UNIVERSITÉ PARIS II - PANTHÉON-ASSAS
INSTITUT DE DROIT COMPARÉ

&

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

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Master 2 Droit Comparé des Affaires, 2022-2023
Second Year of Master's Degree in Comparative Business Law, 2022-2023

THE IMPACT OF ENVIRONMENTAL NORMS ON BUSINESS LAWS: A COMPARATIVE STUDY OF AMERICAN, CHINESE, AND FRENCH ENVIRONMENTAL CORPORATE SOCIAL RESPONSIBILITY.

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Mémoire de recherche effectué à *The George Washington University Law School*.
Research made at The George Washington University Law School.

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This research paper will be written in English to accommodate all persons involved in its writing.

“Success is not final, failure is not fatal: it is the courage to continue that counts."

Winston Churchill

ACKNOWLEDGMENTS

First, I would like to express my appreciation to the Professor Clarke and the Professor Goré that have accepted to supervise my research paper and guided my thoughts throughout this project.

I also want to express my deepest gratitude to Professor Goré and Professor Ancel, for selecting me for their master's degree and the exchange program at The George Washington University Law School. Both these academic experiences were extremely valuable and taught me life-long skills, whether on the professional, academic, or human level.

My thanks should also go to The George Washington University Law school. Without its support, this project would not have been possible. They warmly welcomed me for a semester and allowed me to extend my stay in the Law School, so that I could write my research paper.

Eventually, I wish to address my heartfelt thanks to my parents, siblings, and friends for their love throughout the years and support for my dreams.

TABLE OF ABBREVIATIONS

- ALI: American Law Institute
- BRI: Belt and Road Initiative
- CBCSD: China Business Council for Sustainable development
- CPC: Communist Party of China
- CSOE: State Owned Enterprises under the direct authority of the Central Government
- CSR: Corporate Social and environmental Responsibility
- CSRC: China Securities Regulatory Commission
- CSRD: Corporate Sustainability Reporting Directive
- DNA: Deoxyribonucleic Acid
- EU: European Union
- EPA: Environmental Protection Agency
- FTC: Federal Trade Commission
- GDP: Growth Domestic Product
- GES Bilan: Greenhouse Gas Report
- ICPE: *Installations Classées pour la Protection de l'Environnement* (Classified Installations for the Protection of Environment)
- NFRD Directive: Directive on the "disclosure of non-financial and diversity information by certain large undertakings and groups
- NPC: National People's Congress
- NRE Law: Law on the New Economic Regulations
- POE: Private-Owned Enterprises
- PRC: People's Republic of China
- SASAC: State-Owned Assets Supervision and Administration Commission of the State Council
- SEC: Securities and Exchange Commission
- SEE: Alashan Society of Entrepreneurs and Ecology
- SSE: Shanghai Stock Exchange
- SEPA: The State Administration on Environmental Protection
- SOE: State-Owned Enterprises
- TCFD: Taskforce on Climate-related Financial Disclosures
- USA/US: The United States of America
- WTO: The World Trade Organization

SUMMARY OF DISSERTATION

Introduction

"Vous n'échapperez pas au devoir de vigilance"[1] . With these words, the Euro-deputy Raphaël Glucksmann set the tone of the European Union wishes regarding the direction European business law is aiming at. Indeed, on the 23rd of February 2022, the European Commission adopted a proposal for a directive on Corporate Sustainability Due Diligence. This text has yet to be negotiated in July and August of 2023, by the European Parliament, Council and Commission, before being adopted by the last institution to become hard law. Still, this new proposal is revolutionary as it aims at addressing the impact European industries and companies have on human rights and the environment across the world — noteworthy, this paper will only focus on the current interactions between business law and environmental concerns. In fact, the European Union has been trying to enforce a regime that would ensure a more sustainable way of living and doing business within its territory, a goal that was enhanced by the 2023 Green New Deal. This proposal is then partly shifting the focus from States to the private sector in terms of duties and accountability, acknowledging the fact that the private sector is as much responsible for climate change as the public sector is. However, interactions between environmental concerns and business law appear across continents more distant and oriented towards another interest: the success and financial well-being of their companies. Thus, to first understand why the European Union has been increasing its emphasis on this newly born legal discipline, unlike other systems, a look should be given to history.

