Fall 2023

Incentivizing Sustainability in American Enterprise: Lessons From Finnish Model

Vasa T. Dunham

[Sustainable Development Law & Policy](https://digitalcommons.wcl.american.edu/sdlp)

Volume 24 | Issue 1 Article 2

Incentivizing Sustainability in American Enterprise: Lessons From Finnish Model

Vasa T. Dunham

Incentivizing Sustainability in American Enterprise: Lessons from the Finnish Model

*Vasa T. Dunham**

TABLE OF CONTENTS

* J.D. Candidate, 2024, Fordham University School of Law; B.A., 2020, University of Washington. I would like to thank Professor Martin Gelter for providing extensive guidance and direction throughout the drafting process, and Professor Ville Pönkä for his thorough review and thoughtful feedback. I would also like to thank Laura Hines, Morgen Wallerich, and Emma Picton for their unwavering support. Finally, I wish to express my profound gratitude to Lisa Dunham, my longest-standing teacher, for providing constant encouragement and an endless supply of wisdom.

Introduction

There is strong scientific evidence to suggest, without fear of exaggeration, that mankind is plunging toward a post-apocalyptic reality with ever-increasing speed.[1] The fault is our own. The planet's declining state, which is quickly approaching a point of no return,[2] has received significant media coverage,[3] galvanized global climate activists,[4] and inspired various national and international regulatory measures. Nonetheless, the most recent report from the United Nations Intergovernmental Panel on Climate Change (IPCC) states that the increase in global temperature shows no sign of slowing.[5] Greenhouse gas emissions are the leading cause of Earth's continued warming,[6] and, as such, both producers and consumers of fossil fuels are the primary culprits. Emissions from large private corporations involved in fossil-fuel production comprise an enormous portion of atmospheric pollution, and yet, American efforts to hold those entities accountable through lawsuits for their role in the mounting environmental devastation have been met with equity concerns.[7] The question, as stated by U.S. District Judge William Alsup, is one of fairness: "would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?"[8] Indeed, in our capitalist-based global economic system, corporate institutions not only have huge political influence,[9] they are also, by design, incentivized to act almost solely in the interest of profit.[10] Discourse surrounding the intersection of climate change and the private sector has largely focused on their role as polluters, rather than their role as powerful global actors with the capacity to accelerate efforts to mitigate the climate crisis. The Paris Agreement, for example, fails to acknowledge the financial system's role in the fabric of society, instead treating it as auxiliary to meaningful global reform.[11] While national governments and international law play an essential part in such efforts through development and enforcement of strong regulatory regimes, the private sector's governance function is equally critical and cannot be ignored.[12]

With that said, the concept of increasing corporate engagement with climate activism is not a new one.[13] Finland has consistently achieved status as one of the greenest countries in the world for decades,[14] and there is no question that such success is at least partly a result of effective cooperation between Finland's government and business sector.[15] In contrast, sustainable development in the United States has fallen far behind other developed countries despite similar emphasis on corporate responsibility.[16] A 2019 survey showed that 77% of consumers consider a company's commitment to improving the environment when making purchases,[17] and American businesses have responded. A number of major corporations such as Costco and Netflix have issued public statements pledging to reduce their impact on climate change.[18] Given their incentive to appeal to consumers, it is not surprising that such statements have become incorporated into their marketing tactics.[19] However, these claims by American corporations do not match the reality of their practices. Alberto Carrillo Pineda, founder of Science Based Targets,[20] has summarized this greenwashing phenomenon: "'You can look at a company's website and see their sustainability report and it will look great,' . . . '[b]ut then when you look at what is behind it, you'll see there is not a lot of substance behind those commitments or the commitments are not comprehensive enough.'"[21]

The disparate climate performances of Finland and the United States, two of the wealthiest countries in the world, bring to light the question of how corporate responsibility has been inspired in each jurisdiction. Having established the urgency of the climate crisis and the importance of corporate behavior in optimizing a given country's approach to protection of the global environment, an examination of each nation's legal frameworks may shed light on features of the corporate regime that are effective in advancing sustainability goals and those that are not.[22] Part I of this paper establishes a comparative framework by providing background on sociopolitical forces that have shaped American and Finnish corporate law and the respective positioning of their business sectors within the current global landscape.[23] Part II explores dynamics between each country and their business sectors in an effort to ascertain elements of each regime that have contributed to the present state of climate-related corporate governance in each jurisdiction.[24] Finally, Part III speculates on the future of sustainability and corporate governance within the United States by analyzing key features highlighted in Part II, in lieu of recent global economic and regulatory developments.[25]

Part I. Cross-Jurisdictional Dissonance: Political and Economic Determinants for Varied Corporate Responses to a Global Crisis

