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# Capitalism, the sustainability crisis, and the limitations of current business governance

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## 1 Impetus for a new direction

This book investigates the limitations of corporate governance and some related business laws, and their potential reform in furthering environmentally sustainable development, or ‘sustainability’, as this term is more conveniently known. The central idea is that promoting sustainability cannot be left solely to corporate volunteerism, but also requires enabling legal frameworks that go beyond conventional environmental regulation to ensconce within company law the necessary standards and procedures. While the book is strongly motivated by the threat of global climate change, which challenges the traditional assumptions and purpose of business enterprise over the long term, along with many other domains of human endeavour, a range of other environmental problems such as the loss of biodiversity also suggests that a different approach to business activity is needed. Arising from the work of the Sustainable Companies Project, led by Professor Beate Sjøfjell at the University of Oslo,<sup>1</sup> this volume offers multi-jurisdictional perspectives from scholars of business and environmental law. Over eight chapters, a mosaic of analyses, spanning company law, accounting standards, and financial markets regulation, identify both the barriers to and the opportunities to promote sustainability in the context of corporations and their financial investors. The book concludes with some ideas to further ‘sustainable companies’, a phrase intended to capture the ideal of corporations and other business entities acting within environmentally sustainable parameters. The focus of the book is to deepen our understanding of the barriers to creating sustainable companies, rather than outlining a blueprint for reform. The

<sup>1</sup> See [jus.uio.no/companies](https://jus.uio.no/companies) under Projects. The project received funding from the Research Council of Norway. The project’s broad international scope was made possible through the academic contributions of the large team of scholars from all around the world, to whom we express our gratitude and whose work we hereby recognise.

path to reform largely hinges on better understanding of the source and nature of the problems, and recognition that the tools and strategies for such reform will vary somewhat across societies and jurisdictions.

Creating sustainable companies has never been more urgent in a world beset by the intertwined crises afflicting global financial markets and the planetary environment. The Global Financial Crisis (GFC) that erupted in 2008 revealed profound weaknesses in the conventional paradigm of market finance, and the need to rethink its fundamental tenets and purpose. Another emerging crisis stems from humankind's degradation of life-sustaining natural resources with an intensity and speed that threaten the livelihoods and prosperity not only of future generations, but also of those alive today. Climate change looms large as the most ominous such threat. The GFC and environmental crises stem from a different aetiology but they also share the problem of how short-sighted economic activity can lead to dangerous long-term problems.

To promote sustainability, it is not sufficient simply to have more environmentally efficient businesses, in the sense that companies use fewer natural resources or emit less pollution relative to their economic activity. An efficiency standard fails to ensure sustainability when the economy continues to grow and the human population is increasing. The 'efficiency' paradigm also avoids addressing the significant social injustices in contemporary environmental decision-making. Putting the economy on a sustainable path requires a more comprehensive and fundamental strategy that includes rethinking the very purpose and nature of economic activity, including that of the dominant business organisation: the corporation.

This book proceeds from the position that sustainable business should not be a discretionary preference, to follow only if corporate leaders perceive an economic benefit for their company. All economic activity must avoid depleting non-substitutable natural capital or creating environmental externalities. It must invest more in clean, low-carbon technologies, climate adaptation projects, ecosystem rehabilitation and improvement, and other ways to build sustainability.<sup>2</sup> Economic activity that has public costs should be accountable for such impacts.

Presently, business enterprise and the wider capitalist system in which it functions still have a long way to go before it might fulfil this vision. The movement for corporate social responsibility (CSR) and its offshoot,

<sup>2</sup> T. Jackson, *Prosperity Without Growth: Economics for a Finite Planet* (Earthscan, 2009), 138–9.

socially responsible investing (SRI), have captured only a relatively small group of committed converts. CSR has a long history in the context of industrial capitalism, dating back to the nineteenth century in the first movement for improved labour conditions.<sup>3</sup> Its influence has generally been episodic and fleeting. It has more recently regained prominence as modernist economic virtues such as efficiency, profits, and maximum growth have waned in an increasingly cynical world plagued by social and environmental problems.<sup>4</sup> Rejecting the unbridled free market doctrines of previous years,<sup>5</sup> the World Business Council for Sustainable Development (WBCSD) explains: ‘Corporate social responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.’<sup>6</sup>

However, while many investors and business leaders today distance themselves from the hyperbole of Milton Friedman, who once admonished CSR as one of the ‘[f]ew trends [that] could so thoroughly undermine the very foundations of our free society’,<sup>7</sup> most are unwilling to sacrifice profits for environmental gains. The minority of firms and investors that have embraced CSR have tended to recast it in a new business paradigm that views environmental and social issues instrumentally for potential financial advantage.<sup>8</sup> But even this restrictive version of business responsibility has struggled to attract many followers, partly because of problems in organisational cultures and difficulties in financially quantifying the business value of improved environmental performance. Rather

<sup>3</sup> J.J. Asongu, ‘The history of corporate social responsibility’ (2007) 1(2) *Journal of Business and Public Policy* 1.

<sup>4</sup> E. Garriga and D. Mele, ‘Corporate social responsibility theories: mapping the territory’ (2004) 53 *Journal of Business Ethics* 51. D. Birch, ‘Corporate social responsibility: some key theoretical issues and concepts for new ways of doing business’ (2003) 1(1) *Journal of New Business Ideas and Trends* 1.

<sup>5</sup> On financial and corporate management attitudes in the 1980s, see A. Smith, *The Roaring ’80s* (Viking Press, 1988).

<sup>6</sup> WBCSD, *Corporate Social Responsibility: Meeting Changing Expectations* (WBCSD, 1999), 3. Among important CSR literature of recent years, see D. Crowther and L. Rayman-Bacchus (eds.), *Perspectives on Corporate Social Responsibility* (Ashgate, 2004); D. Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press, 2005).

<sup>7</sup> M. Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962), 133–4.

<sup>8</sup> H. Jemel-Fornetty, C. Louche, and D. Bourghelle, ‘Changing the dominant convention: the role of emerging initiatives in mainstreaming ESG’, in W. Sun, C. Louche, and R. Pérez (eds.), *Finance and Sustainability: Towards a New Paradigm? A Post-Crisis Agenda* (Emerald Group, 2011), 85.

than ask how business might contribute to sustainability, today's corporate managers are more likely to self-servingly question how sustainability might contribute to their firms' profitability. There is nothing intrinsically objectionable from benefitting financially from sustainable business practices; the problem arises when the financial rationale becomes the only rationale for acting, given that this logic can also work the other way to encourage environmentally unscrupulous development.

The prevalence of a myopic, single-value approach to commerce and investment may thus marginalise CSR strategies that cannot be commuted into the language of financial risk or profitability. The prevailing belief in the CSR movement that companies' ability to manage environmental risks and opportunities is increasingly relevant to business competitiveness, profitability, and organisational competence, while valid, does not provide a comprehensive framework for sustainable business. Missing from this perspective is acceptance of an ethical responsibility to act for environmental well-being, regardless of immediate financial returns. Dominant global CSR and SRI standards, such as the United Nations Principles for Responsible Investment (UNPRI)<sup>9</sup> and the UN Global Compact (UNGC),<sup>10</sup> lack explicit sustainability performance benchmarks. If fund managers or business leaders rely only on narrow grounds to act responsibly, then by their own reasoning they would be justified in making an exception if ignoring those 'extraneous' values would be more profitable. Any commitment to CSR thus remains fragile.

Unsustainable business practices are also attributable to failures of the legal system. Corporate law is an obstacle, especially its problematic tendency to view business enterprises as private institutions despite their often public-like characteristics and social impacts. Under prevailing legal understandings, this book reveals in Chapter 2 by Millon, and Chapter 3 by Sjøfjell and others, that business managers cannot easily accommodate sustainability considerations if they lack economic benefits for the firm or its shareholders, unless the firm is explicitly established as a non-profit or mixed-purpose corporation. The legal duties of senior managers and directors of companies to act to benefit their company's economic prosperity are perceived to exclude consideration of social and environmental issues unless they can offer financial benefits to the business. There is a cognate assumption that environmental standards are preferably quarantined in separate external regulation as opposed to being incorporated

<sup>9</sup> See [www.unpri.org](http://www.unpri.org).      <sup>10</sup> See [www.unglobalcompact.org](http://www.unglobalcompact.org).

into corporate governance. But as will be explained shortly, modern environmental law has had limited success, despite the sincere efforts of many regulators, judges, and other actors dedicated to the long-term well-being of the planet.<sup>11</sup>

While smarter and more discrete 'external' environmental regulation of companies and financial institutions may help promote sustainability, we also need to incorporate such legal measures into economic institutions. We need to embed environmental standards in the governance of economic institutions in order to minimise the tensions their managers face between reconciling expectations that they act in the public interest while serving their private constituencies. Fund managers, business managers, and other economic decision-makers are expected to prioritise profits or maximise returns to shareholders – goals that create powerful incentives to avoid paying for environmental externalities. Conversely, environmental regulation seeks to communicate responsibility for such externalities and thereby constrain profit-making. By reconciling such mixed messages, environmental protection could be internalised as a fundamental norm for investment and business. It should also thereby help improve compliance with external environmental regulation.

The following section examines the global economic and ecological predicaments that require that this challenge be addressed urgently.

## 2 The global economic and ecological crises

Politicians and corporate executives frequently remind us that our well-being depends on growing the economy.<sup>12</sup> Despite its unsustainable burden on the biosphere, economic growth remains the foremost goal of nations worldwide. The historic economic trends are truly staggering. Worldwide consumer expenditure during the last century rose from US\$1.5 trillion in 1900 to US\$24 trillion in 1998.<sup>13</sup> Likewise, international trade in goods and services soared from US\$50 billion in 1870 to US\$8043

<sup>11</sup> For example, S. Wood, G. Tanner, and B.J. Richardson, 'Whatever happened to Canadian environmental law?' (2011) 37(4) *Ecology Law Quarterly* 981.