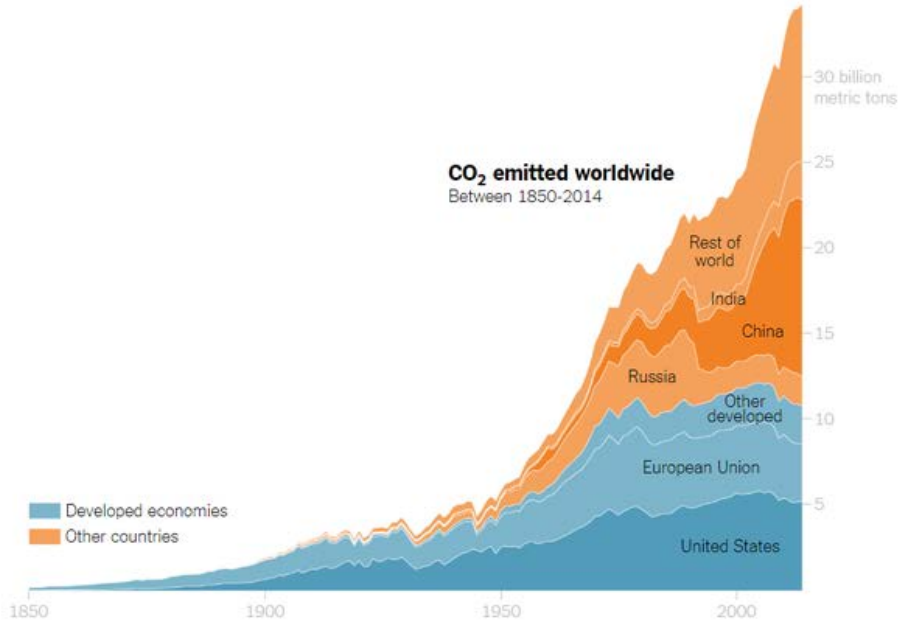
During the previous century, a great number of States have significantly improved their economies and political influences throughout the world, thanks to globalization. There are two main consequences to these evolutions in the world's dynamic and interactions.
First, thanks to this favorable economic environment, it has allowed some private businesses to develop their empire to such an extent that they are now able to compete with States in terms of influence. The Big Techs are a good example of this recent evolution since some of them have now exceeded the GDP of certain States, such as Apple which outgrew Portugal's GDP

[1] Raphaël Glucksmann, *"Vous n'échapperez pas au devoir de vigilance",* Éditions Législatives Lefebvre Dalloz, Gestion d'Entreprise (Jul. 24, 2022, accessed Jun. 12, 2023) : In this interview, the French Euro deputy has declared that "*You [companies and States] will not escape to the duty of vigilance. It is a consumers and citizens' exigence; it is the direction/meaning of history*." (translation for the original version in French), https://www.editions-legislatives.fr/actualite/«vous-nechapperez-pas-au-devoir-de-vigilance-»-raphael-glucksmann/.

and is worth more than the United Kingdom's annual GDP[2]. Companies are now fully able to compete with them[3]. The author Hongfei Gu refers to them as a "new type of Leviathan", in reference to Hobbes' doctrine of State[4].

The second effect is climate change, which is often perceived as an inevitable and adverse effect of economic development. In the following graph, it can be noticed that CO_2 emissions, which is one of the elements responsible for climate change, increased in the countries that have started to develop their economy, which perfectly illustrates this statement. For example, the USA, the EU, other developed Nations along with Russia, China and India emitted 25 billion metric tons of CO_2 between 1850 and 2014[5]. These Nations, which can be considered as the main developed Nations of the world, are the main actors of climate change, which means there is certainly a correlation between climate change and economic development.

Table No.1: The evolution of CO_2 emitted by the Countries in the world.



[2] Zachary Snowdon Smith, *Apple Becomes 1st Company Worth $3 Trillion—Greater Than The GDP Of The UK*, Forbes (Apr. 14, 2022, Accessed Jun. 1st, 2023).

[3] Hongfei Gu, *Data, Big Tech, and the New Concept of Sovereignty*, J. OF CHIN POLIT SCI (May 3, 2023).

[4] Thomas Hobbes, *Leviathan*, London (1651).

[5] Michael Gonchar, *Teach About Climate Change With These 24 New York Times Graphs*, N.Y. Times, The Learning Network, What's Going on in This Graph? (Feb. 28, 2019).

Furthermore, as exposed by the scientific community, climate change will have and is already having disastrous impacts for life on Earth[6]: the atmosphere is not completely safe to breathe anymore, the global temperature is rising, the levels of seas are rising, which threatens the survival or well-being of States with a coastline. For instance, Kiribati and Tuvalu might disappear by the end of the next three decades because of the rise of oceans. To raise international awareness on this life-threatening issue, the Minister of Tuvalu addressed the Cop26 from his Nation, standing in the sea, surrounded by water up to his knees[7]. The message was strong and urged the international community to take further actions, since climate change is a threat to all, whether on one State's economy or survival.

In fact, throughout the entire XXth century, States have entered International Conventions and Organizations to frame their environmental policies and actions to try to limit their negative impact on the environment. The Conventions were first very technical, such as the Espoo Convention of 1991 or the Berne Convention of 1979. They gradually became more general, aiming at reducing and stopping the effect of climate change. The Kyoto Protocol and Paris Agreement are good examples of that new aim. As a result, most countries developed environmental law by protecting biodiversity, atmosphere and regulating dangerous activities that could cause great damage to an ecosystem. In other words, environmental law was born at both international and national levels.