Companies have become targets of national and international environmental regulation because of their historical reluctance to embrace such frameworks.[26] Still, private entities began to garner influence through extensive lobbying efforts and active engagement in international environmental conferences, resulting in heightened representation during decision-making processes.[27] Thus, the business sector has secured a seat at the governance table, even though these actors are generally positioned on the opposite side of the environmental policy debate. Despite this evolution of the corporation's position of power in the global arena, international environmental regulation remains state-centric.[28] As such, the planning and execution of a sustainable development regime happens at the national level, resulting in variance across jurisdictions due to differing economic positions, sociopolitical values, and other influences.[29]

In other words, a country's political economy[30] can result in hugely divergent national and corporate governance despite superficially similar organization.[31] Therefore, in order to accurately compare private sectors (and the implications of their global activities) at the national level, it is necessary to set forth a framework which accounts for these factors of differentiation.[32]

A. Corporate Ownership and Control: Trends in the United States and Finland

Ownership patterns within a country's private sector are largely a result of domestic sociopolitical influences.[33] While there is a certain degree of convergence in ownership structures across jurisdictions, there is arguably greater variance in the shareholding patterns of different firms within any given jurisdiction,[34] which has a measurable effect on the development of corporate law.[35] Because corporate governance is directly related to a company's ownership arrangement, there are different societal implications and downstream effects that arise within jurisdictions which err toward diffuse ownership patterns as opposed to those erring toward concentrated ownership.

The United States is generally considered to have greater protection for shareholders against exploitation from management,[36] leading to the dispersed ownership patterns observed in the jurisdiction.[37] A dispersed ownership structure ensures that control over the company is separated from its owners, a cornerstone feature of the American corporation.[38] Corporate control lies with its directors and managers, who are incentivized to act in the best interest of owners through a system of legally enforced fiduciary duties.[39] Shareholders, as owners of the company, therefore have very little direct control over corporate governance, instead relying on an elected board of directors to represent their interests responsibly and utilizing their voting and information rights to monitor management.[40]

Politics in the United States are deeply rooted in populist values.[41] These values are evidenced by a tendency to enact policy that prevents institutional interests from overwhelming the public.[42] Such policies almost certainly contributed indirectly to the large proportion of American corporations with dispersed ownership.[43] Despite the foundational principles of empowering the populace and balancing institutional power, the United States' business sector is unique in its ability to resist stakeholder pressure compared to other developed western countries.[44] This is undoubtedly related to the fact that external constituencies are virtually excluded from the incentive mechanism between owners and controllers of American companies. While the United States' institutional prioritization of financial capital has largely been paramount and its response to societal pressures generally dismissive, the evolution of the private sector into a powerful political actor over time has made the consequences of such a dynamic more severe.[45] Interestingly, this stance on the prioritization of financial welfare is more or less shared by the American public, notwithstanding an uptick in social activism over recent years, although most Americans acknowledge that climate change is a major concern, it is generally regarded as lower priority than protecting the economy.[46]

Finnish corporate law has developed alongside an evolving landscape of economic, social, and political influences that differs greatly from that of the United States. Finnish firms are dominated by a concentrated ownership structure,[47] wherein a controlling portion of shares are held by a single entity; in some cases, the Finnish government.[48] Unlike the United States, ownership of firms in Finland is closely aligned with control over the firm: neither directors nor management are legally enabled to control or make decisions on behalf of the company without authorization from the shareholders.[49] Moreover, shareholders can replace the directors at any time,[50] while American shareholders typically only have the opportunity to vote on removal of directors once year.[51] Thus, whereas American corporate law attempts to balance the power dynamic between management and shareholders by separating ownership and corporate control, an arrangement that is somewhat self-regulating through a system of incentives, Finnish corporate law channels corporate control through the owner(s) and has very few checks on that power that are built-in to the organization. Instead, the Finnish code targets the owners of firms exclusively, curbing their ability to act opportunistically.[52]

Finland's development as a country in nearly all aspects occurred recently relative to the United States.[53] Economically, Finland was primarily agrarian and produced a relatively low GDP until the industrialization of the early twentieth century. The population consisted almost entirely of farmers and other laborers, and as a result, the rights of workers were a significant force in the shaping of Finland's governance policy.[54] As industrialization took hold, the nation's political organization also changed greatly. Finland gained independence from Russia during the tumult of 1917, and the new Finnish government benefitted from the study of established Scandinavian jurisdictions as it shaped its legal and political regime.[55] The large representation of laborers in the region contributed Finland's adoption of what is now known as the Nordic Model, a bundle of economic and social policies common to Scandinavian countries featuring free market economies with a strong emphasis on social welfare.[56] It is therefore not surprising that stakeholders such as employees, consumers, and other members of the community who are affected by corporate enterprise hold significant influence in the Finnish business sector. One 2021 study showed remarkable alignment of stakeholder goals and company goals, even though they were studied separately from each other.[57]