<sup>12</sup> For example, 'Flaherty raises economic growth forecast', *CBC News*, 2 February 2010, [www.cbc.ca/news/business/flaherty-raises-economic-growth-forecast-1.954083](http://www.cbc.ca/news/business/flaherty-raises-economic-growth-forecast-1.954083); L.P. Bloomfield Jr, 'Corporate investments can help accelerate economic growth in the developing world', *International Business Times*, 19 November 2013, [www.ibtimes.com](http://www.ibtimes.com).

<sup>13</sup> United Nations Development Programme (UNDP), *Human Development Report 1998* (UNDP, 1998), 1.

billion in 2005.<sup>14</sup> Both trends vastly outstripped even the extraordinary surge in human population from some 1.6 billion in 1900 to 7 billion in 2011. In recent decades, a further economic impetus has come from the financial sector. The assets of the world's 1000 largest banks surged from US\$23 trillion in 1990 to approximately US\$101 trillion by mid-2010, despite the headwinds from the GFC.<sup>15</sup> In late 2010, the global financial economy was valued at approximately US\$212 trillion.<sup>16</sup> Such majestic statistics suggest we live in an age of great prosperity that has raised living standards and lifted billions out of poverty.

Apart from the rising economic and social inequalities for some people that have accompanied such growth, one uncomfortable consequence is that the global economy has become very large compared to the ecosystems that sustain it. Natural systems provide innumerable economic and life-support benefits,<sup>17</sup> yet humanity acts brazenly as though Earth's natural bounty is infinitely abundant and free.<sup>18</sup> In *The Cancer Stage of Capitalism*, John McMurtry metaphorically depicts this economic plundering as a malignant tumour.<sup>19</sup> As ecological economists have more academically put it, infinite economic and population growth in a physically finite world is impossible.<sup>20</sup> The debate about such 'limits' is not recent; Thomas Malthus raised it in his influential *Essay on Population*, published in 1778, and since the early 1970s, numerous scientists have warned against rampant growth that devours nature.<sup>21</sup> Resource scarcities

<sup>14</sup> World Trade Organization (WTO), World Trade Report 2007 (WTO, 2007), 244 (expressed in constant 1990 dollar values); see also W. Bernstein, *A Splendid Exchange: How Trade Shaped the World* (Atlantic Monthly Press, 2008).

<sup>15</sup> International Financial Services London (IFSL, now known as TheCityUK), 'Worldwide assets of the banking industry', see also TheCityUK 'Banking: May 2012, financial markets series', available at: [www.thecityuk.com/research/our-work/reports-list/](http://www.thecityuk.com/research/our-work/reports-list/).

<sup>16</sup> C. Boxburgh, S. Lund, and J. Piotrowski, *Mapping Global Capital Markets 2011* (McKinsey Global Institute, 2011), 2.

<sup>17</sup> See G.C. Daily, *Nature's Services: Societal Dependence on Natural Ecosystems* (Island Press, 1997); Y. Baskin and P.R. Ehrlich, *The Work of Nature: How the Diversity of Life Sustains Us* (Island Press, 1998); T. Prugh, et al., *Natural Capital and Human Economic Survival* (CRC Press, 1999).

<sup>18</sup> Its economic value is undoubtedly staggering, and was quantified by one notorious study in 1997 at somewhere between US\$16–54 trillion annually, dwarfing a then annual global gross economic product of about US\$18 trillion: R. Costanza, et al., 'The value of the world's ecosystem services and natural capital' (1997) 389 *Nature* 253.

<sup>19</sup> J. McMurtry, *The Cancer Stage of Capitalism* (Pluto Press, 1999).

<sup>20</sup> H. Daly and J.B. Cobb, Jr., *For the Common Good* (Beacon Press, 1989); H. Daly, *Ecological Economics and the Ecology of Economics* (Edward Elgar, 1999); P. Victor, *Managing Without Growth* (Edward Elgar, 2008).

<sup>21</sup> D.H. Meadows, et al., *The Limits to Growth* (Universe Books, 1972).

are only part of the problem. There are also limits to the capacity of environmental 'sinks', which serve to assimilate the pollution and other by-products of economic activity. Climate change is the most severe of these emerging sink problems.

Soaring ecological problems provoked the UN's Millennium Ecosystem Assessment in 2005 to warn that 'human activity is putting such strain on the natural functions of the Earth that the ability of the planet's ecosystems to sustain future generations can no longer be taken for granted'.<sup>22</sup> Many other international studies echo this view.<sup>23</sup> In 2012, scientists spoke of the risk of 'threshold-induced state shifts' in the Earth's biosphere that could trigger myriad, unforeseen, devastating consequences for all life.<sup>24</sup> With emerging economies such as China and India rapidly industrialising, and thereby intensifying the global environmental burden, grave ecological tipping points may be irreparably passed soon.

These trends are not simply an expression of some carnal human urge for greater material prosperity – though they do have deep cultural and biological roots<sup>25</sup> – but substantially reflect prevailing economic and political systems. The market economy is particularly influential. Some economists laud the market as crucial to human welfare and a tool to solve our environmental problems, such as by unleashing competitive pressures to pioneer innovative green technologies, efficiently using scarce resources, and pricing pollution risks.<sup>26</sup> Geoffrey Heal optimistically contends, 'This poor [environmental] record is not intrinsic to markets. They can be reoriented in a positive direction, in which case their potential for good is immense.'<sup>27</sup> Similarly, through dematerialisation, new technologies, better management systems, and investment in a knowledge-based economy, Paul Hawken and others champion a benevolent 'natural

<sup>22</sup> Millennium Ecosystem Assessment, *Living Beyond Our Means: Natural Assets and Human Well-Being, Statement from the Board* (Millennium Ecosystem Assessment, 2005) at 5.

<sup>23</sup> United Nations Environment Programme (UNEP), *Global Environment Outlook GEO-5* (UNEP, 2012); Worldwatch Institute, *State of the World 2012: Moving Toward Sustainable Prosperity* (Island Press, 2012).

<sup>24</sup> A.D. Barnosky, *et al.*, 'Approaching a state shift in Earth's biosphere' (2012) 486 *Nature*, 52 at 52.

<sup>25</sup> S. Boyden, *Western Civilization in Biological Perspective: Patterns in Biohistory* (Oxford University Press, 1987).

<sup>26</sup> See generally K. Midgley and R. Burns, *The Capital Market: Its Nature and Significance* (Macmillan, 1977).

<sup>27</sup> G. Heal, 'Markets and sustainability', in R.L. Revesz, P. Sands, and R.B. Stewart (eds.), *Environmental Law, the Economy and Sustainable Development* (Cambridge University Press, 2000), 410 at 427.

capitalism' that respects the critical interdependency between the economy and nature.<sup>28</sup> Ecological economists recommend more fundamental changes that go beyond improved 'efficiency' of resource use to actually limit economic growth.<sup>29</sup> They highlight how the market suffers from several environmental blind-spots, including fugitive pollution 'externalities',<sup>30</sup> degradation of 'public goods' such as the atmosphere and oceans,<sup>31</sup> undervaluation of ecological services and amenities such as biodiversity,<sup>32</sup> and myopic decision-making that ignores posterity's interests.<sup>33</sup>

Equally troubling, the cornucopia of material wealth gained from this growth binge does not necessarily equate with heightened prosperity. Empirical research suggests that once basic human needs are satiated, further economic growth yields a diminishing marginal return to human happiness.<sup>34</sup> Economic indicators such as Gross Domestic Product (GDP) undervalue the contribution of nature to overall well-being.<sup>35</sup> Moreover, much of this growth has delivered uneven benefits, with just a fifth of humanity earning about 2 per cent of global wealth.<sup>36</sup> Some economists have pioneered alternative measures of economic vitality and satisfaction, suggesting that the seemingly most prosperous nations do not necessarily enjoy the highest contentment.<sup>37</sup>

<sup>28</sup> P. Hawken, L.H. Lovins, and A. Lovins, *Natural Capitalism: Creating the Next Industrial Revolution* (Earthscan, 2000).

<sup>29</sup> See, e.g. M. Common and C. Perrings, 'Towards an ecological economics of sustainability' (1991) 6 *Ecological Economics* 7; A.M. Jansson, et al. (eds.), *Investing in Natural Capital: The Ecological Economics Approach to Sustainability* (Island Press, 1994); Jackson, *Prosperity Without Growth*, 5.

<sup>30</sup> A.A. John and R.A. Pecchenino, 'International and intergenerational environmental externalities' (1997) 99(3) *Scandinavian Journal of Economics* 371.

<sup>31</sup> T. Cowen, *Public Goods and Market Failures: A Critical Examination* (Transaction Publishers, 1991).

<sup>32</sup> M. Common, *Environmental and Resource Economics: An Introduction* (2nd edn, Longman, 1996), 330–5.

<sup>33</sup> Common, *Environmental and Resource Economics*.

<sup>34</sup> William Rees documents that recent increases in per capital expenditures on US healthcare have not improved the overall health of its population: W.E. Rees, 'The end (of growth) is nigh', paper presented at Ecological Integrity and Sustainable Society Conference (Dalhousie University, 23–7 June 2007).

<sup>35</sup> R. Eisler, *The Real Wealth of Nations: Creating a Caring Economics* (Berrett-Koehler Publishers, 2007).

<sup>36</sup> Jackson, *Prosperity Without Growth*, 5.

<sup>37</sup> H. Henderson, *Ethical Markets: Growing the Green Economy* (Chelsea Green Publishing, 2007). Consider alternative measures of prosperity, such as the 'Index of Sustainable Economic Welfare', [www.neweconomics.org](http://www.neweconomics.org), or the 'Happy Planet Index', [www.happyplanetindex.org](http://www.happyplanetindex.org).