However, these newly born obligations only burden the States and consumers, who are asked to make contributions at their own level for example by reducing their consumption of water and electricity, limiting their use of plastic and so on[8]. It then omits the private sector, which is nevertheless as powerful as most of the States, as previously emphasized, and one of the biggest actors of climate change: They are the one producing the goods, operating the industries, thus making the decision that could impact the environment and advertising for the consumption of goods and services that could be highly polluting. Yet, a limited number of resources addressed their responsibilities, which seems unreasonable or even unfair.

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[6] NASA, *Understanding Our Planet to Benefit Humankind*, Global Climate Change: Vital signs of the Planet, (accessed May 30th, 2023).

[7] Colin Packham & Karishma Singh, *Tuvalu minister stands in sea to film COP26 speech to show climate change*, Reuters (Nov. 9, 2021).

[8] See for example the article 46 of the Law No. 2009-967, *programming on the implementation of the Grenelle Environment Forum*, *Grenelle Law I* (Aug. 3, 2009): "a) Reduce the production of household and similar waste by 7% per inhabitant over the next five years". It is correlated by recent advertisements and campaigns from the government, asking the population to reduce their consumption of energies. See Ministère de la Transition Écologique et de la Cohésion des Territoires & Ministère de la Transition énergétique, Cet été aussi, pour économiser l'énergie, on agit, on réduit, https://www.ecologie.gouv.fr/chaque-geste-compte.

This paper will aim at studying these resources, namely the environmental CSR norms that exist throughout three different continents. CSR is often defined as a method "to align a company's social and environmental activities with its business purposes and values[9]". Numerous soft law instruments developed by companies, or other international organizations, have created and developed concepts of environmental CSR. This is how the environmental CSR movement was born, to later be enshrined in national legal frameworks. Thus, companies' environmental CSR practices were first understood as a purely voluntary behavior arising out of companies, before evolving in some countries into legal rules. Noteworthy, the paper will focus on the corporate law aspect of environmental CSR, although many other fields of business law are also impacted by this recent trend. One concrete example would be competition law and how it increases CSR efforts of companies[10]. Environmental CSR also exists as an independent area of law. For example, the United States Securities and Exchange Commission has published a Federal register on the Commission Guidance Regarding Disclosure Related to Climate Change[11]. These guidelines allow a uniform disclosure of information related to climate change by certain companies, namely information with regard to their greenhouse gas emissions.

As a matter of information, the lack of environmental CSR norms is very detrimental to the environment, as well as the corporations themselves and the State. As exposed by Karen Bubna-Litic, the lack of interest of corporations in environmental issues can cause them reduced profits, higher costs of production because of the lack of resources, or climate issues rendering impossible some type of exploitation, and loss of reputation because of the growing public concern[12]. On the contrary, it will probably ease the recruitment, retainment of employees and improve internal relationships since the company would gain a certain degree of attractiveness thanks to its ethical behaviors. For instance, two thirds of Americans are blaming major private entities for their lack or complete absence of actions with regards to their negative effect on the

[9] V. Kasturi Rangan et al., *The Truth About CSR*, Harvard Business Review, The Magazine, Corporate Social Responsibility (2015, accessed Jun. 11, 2023), https://hbr.org/2015/01/the-truth-about-csr.
[10] Wenzhi Ding et al., *Does competition increase corporate social responsibility?*, Principles of Responsible Investments (Oct. 30, 2020), https://www.unpri.org/pri-blog/does-competition-increase-corporate-social-responsibility/6652.article.
[11] SEC, *17 CFR Parts 211, 231 and 241 - Commission Guidance Regarding Disclosure Related to Climate Change*, Federal Register, Vol. 75, No. 25, (Aug. 2, 2010, accessed Jul. 1, 2023), https://www.sec.gov/rules/interp/2010/33-9106fr.pdf
[12] Karen Bubna-Litic, *Corporate Social Responsibility: Using Climate Change to Illustrate the Intersection between Corporate Law and Environmental Law*, Environmental and Planning Law Journal, p.1 (2007).

environment[13]. In other words, it really has negative influences over their financial wellness, which *in fine* will impact States in which they are incorporated and operating. Businesses are then impacting the environment as well as impacted by the environment.

That is why interactions between business and environmental law should not be undermined as it can have significant economic impacts. It is in fact already a key field with regards to how businesses operate, and the importance of their interactions will only increase in the future. Especially when throughout the two last decades consumers were and still are calling for an increased accountability of companies over their environmental impact. As a reaction to these claims, the European Union has published in 2001 its Green Paper which emphasizes the need to create a Corporate Social Responsibility (CSR) legal regime[14]. Vanuatu's Prime Minister also declared in 2018 during the Climate Vulnerable Forum that "[It] is now exploring all avenues to utilise the judicial system in various jurisdictions – including under international law – to shift the costs of climate protection back onto the fossil fuel companies (…) and the governments that actively and knowingly created this existential threat to my country"[15], implicitly referring to the concept of environmental CSR.

