international law to address climate change.[303] And yet, September 2023 was the hottest September in Earth's history, crushing the previous record by a huge margin.[304] Global oil consumption has steadily grown over the last three decades, with the United States and China being the largest oil consumers.[305]

The frustration about "international bodies' foot-dragging on action to curb global heating"[306] increases the pressure on states and, as a result, tremendously expands the role of state-based extraterritorial corporate law and governance to address our planet's future. However, not every state that seems to have the potential and capacity to drive corporate purpose beyond borders chooses to do so. While the EU and California in the US force sustainable corporate purpose

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africa-neocolonialism-or-cooperation; Amitai Etzioni, *Is China a New Colonial Power?*, THE DIPLOMAT (Nov. 9, 2020), https://thediplomat.com/2020/11/is-china-a-new-colonial-power/.

[301] Jeffrey Sachs et al., *Sustainable Development Report 2020* (Cambridge University Press 2021), 46 (China, the United States, and the European Union together represent close to 50% of the global performance gap of Goal 13 (Climate Action); the European Union also generates negative spillovers, in particular through trade and consumption, which undermine other countries' abilities to achieve the SDGs).

[302] *Id*., 36.

[303] Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change*, WORLD BANK POLICY RESEARCH WORKING PAPER NO. 5095, 35-36 (2009), https://openknowledge.worldbank.org/entities/publication/afe3b3e9-96e5-580e-a71e-882dfc4e9421 (Ostrom emphasizes that trust and reciprocity are a necessary for a successful cooperation action).

[304] *September Smashes Monthly Temperature Record by Record Margin*, WORLD METEOROLOGICAL ORGANIZATION (Oct. 17, 2023), https://public-old.wmo.int/en/media/news/september-smashes-monthly-temperature-record-record-margin.

[305] *Oil Consumption Worldwide from 1970 to 2022*, STATISTA, https://www.statista.com/statistics/265261/global-oil-consumption-in-million-metric-tons/ (last visited Nov. 24, 2023).

[306] *G20 Countries Fail to Reach Agreement on Cutting Fossil Fuels*, THE GUARDIAN (Jul. 22, 2023), https://www.theguardian.com/world/2023/jul/22/g20-countries-fail-to-reach-agreement-on-cutting-fossil-fuels.

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extraterritorially, China and other US states, for instance, apply a different approach that still maintains the primarily domestic focus on a shareholder-oriented model. This suggests certain determinants in which state-based extraterritorial corporate law and governance have the greatest (or least) potential to drive corporate purpose beyond borders. In particular, the export of state-based corporate law and governance is often pushed by strong economic incentives and market power (i.e., the size of the market, the volume of trade, the share of foreign direct investment, the supply of strategic products, etc.) that comprise the degree of commercial leverage. Powerful markets such as the US, the EU, or China have high commercial leverage over other economies to dictate corporate purpose beyond borders.

Another potential determinant is the regulatory capacity and expertise to offer internationally acceptable standards to other jurisdictions. While the EU is a widely recognized exporter of sustainable corporate purpose, China has been primarily focused on its domestic issues and now faces a lack of legal talent to defend its interests abroad, which President Xi named as the country's "security risk".[307] The expansion of the BRI has created an even higher demand for international legal expertise in China.[308] This means that, although China is a powerful market with commercial leverage, it is still building its state-based extraterritorial regulatory capacity and, therefore, might be hesitant to extend its corporate law and governance beyond its borders for now. While China's capacity to drive corporate purpose beyond borders is evolving, Singapore may have both sufficient commercial leverage and regulatory capacity to fulfill this role in ASEAN.[309]

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[307] Jun Mai, *Xi Jinping Says China Has a Legal Problem: Finding the Lawyers to Defend its Interests Abroad*, SOUTH CHINA MORNING POST (Mar. 1, 2021), https://www.scmp.com/news/china/politics/article/3123130/xi-jinping-says-china-has-legal-problem-finding-lawyers-defend?firstTimeRegister=true.

[308] Yang Han, *BRI Spurs Demand for Legal Talent*, CHINA DAILY (Sep. 27, 2018), https://www.chinadailyhk.com/articles/154/225/153/1537772420507.html.