Another crisis, in global financial markets, has recently attracted greater attention from policy-makers and business leaders, yet its causes are partly associated with the same processes fuelling the planetary ecological crisis – namely, excessive risk-taking, failure to incorporate all social costs in the pricing of financial assets, and the short-term orientation of the market. Although some commentators believe ‘[t]here is nothing inherent in the structure of the financial system which necessarily leads to environmental destruction’,<sup>38</sup> such an assumption is largely only plausible at a theoretical level because it ignores problems such as imperfect information, the culture of financial organisations, and collective action problems in the financial industry. The fall-out from the GFC that began in 2008 illustrates how excessive risk-taking by financiers can precipitate wide-ranging economic and social devastation. We are tied to an interconnected global financial system ‘in which money traverses national capital markets with dramatic speed and callous scrutiny, bringing with it both the ability to enhance local economic opportunities or break an economy at its very core.’<sup>39</sup> These impacts are also the product of governance gaps and weaknesses, as a growing preference since the 1970s for market deregulation has led to diminished state oversight and control of the financial economy.

The separation of capital and the control of business, the hallmark of corporate capitalism, has also leveraged the separation between investment and social responsibility.<sup>40</sup> Ease of access to capital through financial markets removes corporate financing constraints that might otherwise curb economic growth and thus its environmental consequences. Passive investors also tend to be physically distant from the activities that directly impact the environment, thus weakening their sense of responsibility for taking corrective action. Further fraying the ties between those who manage companies and those who contribute capital, investors tend to own tiny fractional stakes in a multitude of companies in their portfolio, and the ease of selling corporate securities helps diminish the perceived importance of being a shareholder or creditor to the company. The result of so many intermediaries is the diminution of the sense of moral agency of investors for the activities of the companies they fund.

<sup>38</sup> M.A. White, ‘Environmental finance: value and risk in an age of ecology’ (1996) 5 *Business Strategy and the Environment* 198, at 200.

<sup>39</sup> C.J. Mailander, ‘Financial innovation, domestic regulation and the international marketplace’ (1997–98) 31(3) *George Washington Journal of International Law and Economics* 341, at 378.

<sup>40</sup> See B.J. Richardson, ‘Putting ethics into environmental law: fiduciary duties for ethical investment’ (2008) 46(2) *Osgoode Hall Law Journal* 243.

Whatever environmental sensitivities investors may have, they function within a financial system whose aim is to mobilise capital through loans and investments in order for it to deliver a profit (or 'return' as investors call it). Such returns are unlikely to accrue from investing in firms that do not expand or innovate. Shareholders' and financiers' desire for returns in turn creates pressure on corporations to be profitable in order to repay creditors or generate returns for shareholders. The recent rise in financial capital and the decline in natural capital are thus surely not merely coincidental.

In addition to squandering natural capital, the markets' contribution to material prosperity is reproachable. Although investing has the generic purpose of sacrificing current value and use of existing capital in order to obtain greater future benefit, the financial system is prone to speculative, ephemeral, and short-term tactics that can undermine long-term social and economic well-being.<sup>41</sup> The dominant paradigm of the finance system that arose after the 1950s is grounded on several models, particularly the efficient market hypothesis, the capital asset pricing model for the trade-off between risk and return, the modern portfolio theory of diversification of investment, and arbitrage pricing theory.<sup>42</sup> Over-reliance on these models, which suffer from some unrealistically simple assumptions about financial risk and investor behaviour, coupled with regulatory lacunae and lax market supervision, has created vulnerabilities in the financial economy that metamorphosed into the GFC in 2008. Financial crises are not new, however: a World Bank study identified 112 systemic financial crises in 93 countries between the late 1970s and 2000.<sup>43</sup> The 2008 crisis, however, was of historic breadth and depth, partly because financial markets have become much more integrated than was the case in earlier decades. The crisis led to financial bailouts of US\$4.89 trillion between 2007 and 2009 in the United States and the European Union (EU), equivalent to 6 per cent of GDP in each country/region.<sup>44</sup> By contrast, no commensurate sense of urgency and commitment of financial resources have been offered to address global ecological problems.

<sup>41</sup> F. Jameson, 'Culture and finance capitalism' (1997) 24(1) *Critical Inquiry* 246, at 247; A. Harmes, *Unseen Power: How Mutual Funds Threaten the Political and Economic Wealth of Nations* (Stoddard, 2001) at 76.

<sup>42</sup> C.F. Lee and A.C. Lee (eds.), *Encyclopedia of Finance* (Springer, 2006).

<sup>43</sup> World Bank, *Finance for Growth: Policy Choices in a Volatile World* (World Bank, 2001).

<sup>44</sup> J. Black, *Restructuring Global and EU Financial Regulation: Capacities, Coordination and Learning*, Law, Society and Economy Working Paper 18/2010 (London School of Economics, 2010), 8.

Other commentators are hopeful that markets can sort themselves out. Gordon Clark and Dariusz Wójcik praise global finance for reshaping the economic landscape of twenty-first-century capitalism by facilitating corporate restructuring, technological innovation, and economic development.<sup>45</sup> They see the growing presence of institutional investors as a generally positive phenomenon that can help align corporate behaviour with social norms. Clark and Tessa Hebb, whose writings focus on pension funds, contend these actors have helped re-group dispersed shareholders with unprecedented concentrations of ownership that enable them to pressure corporations into raising their business practices and standards on a range of issues, including transparency, and improving their social and environmental performance.<sup>46</sup> Relatedly, other commentators such as Robert Monks have observed a willingness of institutional investors to collaborate in order to amplify their influence over the governance of their investee firms.<sup>47</sup> The voices of institutional funds, whose beneficiaries are millions of ordinary workers and households, are promoting CSR not only in response to broad societal demands, but also because they believe improved social and environmental performance may lower financial risks over the long term.

The capacity and willingness of enlightened investors to nudge the economy towards sustainability are examined later in this book, in Richardson's Chapter 6. Suffice to say at this point that institutional funds and the SRI movement largely failed to predict the 2008 financial crisis, let alone do anything to prevent it. Many in the SRI sector have been preoccupied with ad hoc or specific issues of corporate conduct, while giving insufficient attention to the structural and systemic dimensions of the financial economy that are also determinative of progress towards sustainability. Similarly, as David Millon discusses in Chapter 2, the CSR movement that focuses on companies in the productive or 'real' economy has struggled to leverage positive change in the environmental behaviour of companies through voluntary or discretionary initiatives such as CSR reporting.

Before examining further the barriers and opportunities in corporate and business law to address these economic and environmental challenges,

<sup>45</sup> G.L. Clark and D. Wójcik, *The Geography of Finance: Corporate Governance in the Global Marketplace* (Oxford University Press, 2007).

<sup>46</sup> G.L. Clark and T. Hebb, 'Pension fund corporate engagement: the fifth stage of capitalism' (2004) 59(1) *Relations Industrielles/Industrial Relations* 141.

<sup>47</sup> R.A.G. Monks, *The New Global Investors: How Shareowners Can Unlock Sustainable Prosperity Worldwide* (Capstone, 2001).

it is important to pause and consider the limitations of conventional environmental regulation. Why can we not just rely on such regulation to discipline environmentally irresponsible companies?

### 3 Environmental law in the dyadic state

The assumption that the environmental activities and impacts of business can be successfully improved through external regulation rather than through company law or other areas of business law is doubtful. Ostensibly, environmental law has blossomed in many countries over the past half-century as governments have legislated to curb pollutants, protect endangered species, and restrict the exploitation of nature's scarce or finite resources. However, all states have struggled to discipline humankind's environmentally wanton behaviours because those behaviours, especially through industry and the marketplace, also deliver material prosperity and sustain the states themselves. This is the outcome even when we increasingly recognise that plundering nature's capital will eventually deprive business of the capacity to create new, economic capital. These contradictory tendencies between the need for environmental protection (in the long term) and allowing its exploitation for economic development (in the short term) are central to understanding the dyadic or conflictual character of the modern state charged with regulating business. The following pages thus delve into the limitations of environmental law in order to help us understand this book's agenda about the imperative for a supplementary means of governing the source of our most serious environmental pressures: the business sector.

Depressingly, global environmental conditions have generally deteriorated despite the vast swathe of environmental regulations enacted in many nations in recent decades. We continue to edge closer to the precipice of an anthropogenic collapse in planetary ecological systems. Species are disappearing at unprecedented rates and the planet's sixth mass extinction is forecast,<sup>48</sup> while atmospheric carbon dioxide is at its highest level in some 800,000 years, and is rising rapidly.<sup>49</sup> We should not be misled by the law's occasional triumphs, such as the phasing out of atmospheric

<sup>48</sup> A.D. Barnosky, *et al.*, 'Has the Earth's sixth mass extinction already arrived?' (2011) 471 *Nature* 51.

<sup>49</sup> 'First time in 800,000 years: April's CO<sub>2</sub> levels above 400 ppm'. *CBS News*, 6 May 2014, [www.cbsnews.com/news/first-time-in-800000-years-aprils-co2-levels-above-400-ppm](http://www.cbsnews.com/news/first-time-in-800000-years-aprils-co2-levels-above-400-ppm).

ozone-depleting chemicals<sup>50</sup> or the rescue of iconic species from the brink of extinction.<sup>51</sup> At most, we can concede that environmental law is modestly mitigating what would be a more dire situation.

While the subject of environmental law deserves much more comprehensive treatment and we should be mindful of differences in its design and impact among jurisdictions, especially between the rich developed countries and the poorer nations of the Global South, some general trends can be observed here. Until now, environmental law has tended to function as external controls on economic activity rather than as norms embedded within the inner institutional structure of companies, financiers, and other economic agents. These entities have had to obtain licences or other approvals to harvest resources, pollute, or commit other environmental impacts, overseen by a labyrinth of administrative agencies and procedures. The function of environmental law, therefore, remains limited to mitigating the worst excesses of the dominant model of economic development rather than fundamentally challenging or transforming it. It is rare for a major project, especially one that promises jobs and other economic benefits, to be vetoed in the name of protecting nature.