To emphasize more on these interactions, it should also be highlighted that environmental law has now become to some extent a tool for the hegemony of States. The European Union and a lot of its member States are trying to develop environmental law to answer the people's will[16]. One evidence of this current movement can be found in the development of the concept of circular economy, which aims at developing a sustainable way of living, within the European

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[13] Alec Tyson et al., *What the Data Says About Americans' views of climate change*, Pew Research Center, Climate Change (Apr. 18, 2023).

[14] Commission of the European Communities, *Green Paper Promoting a European Framework for Corporate Social Responsibility*, Com (2001) 366 final, §2 (Jul. 18, 2001): "As early as 1993, the appeal to European business of President Delors to take part in the fight against social exclusion resulted in a strong mobilisation and in the development of European business networks. More recently in March 2000, the European Council in Lisbon made a special appeal to companies' sense of social responsibility regarding best practices for lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development."

[15] Joël Cossardeaux, *Climat : le Vanuatu menace d'attaquer en justice les compagnies pétrolières*, Les Échos (Nov. 13, 2018), https://www.lesechos.fr/monde/enjeux-internationaux/climat-vanuatu-menace-dattaquer-en-justice-les-compagnies-petrolieres-149667.

[16] See headnote n°1; Raphaël Glucksmann, *"Vous n'échapperez pas au devoir de vigilance",* Éditions Législatives Lefebvre Dalloz, Gestion d'Entreprise (Jul. 24, 2022, accessed Jun. 12, 2023) : In this interview, the French Euro deputy has declared that "*You [the companies and States] will not escape to the duty of vigilance. It is a consumers and citizens' exigence; it is the direction/meaning of history*." (translation for the original version in French).

Union and other countries[17] [18]. In a more practical perspective, the Chinese Belt and Road Initiative is a good example. The project aims at stimulating trade with foreign Nations and increasing the Chinese's hegemony, mainly in Asia and developing countries, while ensuring a sustainable growth[19]. Environmental law is then not only a necessity but also a strategy, even in business law. Recent surveys have also demonstrated that customers were more likely to buy a product if they knew the company was taking positive actions to limit its environmental impact[20]. In a similar way, environmental concerns have become a tool for the competitiveness of companies.

Yet, the practice of environmental CSR cannot be considered as generalized. Smaller and medium size companies are not investing into such behaviors and some bigger companies remain reluctant, as it will be demonstrated in the following paper. Creating such ethical behaviors in a systemic way can indeed be time and resource consuming for one company. It will need to create mechanisms to assess its environmental impact, create reports and other forums to discuss this impact and then implement decision-taking procedures to improve their environmental impact and thus increase their profits. Such efforts can then impair their profits in the present time, without concrete and immediate evidence that this systemic policy is succeeding in reaching its objective and without any concrete guarantees for the future, despite experts' analysis and data. The reluctance and fear are then impeding a general implementation of an environmental CSR practice at the corporations' level.

Some countries took action and enacted laws so as to compensate for this failure of generalized behaviors. French law has indeed initiated on its territory the development of a solid legal framework for such reporting duty, weight bore by a pretty large scope of companies. Still, significant differences in its approach can be highlighted with the American perspective. France has enacted a clearly defined framework, when the U.S.A. appears to give more freedom

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[17] European Commission, *Circular Economy Action Plan*, Energy, Climate Change, Environment (accessed Jun. 6, 2023), https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en.

[18] Atalay Atasu et al., *The Circular Business Model*, Harvard Business Review, The Magazine, Corporate Social Responsibility (2021, accessed Jun. 11, 2023), https://hbr.org/2021/07/the-circular-business-model: This article provides a wide overview of what is a circular business model which relates to the implementation of a circular economy in one State.

[19] OECD, China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape, OECD Business and Finance Outlook (2018).

[20] Adam Butler, *Do Customers Really Care About Your Environmental Impact?*, Forbes (Nov. 21, 2018), https://www.forbes.com/sites/forbesnycouncil/2018/11/21/do-customers-really-care-about-your-environmental-impact/?sh=325ce0c7240d; Amelle Nebia, *Infographie – Comment le souci de l'environnement indluence nos achats?,* e-marketing.fr (Sept. 10, 2014).

to companies to determine their own behavior, enacting a disseminated legal frame and relying on their will. China on another hand appears to be politically pressuring its companies to commit to environmental CSR and has traditionally very limited legally rooted rules. This paper will then proceed to a comparative analysis between the French — and consequently the European Union —, Chinese and American perspectives on that question. These three Nations were chosen since they are three representatives of their legal families[21]. It will consequently allow to determine whether the type of legal systems, and their political regime, which are two liberal democracies emphasizing on the rule of law and an authoritarian State, may influence the enactment of laws in that field or not. Moreover, they are also three States with one of the most powerful companies in the world, generating a lot of revenues, having a substantial impact on the environment. It is then interesting to understand how each of these countries answers to the current controversies and issues and adapt their business laws to a changing world. This paper will also help to understand the perspective each of these States have on the role of companies and the legal interactions they consequently have with them.