Notwithstanding differences in implementation of corporate law between the United States and Finland, the two frameworks share the fundamental principle that the default purpose of a business is shareholder profit.[58] An important area where the two appear to diverge is in their jurisdictional interpretations of value. Finland's conception of value maximization contrasts from the U.S. model in that it treats a company's social responsibility as a "long-term, inclusive shareholder value variant."[59] This perspective enables Finnish institutions to apply a more balanced approach for fulfilling shareholder interests by adopting strategies for sustained growth that are infused with considerations of corporate purpose, rather than sole emphasis of immediate returns.[60] A Finnish company's long-term growth is generally understood to correlate directly with its ability to perform in areas pertaining to societal welfare, such as sustainability and reduced climate impact. Sholars have concluded that the Finnish corporate governance model does not map onto the U.S. model, and vice versa. Very broadly speaking, Finland's prioritization of social welfare comes at the cost of its economic health,[61] and the United States' status as a global economic superpower is dependent upon its lower prioritization of social welfare.[62]

B. Respective Positioning of American and Finnish Business Sectors Within the Global Landscape

The level of global activity of domestic firms is an important indicator for jurisdictional patterns in corporate governance. The United States is the world's largest national economy and is widely considered to occupy a leading role in the world financial markets,[63] characterized by massive global trade activity and multinational corporate expansions.[64] The widespread globalization of America's largest firms and the domestic economy's deep entanglement with the global market will inevitably complicate efforts to inspire reform in American corporate governance. One illustrative example of this conflict is U.S. reliance on global supply chains. For instance, the clothes made by U.S. company Levi Strauss are produced in Chinese, Pakistani, and Indian factories which utilize coal-fired power plants and thus contribute significant emissions to the apparel industry's large carbon footprint.[65] Most solutions that would enable Levi Strauss to meaningfully reduce their emissions by eliminating pollutive production practices would involve a massive and costly overhaul of their corporate strategy.[66] If the company were to implement such reform, Levi's would likely be compelled to offset the inevitable expenses by charging higher prices for their merchandise, thereby risking widespread ostracization of their consumer base.

Finland's domestic economy, on the other hand, is much smaller than that of the United States, and although it is dependent on international trade and highly integrated globally,[67] the impact of its global activity is also significantly smaller than the United States. In 2021, Finland's income from exportation of goods totaled $117.23 billion,[68] while U.S. exports totaled $1.63 trillion.[69] Even so, Finland is home to several large companies that operate globally and are thus subject to situations similar to the aforementioned supply chain example where their operations exist in jurisdictions with less stringent environmental policy. Nokia Corporation, one of Finland's largest privately-owned companies,[70] has presence in North America, Europe, India, Asia, Latin America, the Middle East, and Africa;[71] and yet, the company has managed to make remarkable progress on its SDG-focused impact goals.[72] In 2022, Nokia surpassed its target to source 60% of its energy from renewable sources, achieving 63% across global facilities.[73] Suppliers who are contracted with the company to do final assembly of the consumer product also reduced their GHG emissions by 39% from 2019.[74] Nokia's annual Sustainability Report set forth a detailed account of its methods for pursuing their targets and, while the influence of environmental regulation is to be expected, most of Nokia's action involves corporate measures independent from its legal obligations. Among the company's focuses are consistent engagement with a variety of stakeholders,[75] regular comparative assessments of ESG performance against industry competitors, and implementation of ESG-focused corporate strategy.[76]

Part II. The Current State of Climate-Focused Corporate Governance in the United States and Finland

There is a common misconception amongst the American public that Nordic countries like Finland are socialist regimes,[77] likely due to the Finnish government's strong involvement in the country's business sphere and other sectors. In reality, Finland was ranked 17th amongst the most capitalist countries in the world, while the United States ranked 20th.[78] Finland is traditionally pro-market and has been a regular advocate for less restrictive trade policies in front of the European Union.[79] The defining feature of capitalist economic systems is a profit- driven and competitive market; therefore, a strong incentive to perform financially is at least one area where American and Finnish firms find common ground. What, then, enables the Finnish firm to pursue and achieve success in sustainability goals while remaining economically competitive in a market that incentivizes prioritization of financial capital instead? More pressingly, what has hindered the United States from doing the same? Having laid a foundation through a state-level comparison of the inception, existence, and functioning of their corporate institutions, the following sections will attempt to answer these questions by closer examination of the relationships between government regulation and business entities and exploring the implications those relationships have on the efficacy of climate-related corporate governance.