The efficacy of environmental law has been undermined by the convergence of several negative factors, including its political-economic context and its methods of governance,<sup>52</sup> in addition to more fundamental characteristics of humankind's evolutionary disposition.<sup>53</sup> The modern environmental administrative state is structured largely to legalise environmental damage, for under most legislation, the governing agency has the authority – or discretion – to permit the very pollution or resource destruction that the regulations were drafted to prevent or reduce. Further, within this context, government agencies often confront and succumb to political pressure and lobbying by vested interest groups, especially the corporations they are supposed to police, in order to issue permits

<sup>50</sup> Montreal Protocol on Substances That Deplete the Ozone Layer, ILM 28, 1989, 649.

<sup>51</sup> A notable example is the American Bald Eagle (*Haliaeetus leucocephalus*), the national symbol of the United States, which was saved by the Endangered Species Preservation Act, Pub. L. 89–669, 1966.

<sup>52</sup> See e.g. D. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (UBC Press, 2003); B.A. Ackerman and R.B. Stewart, 'Reforming environmental law: the democratic case for market incentives' (1985) 37 *Stanford Law Review* 1333; A. Gillespie, *The Illusion of Progress: Unsustainable Development in International Law* (Earthscan, 2001).

<sup>53</sup> B.J. Richardson, 'A damp squib: environmental law from a human evolutionary perspective' (2011) 3 *Law and Prosociality eJournal*.

and sanction other harmful actions.<sup>54</sup> Areas set aside for strict nature conservation, such as national parks, usually reflect such areas' perceived weaker economic value for mining, forestry, human settlement, or other developments, rather than any unadulterated ethical commitment to nature's sanctity.

The target of environmental regulation can also be misguided. It tends to focus on the 'front-line' companies (e.g. manufacturing firms or mining companies) that most visibly pollute or exploit natural resources, rather than their financial sponsors, such as global banks or multinational companies shielded behind subsidiaries that become the 'fall guy' for any environmental problems. The latter have been viewed as systemically remote from these environmental and social consequences,<sup>55</sup> despite the capital they provide and their ability as shareholders or creditors to voice concerns to the firms they aid. Causal relationships between finance and environmental impacts are separated widely across time and space, frequently obscuring holistic responsibility for the degradation.

States tend not to favour stringent environmental regulation because their political fortunes hinge more on their success as economic managers than as environmental stewards, despite a growing environmental movement in many countries. Driven by the imperatives of national housekeeping, the state acts as the '*parens patriae*' with responsibility to sustain economic growth.<sup>56</sup> Yet, because economic activity can also produce politically contentious environmental impacts, the state must reconcile the antagonistic imperatives of curbing the worst pollution while allowing market actors enough freedom to grow the economy.<sup>57</sup> Unresolved contradictions between these imperatives have prompted major disputes over forestry, nuclear power, mining, and other resource issues in recent decades.<sup>58</sup> Governments have sought to manage their conflicted

<sup>54</sup> One notorious example is the Gunns' pulp mill proposal in northern Tasmania, Australia, a development allegedly approved by state and federal governments because of the political influence of Gunns, a major forestry company: Q. Beresford, 'Corporations, government and development: the case of institutional corruption in Tasmania' (2010) 45(2) *Australian Journal of Political Science* 209.

<sup>55</sup> J. Rada and A. Trisoglio, 'Capital markets and sustainable development' (1992) 27 *Columbia Journal of World Business* 42; W. Thomas, 'The green nexus: financiers and sustainable development' (2001) 13 *Georgetown International Environmental Law Review* 899.

<sup>56</sup> See H. Arendt, *The Human Condition* (University of Chicago Press, 1957).

<sup>57</sup> See K. Walker, 'The state in environmental management: the ecological dimension' (1989) 37(1) *Political Studies* 25.

<sup>58</sup> For example, R. Falkner, *Business Power and Conflict in International Environmental Politics* (Palgrave Macmillan, 2007); I. Watson, *Fighting Over the Forests* (Allen and Unwin, 1990).

roles and the attendant challenges to their legitimacy by devolving more authority to market actors.<sup>59</sup> Particularly since the 1980s, states have increasingly privatised public services and assets and liberalised market controls in the hope of reducing the regulatory burden on industry and creating more opportunities to harness market efficiencies.<sup>60</sup> This strategy, however, carries its own risks. The GFC of 2008–2009 led governments worldwide to intervene to restore market stability in a way not seen since the Great Depression.<sup>61</sup> By contrast, the looming crisis of climate change prompted only a lukewarm political accord in Copenhagen in 2009.<sup>62</sup>

The effectiveness of environmental law is blunted not only by its political and economic context, but also its *methods*. The rise of modern environmental regulation in the countries of the West was closely associated with the norms and institutions of the welfare state, including reliance on instruments of public ownership and prescriptive standards.<sup>63</sup> While these techniques helped mitigate such acute pollution problems as water pollution and lead in petrol, their ability to solve complex environmental issues is increasingly in doubt.<sup>64</sup> The main elements of the critique are now quite familiar:<sup>65</sup> the conventional techniques of ‘command and control’ regulation were too rigid, complex, burdensome, costly, inefficient, adversarial, and ineffective; they stifled entrepreneurial innovation, eliminated jobs, and hindered competitiveness in return for diminishing environmental benefits; and they were prone to industry capture. Their proliferation resulted in a dense maze of legal controls, the effectiveness of which was increasingly outweighed by their administrative costs and economic burden, threatening finally to collapse under their own weight

<sup>59</sup> D. Boaz and E. Crane (eds.), *Market Liberalism: A Paradigm for the 21st Century* (Cato Institute, 1993).

<sup>60</sup> B. Bortolotti and D. Siniscalco, *The Challenges of Privatization: An International Analysis* (Oxford University Press, 2004).

<sup>61</sup> ‘Adding up the government’s total bailout tab’, *New York Times*, 4 February 2009, available at: [www.nytimes.com/interactive/2009/02/04/business/20090205-bailout-totals-graphic.html](http://www.nytimes.com/interactive/2009/02/04/business/20090205-bailout-totals-graphic.html).

<sup>62</sup> ‘Copenhagen Accord climate pledges too weak: UN’ (31 March 2010) *Reuters*, available at: [www.reuters.com/article/idUSTRE62U13M20100331](http://www.reuters.com/article/idUSTRE62U13M20100331).

<sup>63</sup> C. Sunstein, ‘Paradoxes of the regulatory state’ (1990) 57 *University of Chicago Law Review* 407; M. Moran, ‘Understanding the regulatory state’ (2002) 32 *British Journal of Political Science* 391.

<sup>64</sup> See e.g. P. Yeager, *The Limits of Law: The Public Regulation of Private Pollution* (Cambridge University Press, 1991).

<sup>65</sup> See e.g. C. Abbott, ‘Environmental command regulation’, in B.J. Richardson and S. Wood (eds.), *Environmental Law for Sustainability* (Hart Publishing, 2006), 61.

or to seize up in a process of ‘juridification’.<sup>66</sup> According to one influential account, ‘The present regulatory system wastes tens of billions of dollars every year, misdirects resources, stifles innovation, and spawns massive and often counterproductive litigation.’<sup>67</sup> While this is not an accurate depiction of *all* environmental regulation, which sometimes has been characterised by a consultative style in which environmental rules were negotiated and enforced in a largely non-coercive way via closed-door, bilateral deals between government and industry,<sup>68</sup> it does reflect much of the history of modern environmental law.

In recent decades, criticisms of the efficacy of the regulatory state and its reliance on coercive prescriptive regulation have fostered experimentation with alternate approaches that cede some responsibility for environmental governance to the market or civil society. These realignments have been described by commentators using various terms, such as ‘mutual regulation’,<sup>69</sup> ‘self-organisation’,<sup>70</sup> ‘responsive regulation’,<sup>71</sup> ‘smart regulation’,<sup>72</sup> and ‘post-regulatory governance’.<sup>73</sup> Among the common elements of these so-called ‘decentred’ forms of regulation are the preference for legal systems that are ‘less heavy-handed, and more responsive to the demands and possibilities of their context’,<sup>74</sup> and also, the

<sup>66</sup> G. Teubner, ‘Juridification: concepts, aspects, limits, solutions’, in R. Baldwin, C. Scott, and C. Hood (eds.), *A Reader on Regulation* (Oxford University Press, 1998), 389 at 398.

<sup>67</sup> Ackerman and Stewart, ‘Reforming environmental law’, 1333.

<sup>68</sup> M. Howlett, ‘Policy instruments and implementation styles: the evolution of instrument choice’, in D. Van Nijnatten and R. Boardman (eds.), *Canadian Environmental Policy: Context and Cases* (Oxford University Press, 2002), 25.

<sup>69</sup> See P. Simmons and B. Wynne, *State, Market and Mutual Regulation? Socioeconomic Dimensions of the Environmental Regulation of Business* (Lancaster University, 1994).

<sup>70</sup> G. Teubner, L. Farner, and D. Murphy (eds.), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organisation* (John Wiley & Sons Ltd, 1994).

<sup>71</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>72</sup> N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998).

<sup>73</sup> C. Scott, ‘Regulation in the age of governance: the rise of the post regulatory state’, in J. Jordana and D. Levi-Faur (eds.), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004), 145.