In the first part of this paper, the three legal systems will be examined to determine for each of them which concrete legal framework was used to promote environmental CSR. In the second part of this paper, a comparative analysis of all three of these legal systems will be conducted.

[21] René David et al., *Les Grands Systèmes de Droit Contemporains*, Dalloz Précis, Droit Privé, 12th edition (Sept. 7, 2016).

Part I – The Current State of the Law

Before States imposed any CSR regulations on companies, there were already certain practices from Companies thanks to the non-binding guidance from international organizations. For example, the OECD guidelines for Multinational Enterprises on Responsible Business Conduct, incorporating some elements of environmental CSR, were created in 1976 and updated for the last time in 2011. This document recognizes the importance of the impact of Multinational companies and emphasizes on how they can reduce, avoid, or compensate for this impact[22].

This is not an isolated example since other tools were also created in the same decade. See for example, the Global Reporting Initiative Standards created in 1997, the ESG standards for sustainable investments, the norms SA 8000 created in 1998 and ISO 26000 created in 2005. It allowed voluntary practices of companies, which started to integrate CSR to their governance, before any laws, under which they may fall, were even enacted[23]. The pharmaceutical company Johnson & Johnson was a pioneer on the matter since it implemented CSR plans on its environmental impact since the 1990's[24]. The World Business Council for Sustainable Development, created in 1995 by companies themselves, is also a good example. It now gathers 190 international companies and provides a forum for debate about companies' efforts towards sustainable development and greener governance models[25].

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[22] OECD, *Guidelines for Multinational Enterprises on Responsible Business Conduct*, VI. Environment, pp. 33-38 (accessed Jun. 15, 2023): "Enterprises play a key role in advancing sustainable economies and can contribute to delivering an effective and progressive response to global, regional and local environmental challenges, including the urgent threat of climate change. Within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements (…) and standards, enterprises should conduct their activities in a manner that takes due account of the need to protect the environment, (…), avoids and addresses adverse environmental impacts and contributes to the wider goal of sustainable development."

[23] Commission of the European Communities, Green Paper Promoting a European Framework for Corporate Social Responsibility, Com (2001) 366 final, §3 (Jul. 18, 2001): "By stating their social responsibility and voluntarily taking on commitments which go beyond common regulatory and conventional requirements, which they would have to respect in any case, companies endeavor to raise the standards of social development, environmental protection and respect of fundamental rights and embrace an open governance, reconciling interests of various stakeholders in an overall approach of quality and sustainability."

[24] Susan Borkowski et al., *Johnson & Johnson: A Case Study on Sustainability Reporting*, IMA Educational Case Journal, Case study, Vol. 3, No. 2, art. 1 (June 2010); Johnson & Johnson, *Aspiring to a Sustainable, Healthier World*, Our Societal Impact (accessed Jun. 15, 2023), https://www.jnj.com/caring.

[25] World Business Council For Sustainable Development, *Imperative: Climate Change* (accessed Jun. 15, 2023), https://www.wbcsd.org/Imperatives/Climate-Action.

All of these soft law tools then allowed to consolidate some very limited practice and launch the spark that will initiate legal implementation of CSR. The French civil law example will first be studied since it developed a rather expansive CSR legal regime (Chapter I). The American example will be studied in a second time since their efforts may be perceived as at an earlier stage (Chapter II).The Chinese legal system will be studied at last, since it is the only legal system that is governed by an authoritarian regime, which must consequently have an impacts on the way environmental CSR is apprehended (Chapter III).

Chapter I – The Civil Law Example of Environmental Corporate Social Responsibility Practices in France

Corporate Social Responsibility is a relatively recent area of Business Law since it first emerged in France in 2011 with the enactment of the "Loi relative aux nouvelles régulations économiques[26]". Yet, CSR was, and still is, the fruit of a long evolution, which was accelerated by the event in Bangladesh in 2014, after the Rana Plaza disaster[27]. It triggered a high response within the European Union. Germany and the Netherlands started to work on law on the duty of vigilance and France was no exception to this European movement of placing CSR in the very heart of its concerns. It was then implemented, sixteen years after the first law on the matter, "la Loi sur le Devoir de vigilance"[28]. However, there were numerous other laws enacted in between. France, also being a Member State of the European Union, also had to incorporate or apply the various instruments adopted at the European level. In the first section, the French national law will be examined (Section 1), to then focus on the influence of the European Union on French law (Section 2).