A. Finland

As has been suggested, environmental regulation at the international and state levels cannot reach full potential without cooperation from the corporate sphere through internalization of those policies.[80] As a member state of the European Union, Finland is subject to a number of regulatory measures that enforce corporate responsibility with respect to the environment.[81] Among these is the 2014 E.U. Non-Financial Reporting Directive (NFR), which requires companies employing more than 500 people to include non-financial statements with their annual reports, including information on the company's performance in environmental protection.[82] In compliance with this directive, Finland amended the national Accounting Act to embody virtually the same provisions set forth in NFR.[83]

Surprisingly, while reporting is mandatory, the legislation is relatively flexible in cases of non-compliance: where companies do not adhere to their reporting requirements, they are first given the chance to explain.[84] The penalty for non-compliance is a fine, although the provision is silent on the amount or range of amounts a company may be required to pay.[85] Such reporting requirements will naturally have the effect of increasing corporate transparency, encourage corporate consideration of stakeholder interests and reciprocal engagement from stakeholders, but it is hard to imagine the ambiguous language igniting any meaningful deterrence for wealthy Finnish companies. It is more likely that any deterring effect was intended to arise out of the increased availability of necessary information for stakeholders to hold companies accountable through private means such as litigation. However, this theory is also relatively weak: NFR has also been criticized for its vague standards for what companies must include in their reports.[86] Under the directive, for example, companies are only required to report information about risks within supply chain, contractor, and other business relationships "if relevant and appropriate."[87] The language omits further clarification, resulting in a loosely defined obligation that somewhat resembles an honor system. Without clearer instruction, companies are afforded a good amount of deference from the government, frustrating the potential for maximized corporate transparency. Regardless, the positive impact of NFR on corporate sustainability performance across Europe is undeniable.[88] It is worth noting, however, that the *mandating* of NFR in the European Union is not necessarily responsible for its success in any given jurisdiction, particularly in the case of Finland.[89]

Sustainability was introduced into the Finnish corporate agenda long before the NFR directive. The country's longstanding tradition of giving voice to workers enabled the corporate institution to develop congruently, and thus, preceded the potency of Finnish stakeholders as a driving force of heighted CSR over time.[90] The role of Finland's government as a stakeholder in the corporate sector also likely contributed the early and successful integration of sustainability into enterprise.

The Finnish government's company ownership model involves the justification of state interest by categorizing such state-owned enterprises (SOEs) into three categories: strategic interest, typically relating to infrastructure or national security; financial interest,[91] utilized where state ownership can boost the national economy; and 'special assignment,' where an SOE is delegated a particular societal objective.[92] The Finnish government's authority to acquire companies as part of a strategy to achieve sustainability makes clearer the sustainable development themes evident in the business sector. Finnish Ministerial Advisor Katariina Sillander, a sustainability developer in the state department responsible for managing Finland's SOEs, recently clarified this dynamic: "The State is a demanding owner when it comes to sustainability. In order to form an overall picture, it is important for us to monitor, at the level of corporate assets as a whole, how the various expectations of the State as an owner have been met."[93] This, however, does not necessarily explain the parallel success in some of Finland's largest private corporations, like Nokia.[94]

Given Finland's longstanding emphasis on low environmental impact in the shaping of its sociopolitical landscape, another likely determinant of success is the progressive weaving of sustainability interests into the Finnish economy. More specifically stated, the economic environment in Finland has evolved such that a company's financial incentive to compete in the marketplace has become, to some extent, aligned with environmentally responsible internal governance. The more conspicuous examples involve the availability of government aid for businesses to fund sustainability reform and improvements.[95] However, emerging global trends in responsible investment practices that take into account a company's climate impact in the due diligence process is altering the way companies are valued, moving closer toward Finland's traditional and prescient stance on sustainability performance as an important determinant of long-term value.[96] Although the E.U. NFR guidelines have been described as relatively vague,[97] the directive has introduced some level of uniformity and standardization to sustainability reporting within the jurisdiction; furthermore, the Finnish Consumer Ombudsman has issued guidelines that regulate a company's marketing tactics with respect to environmental claims in order to prevent greenwashing.[98] This has increased the quality of information about the Finnish company's climate impact which allows both institutional investors and less sophisticated retail investors to make informed decisions while reducing their search costs, making Finnish companies an attractive investment opportunity for many.[99]