<sup>74</sup> J. Steele and T. Jewell, ‘Law in environmental decision-making’, in T. Jewell and J. Steele (eds.), *Law in Environmental Decision-Making. National, European and International Perspectives* (Clarendon Press, 1998), 1 at 14; see further, D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (Addison-Wesley Publishing, 1992); J. Black, ‘Decentring regulation: understanding the role of regulation and self-regulation in a “post-regulatory world”’ (2001) 54 *Current Legal Problems* 103.

enlistment of non-state actors in regulatory governance. Gunther Teubner describes reflexive law as one of these approaches – a system of regulation that does not seek coercive policy direction but confines itself to the ‘regulation of organization, procedures and the redistribution of competences’.<sup>75</sup> With the vision that governance should no longer arise out of external regulation but should occur through the internal reconfiguration of decision-making within corporations, detailed regulatory prescription is thus replaced by mechanisms encouraging internal reflection, learning, and behavioural changes. Thus, the function of law is recast from direct control to ‘procedural’ control.<sup>76</sup> For environmental policy, Eric Orts describes reflexive law as seeking ‘to encourage internal self-critical reflection within institutions about their environmental performance . . . to set up processes that encourage institutional self-reflective thinking and learning about environmental effects’.<sup>77</sup> Similar reflexive law approaches have been used in business law, with regard to CSR reporting, for instance. Thus, many jurisdictions are increasingly relying on informational policy instruments, norms of self-governance, economic incentives, and contractual agreements to govern markets.<sup>78</sup>

But their effectiveness in promoting sustainability has not yet been demonstrated. Instead, they have served to reduce pressure on the regulatory system by offering a more efficient and cost-effective environmental governance. These mechanisms leave unaltered the basic assumptions about the purpose and value of economic development, fail to provide tools to steer the economy towards long-term horizons, and fail to provide a mechanism to scale the economy within biosphere limits. They can nudge change and deliver incremental improvements, as evident in gradual improvements in corporate environmental accounting and reporting (discussed in Chapter 5 by Villiers and Mähönen in this book),

<sup>75</sup> G. Teubner, ‘Social order from legislative noise? Autopoietic closure as a problem for legal regulation’, in G. Teubner (ed.), *State, Law, Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Giuffrè, 1992); G. Teubner, ‘After legal instrumentalism?’ in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 1986), 222.

<sup>76</sup> J. Black, ‘Proceduralising regulation: Part I’ (2000) 20 *Oxford Journal of Legal Studies* 597.

<sup>77</sup> E.W. Orts, ‘Reflexive environmental law’ (1995) 89(4) *Northwestern University Law Review* 1227, at 1254.

<sup>78</sup> See D.A. Farber, ‘Taking slippage seriously: noncompliance and creative compliance in environmental law’ (1999) 23 *Harvard Environmental Law Review* 297; A. Iles, ‘Adaptive management: making environmental law and policy more dynamic, experimentalist and learning’ (1996) 13 *Environmental and Planning Law Journal* 288; E.W. Orts and K. Dekete-laere (eds.), *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer Law, 2000).

but do not engender the kind of comprehensive change that is urgently needed.

Other regulatory failures and gaps that contribute to unsustainability inhere in business law, including companies legislation, securities regulation, and financial markets controls, whose effects are critiqued later in this book. In these domains, the primary problem is the general lack of environmental standards, rather than misguided standards or insufficient enforcement. The deregulation of financial markets since the 1980s has generally aimed to lighten legislative restrictions to be replaced by disclosure standards and self-regulation under government supervision.<sup>79</sup> The expansion of the CSR and SRI movements in recent years may charitably be viewed as a surrogate governance strategy to compensate for deficiencies in official business regulation in these domains.<sup>80</sup> However, we can also view these movements less charitably as attempts to thwart stricter regulatory standards through pre-emptive action by market actors.<sup>81</sup>

Transnationally, an even larger regulatory lacuna exists. Global environmental rules are typically quarantined within designated 'environmental treaties', such as those governing biodiversity conservation or transboundary pollution, and their implementation has tended to be poor.<sup>82</sup> Conversely, treaties governing investment and other economic activities are largely devoid of sustainability considerations. Market liberalisation and technological advances have greatly accelerated the mobility and liquidity of financial capital across national borders, and consequently the capacity for more unsustainable development.<sup>83</sup> Largely missing from these policy prescriptions are mechanisms to ensure that transnational firms and their investors who benefit from the liberal economic framework adhere to high standards of corporate governance and environmental responsibility. While globalisation has helped disseminate and universalise voluntary standards for CSR and business ethics, 'hard' regulation of foreign investment, banking, and capital markets at an international

<sup>79</sup> On Canadian reforms, see A.M. Abdalyan, 'The Porter Commission Report revisited' (1995) 11 *Banking and Finance Law Review* 57, at 64.

<sup>80</sup> R. Aguilera, *et al.*, 'Corporate governance and social responsibility: a comparative analysis of the UK and the US' (2006) 14(3) *Corporate Governance and Social Responsibility* 147.

<sup>81</sup> B. Sjøfjell, 'Report from Norway: another CSR victory for the business lobbyists', available at: SSRN: <http://ssrn.com/abstract=1413388>.

<sup>82</sup> Gillespie, *The Illusion of Progress*.

<sup>83</sup> C. Williams, 'Corporate social responsibility in an era of economic globalization' (2002) 35 *University of California Davis Law Review* 705, at 731.

level remains sparse and deeply fragmented.<sup>84</sup> The corporate hostility to the relatively stringent proposed UN Norms on the Responsibilities of Transnational Corporations in 2003 illustrates how many business actors view credible regulation of their social and environmental activities.<sup>85</sup> The human rights standards subsequently adopted by the UN in 2011 from the Ruggie process are comparatively much milder for business.<sup>86</sup>

The GFC has provoked much debate among policy-makers, academics, and other observers about the future governance of the global economy, but so far politicians have struggled to agree to long-term solutions. Mainly ad hoc, expedient, or temporary measures have been adopted, such as controls on short-selling, tighter regulation of financial derivatives, closer scrutiny of lending conditions, and bail-outs and partial nationalisations of insolvent financial institutions.<sup>87</sup> The measures have tended to serve restoration of business-as-usual rather than engineering fundamental, structural reforms. The environmental sustainability agenda has hardly featured in these policy-making discussions, with the UN initiative, the 'Global Green New Deal', quickly fizzling out.<sup>88</sup>

In conclusion, around the world, the environmental law for the front-line companies in the productive economy has generally been of limited success, and environmental standards have hardly extended to the financial economy or corporate governance. Serious deficiencies in the capacity and willingness of states to regulate the market for sustainability exist. In developing an alternative governance model, to mitigate the deficiencies of external environmental regulation and the limitations of business voluntarism, it is important to clarify the meaning of sustainability and

<sup>84</sup> See generally, K. Alexander, R. Dhumale, and J. Eatwell, *Global Governance of Financial Systems* (Oxford University Press, 2006).

<sup>85</sup> UN Economic and Social Council (ECOSOC), Sub-Commission on Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (ECOSOC, 2003).

<sup>86</sup> J. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, HRC 17th Session, UN Doc A/HRC/17/31 (2011).

<sup>87</sup> K. Davis, *Regulatory Reform post the Global Financial Crisis: An Overview* (Australian Centre for Financial Studies, 2011).

<sup>88</sup> UN Environmental Programme (UNEP), 'Global Green New Deal – Environmentally-Focused Investment Historic Opportunity for 21st Century Prosperity and Job Generation', Press release, 22 October 2008; available at [www.unep.org/Documents.Multilingual/Default.asp?DocumentID=548&ArticleID=5957](http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=548&ArticleID=5957); E. B. Barbier, 'Green stimulus is not sufficient for a global green recovery', *Vox*, 3 June 2010, available at: [www.voxeu.org/index.php?q=node/5134](http://www.voxeu.org/index.php?q=node/5134). For more about UNEP's recent green economy efforts, see [www.unep.org/greeneconomy](http://www.unep.org/greeneconomy).

its manifestation in the notion of the ‘sustainable company’, which is discussed in Section 4.

#### 4 Sustainability and the ‘sustainable company’

The concept of ‘sustainability’ emerged in the late twentieth century as the Zeitgeist of environmental policy and law. In its most prevalent formulation, ‘sustainable development’, it has been widely endorsed as the goal of states, international bodies, non-governmental organisations (NGOs), and the business community itself. Sustainability has been enshrined in the European Union’s Treaty as a core objective,<sup>89</sup> and it features in many international environmental conventions, multilateral development policies, national environmental strategies, and legislation.<sup>90</sup> In the context of business enterprise, sustainability has been incarnated in the motifs of ‘sustainable companies’, ‘sustainable finance’, and similar phrases that imply economic activity within acceptable environmental parameters.<sup>91</sup> The CSR movement, as discussed in Millon’s Chapter 2, is also now deeply infused with the rhetoric of sustainability.

In contrast to the older terminology of environmentalists who spoke of ‘nature conservation’, the sustainability discourse seeks to integrate the environmental, social, and economic agendas. It advocates a responsible balance between the otherwise incongruous imperatives of unfettered economic exploitation of natural resources and the dependence of all life on healthy ecosystems. A stronger version of the concept would prioritise the maintenance of ecological integrity as a precondition to economic and social development.<sup>92</sup> Sustainability is supported by several specific

<sup>89</sup> Treaty on European Union (1992), last amended by the Treaty of Lisbon, OJ 2008 C115 (consolidated version), Art. 3; B. Sjøfjell, ‘Quo vadis, Europe? The significance of sustainable development as objective, principle and rule of EU law’, in C. Bailliet (ed.), *Non State Actors, Soft Law and Protective Regimes* (Cambridge University Press, 2012), 254.

<sup>90</sup> C. Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts Between Climate Measures and WTO Law* (Martinus Nijhoff, 2009); M.C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford University Press, 2005); S.A. Atapattu, *Emerging Principles of International Environmental Law* (Transnational Publishers, 2006); R.L. Revesz, P. Sands, and R.B. Stewart (eds.), *Environmental Law, the Economy and Sustainable Development: The United States, the European Union and the International Community* (Cambridge University Press, 2000).

<sup>91</sup> M. Jeucken, *Sustainable Finance and Banking: The Financial Sector and the Future of the Planet* (Earthscan, 2001).