[309] Dan W. Puchniak & Samantha Tang, *Limited Shareholder Inspection Rights in Singapore: Worrying Legal Gap or Unnecessary for Rankings?*, ECGI LAW WORKING PAPER 608/2021, 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3918900 ("[Singapore] has ranked first, or near the top, on the most prominent index [i.e. Asian Corporate Governance Association's ranking of good corporate governance] that measures good corporate governance in Asia for over a decade"); Heru Andriyanto, *Indonesia Reports Highest FDI in History*, JAKARTA GLOBE (Nov. 30, 2023), https://jakartaglobe.id/business/indonesia-reports-highest-fdi-in-history ("Neighboring Singapore is the biggest source of Indonesian FDI in 2022, with investment amounting to $13.3 billion"); Tan Ai Leng, *Malaysia Bags RM13 Billion in Foreign Direct Investment from Three Investors After Singapore Mission*, THE BUSINESS TIMES (Jan. 31, 2023), https://www.businesstimes.com.sg/international/malaysia-bags-rm13-billion-foreign-direct-investment-three-investors-after-singapore; Yush Chau, *Singapore a Key Driver of Foreign Investment in Vietnam*, THINK CHINA (Aug. 18, 2023), https://www.thinkchina.sg/big-read-singapore-key-driver-foreign-investment-vietnam#:~:text=For%20three%20consecutive%20years%20from,Vietnam%20reached%20US%2470.8%20billion.

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Nonetheless, the question of why particular countries have the capacity to act extraterritorially and can successfully do so, calls for further in-depth research. In particular, perspectives from game theory, regime theory, and international relations literature might offer unique insights and a starting point for this future analysis.[310] Our taxonomy suggests that corporate purpose beyond borders is a global movement, the future of which will be determined by powerful states, powerful firms, and powerful organizations based on their interest and capacity. Depending on their choice, corporate purpose beyond borders can play a groundbreaking role in promoting sustainable development. Conversely, it can push the world further away from sustainability and contribute to neo-colonialism (state-based), global greenwashing (firm-based), and geopolitical capture (organization-based).

Whether the colossal implications of corporate purpose beyond borders is a path to sustainable development for all or colonialism repackaged is an open question. However, what is clear is that the classic corporate purpose debate is fatally myopic as Friedman's jurisdictionally bound world no longer exists. Thus, to understand the future of corporate purpose, corporate governance, and sustainability, we must understand corporate purpose beyond borders.

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("For three consecutive years from 2020 to 2022, Singapore was Vietnam's largest source of investments. In 2022, Singapore accounted for nearly US$6.5 billion worth of investments in Vietnam, or 23% of its total FDI. At the end of 2022, Singapore's accumulated investments in Vietnam reached US$70.8 billion."); *Thailand's Investment Pledges Jump 70% in H1, China Tops FDI*, REUTERS (Jul. 10, 2023), https://www.reuters.com/markets/asia/thailands-investment-pledges-jump-70-h1-china-tops-fdi-2023-07-10/ (Singapore was Thailand's second biggest investor after China); Manoj Mathew, *Singapore Replaces China as Cambodia's Top FDI Source*, KHMER TIMES (Nov. 2, 2022), https://www.khmertimeskh.com/501178069/singapore-replaces-china-as-cambodias-top-fdi-source/ ("Singapore has replaced China as the leading investing country in Cambodia in 2021, accounting for six projects, or 40 percent of Cambodia's inward FDI"); *Singapore Overtakes Hong Kong as Asia's Top Financial Centre; 3rd in World*, THE STRAITS TIMES (Sep. 23, 2022), https://www.straitstimes.com/business/economy/singapore-overtakes-hong-kong-as-asias-top-financial-centre-3rd-in-world.

[310] Amir Licht offers an insightful analysis from three different perspectives – theories of corporate governance and securities regulation, standard game theory modelling, and international relations and regime theory analysis – to shed light on why states choose to compete or collaborate in the context of international securities regulation. Amir Licht, *Games Commissions Play: 2x2 Games of International Securities Regulatio*n, John M. Olin Discussion Paper 223, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=156794.

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