Similar to the United States, Finland has mechanisms of enforcing corporate law in the form of civil liability to shareholders and criminal sanctions.[100] Securities litigation is rare in Finland,[101] especially when compared to the United States where shareholder suits are the primary means of enforcing corporate law. In the context of corporate governance, the relevant right of shareholders enforceable by civil suit is that of access to truthful information about the company's practices; as such, the lack of litigation may speak to the harmoniousness of the Finnish system at least to some small degree. To a larger degree, it reflects the jurisdiction's pattern of concentrated corporate ownership[102] in that there are simply fewer minority shareholders to bring suit, and the alignment of control and ownership[103] which affords shareholders some degree of *ex ante* power, thereby mitigating the need for *ex post* enforcement through litigation. Enforcement through Finland's criminal law is fairly sparse, as well. The acts for which a Finnish company can be held criminally liable are relatively few under the Penal Code,[104] and while it provides for offenses related to corporate transparency and environmental crimes, the penalties are strictly monetary and limited to a maximum of EUR 850,000.[105]

B. United States

Without the combination of various factors that contributed to the development of Finland's strong climate regime, the current landscape in the United States at the intersection of sustainability, the corporation, and regulation is predictably much different. The strength of local state governments due to constitutionally granted sovereignty has created a somewhat challenging setting for the reconciliation of corporate law and environmental protection, governed by state law and federal law respectively.[106] The United States has seen great levels of cultural and state-level fragmentation around ESG initiatives in recent years. In 2021 and 2022, a total of 17 states introduced 'Anti-ESG' laws; one example is a Texas law that requires the state comptroller to identify and document a list of all financial firms that 'boycott' fossil fuel companies, who are then subject to divestment by state pension funds.[107] At the federal level in 2022, the US Securities and Exchange Commission (SEC) proposed a rule for mandatory climate-related disclosures, similar to the 2014 EU NFR Directive, that would require American companies to report information about their impact on the climate crisis including greenhouse gas emissions, climate risk management, oversight process, and related corporate governance strategies to mitigate their environmental impact.[108]

The same way various sociopolitical values have enabled Finland's political economy to develop into a hospitable environment for climate-focused reform, the values that shaped the American political economy have resulted in an environment somewhat hostile to reform. The SEC's proposed rule on climate-related disclosure has been highly controversial; the vote has been delayed more than once, partly due to extraordinary lobbying efforts by both supporters and opposers of the rule.[109] The pro-market opposition remains unmoved, despite the SEC's press release that framed the rule largely as a measure for mitigating the financial risk associated with poor climate performance in companies, a thoroughly researched and well-documented reality.[110]

Opposition to the SEC's proposed reform finds strong underpinnings in the overwhelming wealth-maximization paradigm seen in American corporate law as it exists today and its development over time. This same paradigm has given rise to a uniquely American fixation on short-term profits where shareholders typically prioritize short-term profits they make from a company's brief period of increased performance rather than engaging in longer- term investing.[111] This phenomenon naturally reinforces managerial incentives to appeal to shareholders by focusing on enhancing short-term performance of the enterprise—indeed, this trend is pervasive throughout the jurisdiction—arguably to the near-exclusion of the company's long-term performance.[112] The reverse effect necessarily has the same implications: the holding of shares for a short period of time allows investors to purchase equity in a company without concern for longevity, thereby enabling apathy and lack of meaningful participation in corporate governance.[113] Therefore, it is no surprise that opponents of the SEC proposal are unmoved by the SEC's reasoning; the rule would, in some ways, forcibly and fundamentally shift the American investor's role in the stock market toward one involving more active monitoring of a set of metrics focused on long-term value. It is not hard to imagine this shift having a variety of downstream effects on the current framework of profit-focused American investing, which is deeply rooted in cultural and political tradition.

On the other hand, the US has seen investor support for the introduction of climate- related disclosures into regular corporate practice through a number of shareholder derivative suits.[114] Although a company's sustainability reporting is voluntary and they are accordingly not obligated to abide by any guidelines on the specifics they include or omit, federal securities law provides a cause of action for investors who were damaged due to reliance on a false representation or omission of material fact that was expressed by a representative of the corporation who did so knowingly.[115] The provision is a codified manifestation of investor and shareholder rights to company information, and so theoretically, a company found to have omitted or provided misleading sustainability information that was material to an individual's investment decision could be found civilly liable for securities fraud.[116] While this wave of litigation has applied some level of pressure on US companies to consider climate goals more seriously, most are dismissed at the pleading stage.[117]

To succeed on such a claim, the plaintiff must show a variety of elements: (1) that the fact in question was omitted or misleading; (2) that they 'relied' on the fact in making their investment decision; (3) the fact was 'material;' and (4) their reliance on the misrepresentation caused them harm.[118] Shareholder utilization of Rule 10b-5 for holding companies accountable for sustainability poses many problems, and is therefore an inefficient solution for corporate governance reform. Perhaps most importantly, the body of law drawn upon by courts when adjudicating such claims is not equipped with precedent that applies accurately or efficiently on non-disclosure of sustainability information, the financial consequences of which may not be seen for many years.[119] Thus, although equity investors' enforcement of corporate disclosure through litigation is likely to play an important role in the future of American corporate governance, the likely prerequisite for such a system is an enforceable climate-related disclosure mandate.