<sup>92</sup> E. Neumayer, *Weak Versus Strong Sustainability* (4th edn, Edward Elgar Publishing, 2013).

policy principles that give it some operational traction. The ‘polluter pays’ principle expects polluters to bear the expenses of pollution prevention and remediation.<sup>93</sup> The precautionary principle addresses acting in situations of uncertainty regarding the environmental risks of development choices.<sup>94</sup> Sustainability also adheres to principles of social justice by requiring the fair distribution of the benefits and burdens of environmental policy, as reflected in the cognate principles of inter- and intra-generational equity.<sup>95</sup>

Sustainability concepts have ostensibly informed vast swathes of modern environmental governance and policy.<sup>96</sup> These efforts include strategic environmental plans, framework laws, and reconfigured regulatory agencies, policy tools such as pollution taxation and environmental liability, as well as democratic reforms widening participation in environmental decision-making.<sup>97</sup> Many environmental statutes and codes explicitly proclaim sustainability as their purpose, such as Nova Scotia’s Environmental Goals and Sustainable Prosperity Act 2007 and the German Sustainability Code, 2011. New Zealand’s pioneering Resource Management Act 1992 was perhaps the first such example, declaring that ‘the purpose of this Act is to promote the sustainable management of natural and physical resources’.<sup>98</sup> Considerable effort since has been expended devising tools to implement such aspirations, and setting ‘sustainability indicators’ to measure progress.<sup>99</sup> Overall, the sustainability paradigm supports a more principled and strategic approach to environmental policy in contrast to earlier more fragmented efforts.

<sup>93</sup> OECD, *The Polluter Pays Principle: OECD Analyses and Recommendations* (OECD, 1992).

<sup>94</sup> N. de Sadeleer (ed.), *Implementing the Precautionary Principles: Approaches from the Nordic Countries, the EU and USA* (Earthscan, 2007).

<sup>95</sup> I. Voinovic, ‘Intergenerational and intragenerational equity requirements for sustainability’ (1995) 22(3) *Environmental Conservation* 223; J.E. Roemer, *Intergenerational Equity and Sustainability* (Palgrave Macmillan, 2007).

<sup>96</sup> See K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, 2008).

<sup>97</sup> J.C. Dembach, ‘Sustainable development as a framework for national governance’ (1998) 49(1) *Case Western Reserve Law Review* 1; K. Ginther, et al. (eds.), *Sustainable Development and Good Governance* (Graham and Trotman; Martinus Nijhoff, 1995); G.C. Bryner, ‘Policy devolution and environmental law: exploring the transition to sustainable development’ (2002) 26 *Environs: Environmental Law and Policy Journal* 1.

<sup>98</sup> Section 5(1).

<sup>99</sup> S. Bell and S. Morse, *Sustainability Indicators: Measuring the Immeasurable* (Earthscan, 1999).

Part of sustainability's appeal is its ambiguity and open-endedness, enabling numerous actors with divergent objectives to commonly embrace it.<sup>100</sup> The success of the sustainability ideal also derives from how the business and political elites have tamed its broad possible implications to avoid radical economic changes. The prevailing rhetoric seeks to reassure us that environmental protection and economic growth can mutually reinforce each other.<sup>101</sup> Sustainability is presented as supporting the means to gain competitive advantages and to build new markets and improve production efficiency, rather than imposing rigid ecological limits on business activity.<sup>102</sup> It also implies soft business advantages, such as improved relations with employees and local communities, and therefore fewer costly disputes.<sup>103</sup>

Also in this business context, the sustainability paradigm has been closely associated with the philosophy of 'ecological modernisation', a potent influence on environmental law and policy.<sup>104</sup> Ecological modernisation accepts environmental degradation as a by-product of our modern industrial 'risk' society,<sup>105</sup> but believes that degradation can be mitigated through rational and technocratic methods. Ecological modernisation therefore does not renounce capitalism. Rather, it promises more efficient and careful husbandry of environmental resources, implemented through a framework of industrial modernity that harnesses innovative technologies, business acumen, and managerial professionalism.<sup>106</sup>

<sup>100</sup> A.D. Basiago, 'Methods of defining sustainability' (1995) 3 *Sustainable Development* 109; K. Pezzoli, 'Sustainable development: a transdisciplinary overview of the literature' (1997) 40(5) *Journal of Environmental Planning and Management* 549.

<sup>101</sup> On the potential symbiosis of environmental and economic concerns, see M.E. Porter and V. der Linde, 'Green and competitive: ending the stalemate' (1995) 73(5) *Harvard Business Review* 120.

<sup>102</sup> For example, WBCSD and UNEP, *Cleaner Production and Eco-Efficiency: Complementary Approaches to Sustainable Development* (WBCSD, 1998).

<sup>103</sup> M. Grieg-Gran, *Financial Incentives for Improved Sustainability Performance: The Business Case and the Sustainability Dividend* (Institute for the Environment and Development, WBCSD, 2002), 5–6.

<sup>104</sup> For a discussion of the central tenets of ecological modernization, see M.S. Andersen and I. Massa, 'Ecological modernization: origins, dilemmas and future directions' (2000) 2 *Journal of Environmental Policy and Planning* 337; M. Hajer, *The Politics of Environmental Discourse: Ecological Modernisation and the Policy Process* (Oxford University Press, 1995); S. Young (ed.), *The Emergence of Ecological Modernisation: Integrating the Environment and the Economy?* (Routledge, 2000).

<sup>105</sup> U. Beck, *Ecological Politics in an Age of Risk*, trans. A. Weisz (Polity Press, 1995).

<sup>106</sup> See especially J. Huber, *Die verlorene Unschuld der Ökologie* (Fischer Verlag, 1982); M. Jänicke, *Staatsversagen. Die Ohnmacht der Politik in der Industriegesellschaft* (Piper, 1986).

Thus, pollution prevention and sustainable practices can yield competitive advantages for companies.<sup>107</sup> This outlook also informs the business case model of CSR, which depicts environmental constraints as opportunities for higher profitability through more frugal use of resources or less costly pollution. Therefore, ecological modernisation, like many understandings of sustainability, deftly reframes the ethical and political dilemmas of industrialisation as primarily technical and entrepreneurial challenges.<sup>108</sup> Legally, this stance also supports changes in environmental governance towards ‘smart regulation’,<sup>109</sup> whereby the state partners the market through negotiated agreements, economic instruments, auditing, reporting, and management systems rather than seeking change through inflexible regulatory prescriptions.

This incremental and reformist approach to sustainable development has not gone uncontested. The anti-globalisation movement represents the most visible form of resistance.<sup>110</sup> Diverse campaigns by civil society advocacy networks have exposed the environmental and social impacts of firms and investors, keeping their influence on the sustainable development discourse somewhat in check.<sup>111</sup> The post-GFC ‘Occupy Movement’ has extended this discontent to the sustainability of the financial economy and its crippling social and economic impacts.<sup>112</sup> Activists in the Global South also have censured some of the Western proponents of sustainability for glossing over the social justice dimensions of the environmental agenda, such as more equitable global trade and poverty alleviation.<sup>113</sup>

Likewise, this book’s advocacy of ‘sustainable companies’ is informed by a critical stance that views the planetary environmental crisis as requiring fundamental changes in the governance and purpose of business

<sup>107</sup> See further, J. Elkington, ‘Towards the sustainable corporation: win-win-win business strategies for sustainable development’ (1994) 36(2) *California Management Review* 90.

<sup>108</sup> S. Baker, ‘The evolution of European Union environmental policy’, in S. Baker, *et al.* (eds.), *The Politics of Sustainable Development: Theory, Policy and Practice within the European Union* (Routledge, 1997), 91 at 96.

<sup>109</sup> Gunningham and Grabosky, *Smart Regulation*; J. Elias and R. Lee, ‘Ecological modernisation and environmental regulation: corporate compliance and accountability’, in S. MacLeod (ed.), *Global Governance and the Quest for Justice. Volume 2: Corporate Governance* (Hart Publishing, 2006), 163.

<sup>110</sup> N. Klein, *No Logo: Taking Aim at the Brand Bullies* (Vintage Canada, 2000).

<sup>111</sup> D. Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Hart Publishing, 2007) at 64.

<sup>112</sup> Writers for the 99%, *Occupying Wall Street: The Inside Story of an Action That Changed America* (OR Books, 2011).

<sup>113</sup> V. Shiva, *Earth Democracy: Justice, Sustainability and Peace* (Southend Press, 2005).

enterprise. The hallmarks of a sustainable company are that it is procedurally managed in a more transparent and democratic manner, and substantively it is accountable to robust environmental performance standards. A sustainable company also functions within a market system that likewise is restructured along these principles.

Of course, sustainability is not simply a matter of environmental protection and improvement. It has important social justice dimensions, such as respect for basic human rights and social justice. Environmental management is not just about humankind's relationship with nature but also involves the relations among stakeholders over access to scarce resources and the distribution of environmental benefits and burdens. For example, the livelihood of indigenous peoples and their land rights and other legal claims are often closely intertwined with environmental protection.<sup>114</sup> The principle of intra-generational equity most directly engages with sustainability's social dimensions.

However, the analysis and reforms proposed by this book focus on sustainability's environmental side for several reasons. Notably, social concerns such as the abuse of human rights will sometimes motivate stakeholders to be more willing to speak out, protest, or initiate legal action, because those stakeholders' personal well-being is directly affected or because other people's suffering is easier to empathise with than nature's voiceless distress. By contrast, the environment, especially its long-term integrity, indeed tends to be a mute stakeholder, unable to represent itself except indirectly through environmental NGOs who advocate on its behalf. While some environmental problems directly threaten individuals, such as pollution of one's property or person, and often disproportionately bring suffering to the poorest and vulnerable,<sup>115</sup> in many cases, the impacts are so widely dispersed across space or time that they lack sufficient proximity to motivate people to take costly action. In particular, the long-term interests of future generations in environmental well-being are less likely to be represented in public policy debates or business decision-making than the immediate interests of people alive. Because many environmental impacts are irreversible, such as climate change or species extinction, it would not be possible for future generations to obtain justice retroactively. Thus, there is a strong moral imperative to

<sup>114</sup> B.J. Richardson, 'The ties that bind: indigenous peoples and environmental governance', in B.J. Richardson, S. Imai, and K. McNeil (eds.), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009), 337.

<sup>115</sup> R. Nixon, *Slow Violence and the Environmentalism of the Poor* (MIT Press, 2011).

address sustainability's environmental dimensions at their inception in business and economic decision-making.