Section 1 – French National Law

The French evolution of the legislation over the matter can be divided in two eras. Rules setting the basis of CSR and its principle in French law were the first ones to be enacted (I). Then, the French legislature took a more radical turn following the disaster mentioned in the previous section, by enacting two ambitious laws that changed the shape of environmental CSR (II).

I. The Laws Setting the Grounds for Environmental Corporate Social Responsibility in France

There were mainly two laws setting the grounds. Although some other laws intervened in between, the changes and improvements were only minor. The focus should then be directed towards the NRE law (A) and the Grenelle laws, which operated as a pair (B).

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[26] Law No. 2001-420, *on the New Economic Regulations* (May 15, 2001).

[27] Oscar Holland, *10 years after Rana Plaza, is Bangladesh's garment industry any safer?*, CNN (Apr. 13. 2023), https://edition.cnn.com/style/article/rana-plaza-garment-worker-rights-accord/index.html.

[28] Loi n° 2017-399, *on the duty of vigilance of parent companies and ordering companies (1)* (Mar. 27, 2017).

A. The law on the New Economic Regulations

This law created an obligation of reporting on some companies. It implies that some companies will have a duty of information on environment concerns, among other societal issues (1). Yet, this law being the first of its kind was full of limits or flaws that prevented the full development and broad acceptance of CSR by companies (2).

1. The Birth of the Reporting Duty on the Environmental Impact of a Company

The Law on New Economic Regulations adopted in 2001, which entered into force in February 2002 following the "décret du Conseil d'État[29]", marked the beginning of the CSR field in France. This new law aimed in general at increasing the transparency of the information within the business world to, among other objectives, improve the quality of its competition law and the prosecution of white-collar crimes. The Legislature used this occasion to introduce the first components of environmental CSR. In fact, the article 116 of this law created the article L.225-102-1 of the Commercial Code, requiring companies to provide information on the social and environmental impact of their activities. These pieces of information shall be inserted in the mandatory and yearly management report provided by the Directors and Managers during the shareholders meeting and required by the article L.225-102 of the same code. This disposition then allows to involve most of the company's stakeholders to the environmental CSR efforts. This report shall later be made available to the entire public, meaning the environmental impact information will also be available to any person, including the French government.

This declaration was helping companies to formalize the way they deal with all extra-financial risks, whether they are legal, fiscal, social or linked to any other non-financial matters. Impact of companies on the environment and how environmental concerns were incorporated into the companies' daily management were then inserted into those risks, answering a societal need.

[29] Décret No. 2002-221 (Feb. 20, 2002); Definition of "décret du Conseil d'État": *Government regulation called Decree, for the application of a law adopted by the Parliament, promulgated after review by the "Conseil d'État", which is the supreme court of the administrative order in France.*

Yet, this mandatory duty to report on such information had to be limited to some extent in terms of content. It was in fact to be determined at a later occasion by a Decree reviewed by the *Conseil d'État*. Hence, the *décret n°2002-221* was promulgated in February of 2002, allowing at the same time the entry into force of the law. It gave a list of eight information that had to be reported from then on, which ranges from the amount of use of resources, the evaluation of their environmental impact, to the measures taken to ensure efficiency in the use of those resources and the money invested to limit the consequences of their activities on the environment[30]. The ninth point relates to the duty of a company over its subsidiaries.

As a summary, the information must depict the impact of one company on the environment or climate change and the positive measures one company might have taken in favor of sustainable development or circular economy. Thus, companies burdened by this reporting duty must proceed to a self-assessment of their positive and negative impacts on the environment, whether it is technical information, such as what resources were used, how much, and whether it respects the general principles set forth by France for the protection of the environment.

2. The Limits of the Law

The law surely followed a trend in business law and was hailed by legal practitioners. Still, it has a number of significant limits, that were also made visible by the 2007 *Rapport de Mission* on the application of the article 116 of the NRE Law[31].

First of all, this is only a reporting duty. As noticed in the Decree, the reporting duty does not imply any kind of environmental objectives the company should comply with. In other words, if in theory one company was producing such report, informing it was heavily polluting one area by exploiting its resources, causing locals to suffer from a decreased quality of life or even health, the company would not be liable relying on this regulation (although it might be liable relying on some other environmental regulations). It would not have to make any changes in its practices, since they would be fulfilling their obligation of reporting under this law.

[30] *Ibid.*, Art. 3.

[31] François Baratin et al., *Rapport de mission sur l'application de l'article 116 de la loi sur les nouvelles régulations économiques*, Inspection générale de l'environnement n° IGE/06/050, Conseil général des mines n° 04/2007, Inspection générale des affaires sociales n° RM2007-125S (Aug. 2007).

Furthermore, there are absolutely no environmental objectives set in this law, such as the reduction by 25% of the company's carbon emission. This law appears to be very abstract.