Part III. The Future of Sustainability in American Corporate Governance

Despite huge differences between the Finnish model and US model, their side-by-side comparison sheds light on several meaningful themes that enable modest speculation on the future of corporate governance in the United States. First, the development of Finnish infrastructure that has served as an incubator for effective climate-focused corporate strategy was propelled by a set of culturally significant values so different from those of the US such that transposing the current Finnish model onto the US in an attempt to understand potential opportunities for reform is impossible. Second, notwithstanding these differences, Finland's success is evidence that CSR can be aligned with a company's financial incentive to compete in the marketplace, and that such alignment is a viable means for integration of sustainability into corporate strategy. Third, widespread disagreement in the US about the role of enterprise in environmental policy not only results from enduring traces of populist tradition,[120] but also a systemic failure to realize potential for similar incentive alignment. Fourth, this failure to realize potential for incentive alignment is due, at least in part, to pervasive short-termism in American investment activity.

Unless the SEC's proposed rulemaking for mandating climate-related disclosures is successful, it seems unlikely that meaningful reform in American corporate governance will come to fruition without significant external pressures. Even the passage of a climate-related disclosure requirement seems unlikely, given the disproportionate lobbying power of corporate giants who, under the American regime, are highly incentivized to oppose it. In any case, if reform does not arrive internally by the hand of the US government, certain international economic activity looming on the horizon may represent pressures significant enough to catalyze the restructuring of domestic corporate governance to prevent ostracization of the American private sector from the global market. The first is increasingly stringent regulatory strategy around sustainability and corporate governance in the EU, which could impact US enterprise where American business activity interacts with certain jurisdictions, among other downstream effects. The second potential catalyst, closely related to the first, are economic pressures on a broader scale linked to the US's struggle to catch up with global movement toward sustainable corporate governance, potentially making American firms a less attractive investment. This is particularly relevant in light of trends showing increased governance involvement from institutional investors and the rise of shareholder activism.[121]

A. Potential Market Fragmentation Due to Inconsistent Implementation of ESG Domestically and Abroad

Recent developments in the EU include the formal adoption of Corporate Sustainability Reporting Directive (CSRD), which builds upon the current NFR Directive[122] with stricter reporting requirements, a broader reach, and information audits,[123] and the newly passed Corporate Sustainability Due Diligence Directive (CSDDD). The latter, which will require companies to confront and mitigate the climate-adverse impacts of their global business activities, has yet to be finalized but is expected to be formally adopted around 2024 and implemented in pre-determined phases thereafter.[124] While the CSDDD will only apply directly to governance of businesses operating in the EU, the directive will mandate those businesses to monitor the activity of their subsidiaries, as well as "the value chain operations carried out by entities with which the company has a business relationship."[125] Sanctions for violating CSDDD provisions will be no less than 5% of the company's "net worldwide turnover" for the year prior to the breach, and moreover, the directive provides a cause of action for individuals adversely impacted by a company's breach of the directive.[126] The enforcement mechanisms built into CSDDD constitute a more forceful deterrence function than those within the 2014 NFR framework,[127] which reflects a key difference between the NFR Directive and CSDDD: the 2014 provisions were arguably a mere reflection of practices that were already somewhat common to the sector,[128] while CSDDD represents a seismic shift. Alongside the European businesses that will be governed directly by the mandate, its provisions will also apply directly to American companies doing a significant amount of business in the EU.[129] The directive's remarkably long reach, however, is better exemplified in the language which requires European businesses to monitor the sustainability performance of any foreign company with which they do business. For example, a European business subject to this regime, who is otherwise in total compliance, faces significant monetary penalties if they are found to have entered into a business agreement or extended a business agreement with an American company operating outside of the EU whose environmental practices do not comply with the EU Standards.[130]

The European market is the largest trade area in the world.[131] Given the US's extremely high level of global enterprise activity[132] and a systemic failure to reduce the climate impact of some of its largest business entities,[133] an exodus of European business from the American economy is a real possibility if preventive action is not taken. The long-term consequences of allowing market fragmentation of this magnitude to occur are not entirely clear and are beyond the scope of this paper. Nonetheless, it is a logical prediction that the impact on American enterprise would be severe, at least in the short term; as such, the American government and private sector face a sudden and crucial crossroad. Given the widespread dissonance amongst the American public and other complexities that have slowed governmental response to the call for corporate responsibility,[134] it is more difficult to predict how or when the government might intervene. The high level of controversy surrounding the SEC's climate disclosure proposal and the repeated delay of its vote are evidence of this.[135]