Legally incorporating environmental sustainability into the purpose and decision-making of companies, however, is not without some serious challenges. Sustainability is neither a blueprint nor a manual to apply mechanically – rather, it is malleable because its parameters and application require further reflection on each specific context. Asking whether a specific activity is environmentally sustainable will yield different answers depending on the time and place. One might condemn as utterly unsustainable a polluting factory sited adjacent to a biologically diverse wetland, while the same facility placed in a remote desert largely devoid of life might evoke less concern. Another way to understand the importance of context is that an environmentally problematic activity practised by 100 companies might be of some concern, but their impact is dramatically amplified when in a growing economy 1000 companies are culprits. We thus often cannot measure the sustainability of corporate behaviour without a flexible, case-by-case approach. Additionally, obliging corporate managers to be more responsive to their environmental performance may pose cognitively challenging problems of reconciling seeming incommensurables. The incommensurability issue refers to the difficulty of comparing and synthesising different values into business decision-making. If a corporate manager is obliged both to seek profitability for shareholders while taking into account environmental costs, how can those dissimilar values be understood in a common metric to enable coherent, integrated decision-making?

In meeting these challenges, business law needs to promote decision-making approaches that are sufficiently flexible and adaptable, yet not so unbounded as to leave corporations and their investors unaccountable or unable to reconcile seemingly competing economic and environmental considerations. We need processes that neither privilege morally absolutist judgements about environmental protection nor leave decision-makers with open-ended discretion. Rigid, absolutist stances about appropriate corporate environmental conduct are rarely useful except in relation to prohibiting intrinsically dangerous environmental practices such as manufacturing certain toxic chemicals. Simplistic moral slogans such as 'respect the intrinsic value of nature'<sup>116</sup> tend to hinder 'genuine

<sup>116</sup> J. Pietarinen, 'The principal attitudes of humanity towards nature', in H.O. Okura (ed.), *Philosophy, Humanity and Ecology* (African Centre for Technology Studies Press, 1994), 290 at 293.

and enlightening debate about complex and nuanced real-world ethical issues'.<sup>117</sup> Alternatively, leaving the environmental conduct of businesses to managers' discretionary judgement would likely not make companies measurably accountable for their conduct.

While we should recognise a variety of values may inform sustainable companies' decision-making, they should be considered in a manner that allows us to ethically reason, critique, and choose the best justified values. Defensible positions on sustainability emanate from decision-making processes and forums that foster well-informed and nuanced evaluation of the specific circumstances and rival values. The governance of companies should open a space for such dialogue, for otherwise any sustainability standards might be construed as simply imposed, extraneous prescriptions. But it would also be naïve to expect that more transparent, democratic, and consultative decision-making in companies alone would be transformative, given the power dynamics in business organisations and market pressures. Thus, such decision-making must be bounded within certain fundamental environmental performance standards. Furthermore, beyond the level of individual businesses, processes to improve consultation and transparency might be successfully embedded in governance frameworks that are pitched at entire industries or markets.

A 'sustainable company' therefore is one that not only respects national and international environmental laws, but is also informed by a different model of corporate and related business law that embeds within the corporation the fundamental aim of respecting ecological constraints and opportunities for its development. This sustainability envelope may take the form of a number of legal mechanisms, including an overarching duty to avoid environmental harm and the requirement to make corporate governance more transparent and democratic with regard to consideration of a firm's environmental activities and impacts. A sustainable company is also embedded within a sustainable market system, in which the investors and banks that fund business enterprise themselves function under sustainability standards.

## 5 The Sustainable Companies Project

As mentioned at the outset of this chapter, this book reflects the work of the Sustainable Companies Project, the name for a global research

<sup>117</sup> W. Ransome and C. Sampford, *Ethics and Socially Responsible Investment: A Philosophical Approach* (Ashgate, 2010), 54.

network of scholars based at the University of Oslo that was launched in 2009 to improve our understanding of the intersection between business and environmental law, notably through an analysis of company law to identify barriers to and possibilities for the promotion of environmental sustainability. The work of the Sustainable Companies Project is based, as is this book, on three key assumptions.

First, while the exact impact of looming climate change, continued biodiversity depletion, and unchecked social decay from the economic challenges we face are hard to fully quantify and understand,<sup>118</sup> we know one thing for certain: *business as usual is not an alternative*. Enough has already been said in this opening chapter about these environmental threats and impacts. Suffice it to say here that incremental tinkering with the governance of business and markets, while seemingly politically attractive, will not stave off more serious ecological trauma and social upheaval this century.

Second, to change to a sustainable path, we *need business to contribute*.<sup>119</sup> Clearly, our governments, even if they were brave and progressive enough, cannot single-handedly adopt sustainability. The contribution of business is needed, as a source of innovation and financial resources. As Carol Liao's penultimate Chapter 7 in this book conveys, some companies are taking advantage of new legal templates to redesign their business models to focus on contributing to the community. And if business changes in the right direction, customers, employees, and, indeed, whole societies may shift with them. As recognised by the seminal 1992 Earth Summit's leading manual for sustainability – *Agenda 21* – our task requires multi-stakeholder collaboration with business playing an especially prominent role in proportion to its environmental impacts and the resources and expertise it can offer to forge solutions.<sup>120</sup>

The third key assumption that informs this book is that a *voluntary business response is not sufficient*, and indeed it is anathema if voluntarism is manipulated to avoid accountability or to deflect attention from serious action. CSR and SRI initiatives generally are insufficient to leverage positive change, as David Millon in Chapter 2 and Benjamin Richardson in Chapter 6 explain. Even worse, well-intended CSR or SRI initiatives

<sup>118</sup> And there always will be, until we can describe the impact in retrospect, questions as to the various prognoses: see e.g. 'A sensitive matter', *The Economist* (30 March 2013), available at: [www.economist.com](http://www.economist.com).

<sup>119</sup> As the European Commission also states: 'Enterprises can significantly contribute to the European Union's treaty objectives of sustainable development and a highly competitive social market economy', COM (2011) 681 final, s. 1.2.

<sup>120</sup> United Nations, *Agenda 21* (3 vols), E. 92–38352, A/CONF. 151/26, 1992.

can have the problematic effect of supporting the shareholder focus of the mainstream corporate governance debate. CSR and SRI proponents often direct arguments towards the shareholders and the management and board of the company. This inevitably – albeit unwillingly – supports a definition of the company as consisting of only shareholders, the board, and management, which, in turn, through the influence of the corporate governance debate, are seen as principals (shareholders) and agents (the board and, by extension, management), respectively. This observation is not meant to trivialise how the CSR and SRI movements have significantly contributed to bringing important issues on the impact of the companies to the forefront of public discussion and the business agenda. However, in spite of some convergence between mainstream corporate governance thinking and the more critical CSR and SRI discourses, the dominant perspective remains that companies' and investors' consideration of societal interests, outside of enforceable legal standards, is limited mainly to discretionary business case considerations.

While the company as a legal form may be said to be one of the most ingenious inventions of humanity, as a means for people to invest resources and build wealth,<sup>121</sup> the Sustainable Companies Project set out to investigate whether there is something in the legal infrastructure of this institution that contributes significantly to environmental degradation, especially to dangerous climate change (impacts, which of course, in the long run would undermine business success). The Project has focused on analysing the barriers to and possibilities for enhanced environmental protection and mitigation of climate change within the legal infrastructure for corporate decision-making. The corporate form dominates the business world, not only in rich developed countries but also in emerging economies. The aim of the analysis is to contribute to identifying what prevents attention to climate change and other environmental issues in corporate decision-making, and what might increase it. The hypothesis informing the work of the Sustainable Companies Project is that regulation of decision-making in business should be an indelible part of the governance framework for sustainability. This emphasis is consistent with the early conceptualisation of sustainability, such as at the seminal 1992

<sup>121</sup> Whereas the enforceable contract may be the most innovative contribution of Roman law, see A. Watson, 'The evolution of law: the Roman system of contracts' (1984) 2 *Law and History Review* 1, company law may be said to have made a similar contribution to the contemporary economy, see R.G. Rajan and L. Zingales, *Saving Capitalism from the Capitalists: Unleashing the Power of Financial Markets to Create Wealth and Spread Opportunity* (Crown Business, 2003).

Earth Summit, which stressed the need to *integrate* environmental and economic considerations into holistic decision-making.<sup>122</sup>

The work of the Sustainable Companies Project, which concluded in 2014, delved into the hitherto generally ignored area of company law to ascertain the barriers to and possibilities for environmentally sustainable companies. On a comparative law basis, this involved a number of well-documented methodological challenges.<sup>123</sup> One issue is choice of terminology. As explained in the comparative company law chapter by Beate Sjøfjell and others (Chapter 3), there is no common understanding across jurisdictions of core company law concepts such as the purpose of the company or the interests of the company. Often these concepts are not expressly addressed in preparatory works, legislation, case law, or legal doctrine. This makes in-depth analysis within each jurisdiction, and especially comparative analysis across nations, difficult. The authors of this chapter also found that there is a general lack of clarity and distinction with regard to other fundamental concepts such as shareholder value and shareholder primacy; the former used by the authors to denote a legal duty and the latter a social norm. Company law in general appears to be characterised by a discrepancy in terms of the relationship between law in practice and law on the books. When academic commentators are not always clear on whether they refer to the former or the latter, to corporate practice or to the results of legal analysis, and when the underlying value choices seem to be ignored, comparative analysis is extra challenging.

The working method of the Sustainable Companies Project has served to mitigate some of these challenges. Team members from the various jurisdictions have read and commented on each other's work in order to clarify concepts or terminology and share news of recent legal developments. A number of workshops and seminars were held where tentative results were presented and discussed. Nevertheless, as with all work of this kind, the comparative chapters of this book must be read with all the caveats that this type of analysis involves.

Similarly, when it comes to recommending governance reforms to move the business world closer to sustainability, members of the Sustainable Companies Project appreciate that sweeping, universal blueprints for change are problematic. There are some guiding norms of collective

<sup>122</sup> F. Dodds and M. Strauss, *Only One Earth: The Long Road via Rio to Sustainable Development* (Earthscan, 2012), passim.