Additionally, it only aimed at regulating the French public companies, companies whose shares were admitted on the stock exchange. There is a very limited number of such companies in France. In 2002 there were 750 of them, but it later dropped at around 650[32] because of a worldwide trend[33]. Still, 750 remained a very limited number of companies burdened by such obligations, which limited the impact of this text in terms of quantity.

One other substantial insufficiency in this law is the complete absence of direct control and sanctions monitoring the reporting duty[34]. There is no judicial mechanism that would allow the government to ensure whether companies are providing the public with the required information, and if a report is indeed written, whether the information is provided with sincerity or not. To explain this situation the context of environmental concerns and instrument ought to be examined: In 1997, the 1997 Kyoto Protocol was reached, but all developing countries were excluded from it and did not have to meet any of the requirements set forth in the international Convention. The approach of environmental concerns was not as global. In 2023, such a decision is now unthinkable, and all instruments impose duties on developing countries. However, in 2002, the politics were still impacted by this way of thinking. Furthermore, the government and parliament might have intended to rely on non-governmental organizations (NGOs) to enforce these provisions, rather than a judicial procedure. In fact, this report would allow NGOs to access all information about one company's positive and negative actions towards the environment. Combined with their strong investigative power, NGOs would know about the sincerity of such a declaration. NGOs also have a strong power of naming and shaming: In April 2000 the NGO Rainforest Action Network took action against the Citigroup bank for four years, naming it as one of the biggest actors of climate change. Following four years of shaming, the company changed its practices to take into consideration and protect the environment[35]. In other words, these environmental CSR reports produce every necessary

[32] *Ibid.*, p. 7; EURONEXT, Bourse de Paris, ADVFN https://fr.advfn.com/bourses/EURONEXT

[33] Elsa Conesa, *Pourquoi le nombre d'entreprises cotées a été divisé par deux en 20 ans*, Les Échos (Apr. 1, 2019), https://www.lesechos.fr/finance-marches/marches-financiers/pourquoi-le-nombre-dentreprises-cotees-a-ete-divise-par-deux-en-20-ans-1005710

[34] François Baratin et al., *Rapport de mission sur l'application de l'article 116 de la loi sur les nouvelles régulations économiques*, pp. 11/12.

[35] Karen Bubna-Litic, *Corporate Social Responsibility: Using Climate Change to Illustrate the Intersection between Corporate Law and Environmental Law*, Environmental and Planning Law Journal, p.9 (2007).

information to NGOs' actions, while avoiding burdens to the State that a new procedure would represent. Relying on other parties for the enforcement could have seemed practical for the French lawmakers, as it was respecting the national and international CSR values while limiting any undue costs. A law of 2005[36] corroborates this thesis since it allowed any external parties to pressure one company by expressing their concern on the communication of these information. They could also bring a claim in front of civil courts in order to force the communication of these information through penalty fines.

Moreover, as exposed in a conference led by several lawyers[37], there are other indirect leverages that allow a form of sanction in case the duty is not respected. First, shareholders can pressure the company from the inside thanks to their powers and influences, especially when they are the only true owners of the company. Then directors' might be held criminally liable if false information was given, relying on the article L.444-1 of the Criminal Code. Similarly, directors might be charged with civil liability based on a management fault if they omitted information which has caused damage. Consequently, there were indirect ways to control its respect[38]. Eventually, the State might have tried to encourage environmental reports rather than create a general deterring CSR regime. That is why it limited its scope of application and its content, and instead aimed at relying on the civil society whether it was under pressures from companies' inside or outside actors. Indirect instruments were also available to safeguard this law if deemed necessary, such as soft law tools that existed before the enactment of this provision.

As a conclusion, this law depicts a good intent from the legislative power and a true will to revolutionize the model of production and consumption. Yet, it is very weak and only represents an ideal to which the Parliament and Government were trying to abide by. The report on the application of the article 116 highlighted that the reporting was far from perfect, but some improvements were made in both the number and quality of the reporting duties in the years following its enactment[39]. Yet, these reports were under exploited by companies' internal and

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[36] Law No. 2005-842, *For the trust and modernization of the Economy*, Art. 91 (Jul. 26, 2005).

[37] Christian Huglo et al., *La loi Grenelle II : Une obligation d'information renforcée, où en est-on un an après ?*, Conférence au Sénat (Sept. 29, 2011), https://www.akteos.com/fileadmin//mediatheque/documents/Evenements/Compte_rendu_conference_Sequovia_loi_grenelle_20110929.pdf.

[38] François Baratin et al., *Rapport de mission sur l'application de l'article 116 de la loi sur les nouvelles régulations économiques*, pp. 11/12.

[39] *Ibid*., pp. 16 and following: 68% of French public companies were now publish environmental and social information. In 2003, it only amounte dto 41%. The quality increased as well with an average grade of 42,2% against 34,8% in 2003. Still, these studies are incomplete and some of them hide interests at stakes to achieve good results.

external entities that would be able to trigger changes in the practice of companies[40]. This law was then more of a theoretical declaration of intent with a very limited practical impact. Following these insufficiencies, the Grenelle laws were adopted to remedy and improve the legislation.