The position of American enterprise is much clearer: management and shareholders will be forced to weigh the consequences of terminating business relationships with European partners against the consequences of reforming their business strategy to meet CSDDD standards. If these matters are left to firms, the results across the private sector will likely vary on a case-by-case basis, depending on the firm-specific cost and complexity of implementing CSDDD-compliant sustainability practices. If American firms are to remain competitive in the global economy, these decisions will compel management to revisit their growth strategies as the global investment community continues to emphasize sustainability performance as an indicator of long-term value. As such, this dynamic resembles some form of alignment between economic incentive and sustainability,[136] notwithstanding the sudden and forced nature of its arrival and the significant overhaul of corporate governance strategy required for it to become effective in American firms. Acting almost as a ticket for entry into the global market, American firms that operate in a system that focuses on short-term performance will become trapped by a difficult dilemma: very broadly speaking, companies may have to choose between retaining their competitive edge in the global market, thereby risking significant short-term losses in an effort to prioritize their longevity, or risk losing a significant share of the global market by failing to adapt to the evolving global landscape.

Conclusion

Of course, it is impossible to speculate potential outcomes of this highly nuanced issue with any meaningful level of accuracy given the early stages of its development and the complex interplay between the American sociopolitical landscape and global economy. This shift is part of a broader global trend toward the integration of sustainability into corporate governance, and overall expansion of the corporate purpose. The corporate framework comprises a complex system of legal fixtures and actors at the state and international level, many of which were not discussed in great detail here. The rise in shareholder activism, for example, is another nuanced area that represents an important paradigmatic shift, the details of which warrant a separate and more comprehensive study as they relate to corporate governance reform. Nonetheless, analyzing the divergence in the development of Finnish and American corporate regimes reveals the anchoring power of societal values in the shaping of political economy, and thus, the incompatibility of the EU and American models. As the climate crisis continues to progress and the potential effects of CSDDD on the American private sector become clearer, the themes discussed here will provide a useful context for the strategic integration of sustainability into corporate governance.

Endnotes

1 *See* Intergovernmental Panel on Climate Change, Climate Change 2023 Synthesis Report: Summary for Policymakers, U.N. Doc. IPCC/AR6/SYR, at 5 (2023) [hereinafter IPCC Summary for Policymakers] (stating that the extreme weather events felt globally, which have caused significant damage to nature and populations, are a direct result of human-caused climate change).

2 *See id.* at 15 (detailing projected adverse impacts on global food production and availability, destruction of species, and human health if the global temperature surpasses the 1.5 degree Celsius global warming threshold).

3 *See, e.g.*, Sarah Kaplan, *World is on Brink of Catastrophic Warming, U.N. Climate Change Report Says,* Wash. Post (Mar. 20, 2023, 5:33 PM), https://www.washingtonpost.com/climate-environment/2023/03/20/climate-change-ipcc-report-15/.

4 *See* Alec Tyson et al., *Gen Z, Millennials Stand Out for Climate Change Activism, Social Media Engagement With Issue,* Pew Rsch. Ctr. (May 26, 2021), https://www.pewresearch.org/science/2021/05/26/gen-z-millennials-stand-out-for-climate-change-activism-social-media-engagement-with-issue/ (reporting that social engagement with addressing climate change has risen steadily in the United States over the past few decades); *see also* John Schwartz, *Students, Cities and States Take the Climate Fight to Court*, N.Y. Times (Aug. 10, 2017), https://www.nytimes.com/2017/08/10/climate/climate-change-lawsuits-courts.html (describing "a wave of litigation around the world," wherein individuals and organizations globally have begun suing their governments for failure to adequately address the climate crisis).

5 *See* IPCC Summary for Policymakers, *supra* note 1, at 4 ("Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals.").

6 *Id.*

7 *See, e.g.*, City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018).

8 *Id.*

9 *See* Immanuel Wallerstein, *The Modern World-System as a Capitalist World-Economy*, *in* The Globalization Reader 56, 57 (Frank J. Lechner & John Boli eds., 5th ed. 2015) (explaining that a capitalist system requires a relationship between corporate institutions and "holders of political power," which involves a balancing of their respective interests and ultimately necessitates the cooperation of these entities in almost all aspects of decision-making).

10 *See* Nicholas Benes, *Redesigning Corporations: Incentives Matter*, Harv. L. Sch. F. on Corp. Governance (June 15, 2020), https://corpgov.law.harvard.edu/2020/06/15/redesigning-corporations-incentives-matter/.