<sup>123</sup> For example, M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006).

importance regarding the need to embed sustainability thinking in the kernel of financial investing and corporate decision-making, but such 'embedding' can take a variety of permutations in different times and places. A host of factors – political, cultural, and economic – as well as local geographies and historical legacies, will require some accommodation. Thus, the methods of designing reforms (such as processes for dialogue and engagement with stakeholders) as well as the substantive reform agenda (whether it be fiduciary law or corporate reporting, among many issues) must be sensitive to the local context. A legal innovation in one jurisdiction will not necessarily thrive in another, operating under different circumstances and constraints. Yet, the Sustainable Companies Project also has a great deal of faith in the value of transnational sharing of experiences and ideas to help stimulate positive change in any part of the world.

## 6 Synopsis of the book

This book comprises eight chapters that take the reader on a journey of understanding of the barriers to and possibilities for sustainable companies. The journey begins with an analysis of the limitations of current governance approaches in the business world and then moves to a critique of some recent solutions, such as social investing and corporate hybrid structures, and concludes with a distillation of the main challenges and the paths ahead. The book's nine contributors offer diverse expertise on business and environmental law, as well as insights from the variety of jurisdictions that they represent: Australia (Richardson), Canada (Liao), Finland (Mähönen), Norway (Anker-Sørensen and Sjøfjell), the United Kingdom (Johnston and Villiers), Ireland (Clarke), and the United States (Millon). In addition, through their consideration of the numerous 'mapping papers' of corporate law and sustainability authored by the many other international participants to the Sustainable Companies Project, these contributors present insights from a wider array of jurisdictions, such as South Africa, India, Germany, and many more.

David Millon's Chapter 2, 'Corporate social responsibility and environmental sustainability', evaluates the potential for CSR to stimulate commitment to environmental sustainability. Because domestic environmental laws and regulations generally are inadequate for this task, CSR offers the possibility of voluntary action to reduce the negative effects of corporate activity on the environment and to invest in the development of 'green' products and services. Millon distinguishes between two models that have dominated the CSR agenda: the 'ethical' and the 'strategic'. The

former evokes the notion that companies ought in some circumstances to promote the interests of their non-shareholder stakeholders, even if that detracts from financial returns to the company and its shareholders. According to this view, this should be an ethical imperative rather than a matter of discretionary philanthropy. Millon argues that the prospects for ethical CSR depend greatly on the institutional context. In countries where shareholder primacy is strongly embedded in company law or extra-legal social norms or where institutional investors are able to insist on short-term financial returns, ethical CSR struggles to gain much traction. Where, however, a stakeholder orientation is more established in corporate governance, the prospects are more promising. Millon surveys three institutional contexts – Continental Europe, the United States, and the United Kingdom – offering differing perspectives on this issue.

In contrast to ethical CSR, strategic CSR leads to investment in stakeholder well-being in order to promote the company's long-run economic viability. Both shareholders and non-shareholders stand to gain, so this version of CSR has the potential to overcome objections based on shareholder primacy. Two caveats are made. First, shareholders may still object if they are unwilling to tolerate the near-term costs of investment in stakeholder well-being in return for financial benefits that will materialise, if at all, only in the long run. Additionally, because the costs of strategic CSR are justified by financial benefits, there is a built-in limit; companies will invest in environmental sustainability and other stakeholder benefits only if they perceive that they stand to profit. Corporate (and shareholder) financial return is the relevant criterion, not aggregate social welfare, so companies will probably not go far enough in meeting social needs. Until law reform effectively addresses sustainability, the need to cultivate an ethics-based model of CSR persists.

Chapter 3, 'Shareholder primacy: the main barrier to sustainable companies', by Sjøåfjell *et al.*, builds on the hypothesis informing the work of the Sustainable Companies Project, that environmental sustainability should be incorporated into the core regulation of business decision-making. Beate Sjøåfjell, Andrew Johnston, Linn Anker-Sørensen, and David Millon provide a comparative analysis of core features of company law – the rules regulating the duties and purpose of corporate decision-makers – in evaluating the existing scope for integrating sustainable development, especially in its environmental dimension, into corporate decision-making. Their analysis reveals much unexplored potential in current company law regimes for companies to change from 'business as usual'. No company law system mandates the fundamentalist narrow version of shareholder profit maximisation that we see expressed in the social norm of

'shareholder primacy'. That social norm is the most formidable barrier to core company law furthering sustainability. This norm is falsely perceived as supported by company law because that area of law focuses on the position of shareholders. Shareholder primacy has been allowed to develop in the absence of an explicit legal statement setting out the purpose of companies and delineating the company interest, leaving the competence and duty of the company organs, notably of the governing board, rather vague. 'Business as usual' is driven by shareholder primacy, but is actually detrimental to any shareholder with more than a very short-term perspective on their investment, including institutional investors such as pension funds. The shareholder primacy drive keeps mainstream legal reform on a narrow, path-dependent track. In concluding that corporate law reform is necessary, the authors acknowledge that on its own it cannot engender revolutionary change; rather, it must be nested within a wider mosaic of sustainability governance initiatives. Such reform should include an express redefinition of the purpose of companies and its implications for the role, duties, and liability of the board. This has the potential to make more effective the external regulation of companies and realise the potential within each company to make its own independent, creative, and active contribution to society's transformation to sustainability.

The analysis of corporate boards of directors is continued in Blanaid Clarke's more specialised Chapter 4, 'The role of board directors in promoting environmental sustainability'. She discusses the role that boards and individual directors can play in ensuring that their companies act in a manner that promotes sustainability. Clarke considers how this role has developed in recent times with a view to what is expected of boards and what discretion is afforded to them in this respect. She describes the manner in which corporate boards are regulated, with particular emphasis on UK and EU-level regulation. The chapter examines the evolution of the role of non-executive directors and considers their role in embedding sustainability within the business organisational framework. Clarke considers the necessary attributes and skills of non-executive directors that may allow them to fulfil this role (such as independence, diversity, expertise and personal integrity, and character).

In Chapter 5, 'Accounting, auditing and reporting: supporting or obstructing the sustainable companies objective?', Charlotte Villiers and Jukka Mähönen discuss whether and how corporate reporting and auditing requirements encompass the environmental performance of business activity. If we expect companies to be more mindful of their environmental impact, they and their stakeholders must be able to understand the environmental performance and impacts of business. There is a strong

and well-established corporate financial accounting culture worldwide, but few jurisdictions appear to have developed robust accounting for environmental performance. While the authors acknowledge the potential of accounting and reporting to improve corporate environmental performance, they find that these mechanisms, if poorly designed, can hinder such improvements. The chapter explores the barriers and possibilities for improved sustainability through accounting and reporting as well as related audit and other quality assurance processes. Through its cross-jurisdictional analysis, with particular reference to EU Member States, Villiers and Mähönen identify a more progressive role for sustainability-focused reporting and auditing.

The book's next two chapters examine the impact and potential of some recent innovations in the business world that purport to offer new pathways to sustainability: the movement for socially responsible or ethical investing (SRI) and its accompanying legal reforms, and the development of new legal templates for corporate 'hybrids' that mandate community contributions in addition to profit-making goals.

In Chapter 6, 'Financial markets and socially responsible investing', Benjamin Richardson extends the analysis beyond regular companies in the productive economy, which the other chapters in this book discuss, to these companies' investors or financiers. Richardson investigates how the financial sector shapes the environmental performance of the economy, and assesses whether the rising global movement for SRI can foster sustainable companies in the absence of credible governmental regulation. The chapter closely examines five areas of potential SRI influence: (1) changing the cost of capital to companies; (2) making SRI financially advantageous to investors; (3) engaging with companies through dialogue and shareholder activism; (4) enacting voluntary SRI codes; and (5) leveraging change through public policy and legal reform. The principal argument is that the financial sector continues to cast a mostly negative environmental impact, and SRI so far has had a rather muted remedial influence. SRI will likely only acquire greater significance through a more enabling regulatory and public policy framework, and existing efforts of social investors to collaborate with governments appear to be the most promising pathway for this movement to engender change.

A similarly cautious tone is evident in Carol Liao's perspicacious analysis of the 'Limits to corporate reform and alternative legal structures' (Chapter 7). She explores the potential of a new wave of legal reforms in North America and the UK to establish corporate 'hybrids' that combine the goals of business profits and community contributions. These reforms build on the cooperative model, the oldest corporate structure in history.

While the cooperative has been recognised by the UN as playing a critical role in economic development and social innovation throughout the world,<sup>124</sup> it has, for several reasons, not had the success its model might seem to warrant. The new breed of alternative legal structures – called corporate ‘hybrids’ – not only enable, but require, CSR concepts to be embodied within corporate practices. However, there is no legal obligation on any company to transform itself into a corporate hybrid – thus the potential for this model to nudge companies towards sustainability is highly debatable when the option of remaining a for-profit business persists. Nonetheless, Liao argues that corporate hybrids may help stimulate positive change despite the onerous barriers facing reformation of the shareholder primacy model. These barriers identified by her include entrenched ideological beliefs that have permeated the psyche of corporate governance practices in global capital markets, and path dependence in narrowing legal reform. Liao’s analysis of corporate hybrid reforms in Canada, the United States, and the United Kingdom explores some of the main types of hybrids, their governance features that attempt to accommodate and unite both the for-profit and non-profit agendas, the reasons behind these features, the main challenges that implementation of these models face, and their overall potential impact.

The book concludes with a pithy Chapter 8, ‘The future of company law and sustainability’, in which Beate Sjøfjell and Benjamin Richardson distil the principal findings of the book, place them in the broader context of the sustainability discourse, and outline priority policy goals and governance reforms that states and non-state actors should embrace so that the business community can make a more positive contribution to the shared task of seeking environmental sustainability. The kernel of such reform rests on redefining the fundamental purpose of the company and the duties of those who manage and supervise it. The core challenge of climbing the sustainability mountain is to inculcate in the decision-making of economic and other societal actors the imperative to act for the long term.

<sup>124</sup> United Nations, ‘International year of cooperatives’, available at: <http://social.un.org/coopsyear>.