11 *See* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; *see also* Małgorzata Janicka & Artur Sajnóg, *The ESG Reporting of EU Public Companies—Does the Company's Capitalisation Matter?*, 14 Sustainability 4279, 4279 (2022).

12 *See* Umakanth Varottil, *The Role of Corporate Governance in Addressing Climate Change: The Case of India,* 2 USALI East-West Stud. 1 (2022); *see also* José Célio Silveira Andrade & José Antônio Puppim de Oliveira, *The Role of the Private Sector in Global Climate and Energy Governance,* 130 J. Bus. Ethics 375, 376 (2015) ("Business is not just a subject of regulatory climate and energy imposed by the state; rather, business is an intrinsic part of the fabric of climate and energy governance, as 'rule-maker,' particularly in the many voluntary regimes.").

13 *See generally* Mauricio Andrés Latapí Agudelo et al., *A Literature Review of the History and Evolution of Corporate Social Responsibility,* 4 Int'l J. Corp. Soc. Resp. 1 (2019).

14 *2022 EPI Results,* Yale Ctr. for Env't L. & Pol'y (2022), https://epi.yale.edu/epi-results/2022/component/epi (reporting Finland as ranking second globally in the "Environmental Health" category, and third in the "Climate Change" category).

15 *See* Jukka Mähönen & Guðrún Johnsen, *Law, Culture and Sustainability: Corporate Governance in the Nordic Countries*, *in* The Cambridge Handbook of Corp. L., Corp. Governance & Sustainability 218, 225 (Beate Sjåfjell & Christopher M. Bruner eds., 2019) (describing the lack of targeted social responsibility provisions in the Finnish code, implying that strong corporate social responsibility (CSR) themes in Finnish corporate governance arise internally and are not a result of targeted regulation); *e.g.*, Steven Dorst, *Finland's Green Building Revolution,* IMF News (Nov. 2, 2021), www.imf.org/en/News/Articles/2021/10/27/110421-finlands-green-building-revolution. (recounting the efforts of Finnish companies to adopt sustainable practices resulting, in part, from economic incentives to do so).

16 *See* Yale Ctr. for Env't L. & Pol'y, *supra* note 14 (reporting the United States as ranking 22nd globally in the "Environmental Health" category, and 101st in the "Climate Change" category).

17 *2019 AFLAC CSR Survey,* Aflac (2019), https://www.aflac.com/docs/about-aflac/csr-survey-assets/2019-aflac-csr-infographic-and-survey.pdf.

18 *See* Peter Eavis & Clifford Krauss, *What's Really Behind Corporate Promises On Climate Change?*, N.Y. Times, https://www.nytimes.com/2021/02/22/business/energy-environment/corporations-climate-change.html (May 12, 2021); *see also* Emma Stewart, *Net Zero + Nature: Our Commitment to the Environment*, Netflix (Mar. 30, 2021), https://about.netflix.com/en/news/net-zero-nature-our-climate-commitment; *Climate Action Plan*, Costco, https://www.costco.com/sustainability-climate-action-plan.html (Dec. 2022).

19 A 2023 survey conducted by GreenPrint found that while the majority of American consumers prefer to purchase from environmentally responsible companies, the same majority does not know how to assess companies for sustainability performance, nor do they trust companies when they make eco-friendly claims. Anne Field, *Americans Want to Buy Green, But They Don't Trust Companies*, Forbes (June 26, 2022, 11:59 AM), https://www.forbes.com/sites/annefield/2022/06/26/americans-want-to-buy-green-but-they-dont-trust-companies/?sh=66e6eb73f048.

20 Eavis & Krauss, *supra* note 18 ("Science Based Targets initiative [is] a global effort to assess corporate plans to reduce emissions.").

21 *Id.*

22 *See supra* notes 8–12 and accompanying text.

23 *Infra* Part I.

24 *Infra* Part II.

25 *Infra* Part III.

26 Andrade & Puppim de Oliveira, *supra* note 12, at 377.

27 *Id.*

28 *Id.* at 375.

29 *See* Dirk Schoenmaker, *The Impact Economy: Balancing Profit and Impact* 1, 6 (Bruegel, Working Paper No. 4, 2020).

30 'Political economy' refers to the political and economic influences which inform the contours of the law. Reinier Kraakman et al., The Anatomy of Corporate Law: A Comparative and Functional Approach 25 (3d ed. 2017).

31 *See* Schoenmaker, *supra* note 29 at 1, 6–8 (describing three channels—law, tax policy, and culture—by which political economies may be linked to CSR, and finding significant differences in CSR outcomes between common-law, civil-law, and socialist-law countries).

continued on page 21