B. The Grenelle Laws

In February 2009, a study by two brokers revealed that the Big Tech companies in France, called the *CAC 40*, were all gaining awareness of environmental pressures. However, the CSR field was still lacking in terms of organization and efficiency[41]. That is why, in France the Laws Grenelle were enacted, to remedy the previous NRE law regime's lacks. Interestingly, it proceeded in two steps. The Parliament first enacted the law Grenelle I which is programming the "environmental Grenelle" project (1) and then enacted the Grenelle law II, which actually modified or created more duties for companies (2).

1. Grenelle I on the Programming for the "Environmental Grenelle" Entry into Force

The second article, paragraph I§3 of the Grenelle Law I states that

> *France has set itself the objective of becoming the most efficient economy in terms of carbon equivalent in the European Community by 2020. To this end, it will play its full part in achieving the reduction objective of at least 20 % of European Community greenhouse gas emissions by this time frame (…).*

It was one the first time the French legislature has depicted such a precise objective in terms of environment protection. Throughout the law, it could be noticed that a very clear and precise assessment of the various industries' environmental impacts was conducted by the State. There is a lot of data, which suggests the protection of the environment is not merely an ideology anymore, but a reality that should be achieved through serious, practical and precise measures. Then, to achieve such purposes, the French Parliament has enacted a regime that would come into force in two stages. The first stage is the Grenelle Law I, which is in fact a declaration of intent with regard to the environmental goals it wants to reach. The Law Grenelle II is the one that actually enacted the practical steps to be taken to achieve these objectives. The

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[40] *Ibid*., pp .19-20.

[41] Rachida Boughriet*, Grenelle : qu'en est-il de la Responsabilité sociale des entreprises ?*, ActuEnvironnement.com (Feb. 12, 2009), https://www.actu-environnement.com/ae/news/RSE_grenelle_entreprises_loi_NRE_6718.php4.

framework set by these two laws is much more organized than any previous environmental laws, with various sectors to be impacted such as the energy and transport sectors. It has also included a general title on *Governance, Information and Formation*, that is mainly targeting certain companies, localities and the State. The article 53[42] of this title is the most relevant for this paper. This article indeed provides the direction CSR might be taking in France in the following years.

First of all, the law opens the debate on the scale of companies impacted by the reporting duties. It might not be limited to the only public companies anymore, but would be extended to some other companies that would be deemed big enough by a governmental regulation. It is also seeking to ensure companies would be responsible for their subsidiaries across the world, to ensure no one would escape this duty through a complex company arrangement. These two improvements would represent a significant enlargement of the reporting duty.
It is also considering improving the quality of information so as to encompass the contributions made by one company to ensure and support sustainable development. Even more impressive, the Parliament thought of including environmental, sustainable development and risk prevention objectives from the very moment one company would be created and registered. It would become a part of their formation plan.
Furthermore, the legislature had been trying to improve the dialogue with employees[43] in the 2000's. The environmental impact of companies' activities would be one more point on which this dialogue would be encouraged by some mechanism within the company. It would also extend an alert procedure in case of substantial risk to the environment or the health of the public. Eventually, the State would be encouraging green investment.

This declaration of intent is then much stronger than the NRE law, although it does not actually create any procedures. It depicts how the various branches of power in France had grasped the need to associate companies and their employees to the protection of the environment and fight against climate change. The parliament also emphasized its wish to lead the European Union (EU) on that question and encourage all equivalent measures on the international scene. This law appears ambitious, with regards to the clearly set objectives. Yet,

[42] Law No. 2009-667, *Grenelle I on the Programming for the "Environmental Grenelle" Entry into Force*, Art. 53 (Aug. 3, 2009).
[43] Law No. 2007-130, *On the Modernisation of the Social Dialogue* (Janv. 31, 2007).

it has to be determined whether all of these ideas and intentions were followed and enforced by the Law Grenelle II.

2. The law Grenelle II: the Enforcement Instrument of the Law Grenelle I

This law improved the quality of environmental CSR in France, through the improvement of the reporting duty (i), the creation of a report on Greenhouse Gas Emission by companies (ii) and a liability regime for parent companies in certain types of industries (iii).

i. The Modification of the Scope and Extent of the Duty of Reporting

The first chapter of the title on Governance in the second Grenelle law[44], is the relevant chapter to determine how companies will be impacted by the environmental objectives set by the Parliament, especially its article 225. It indeed modified the previous version of the article L.225-102-1 of the Commercial Code. This article has proceeded to several improvements since it has extended the reporting duty in both quality (b) and quantity (a), and ensured some forms of control over the respect of this provision (c). Yet, there are still significant practical limits (d).

a. The Quantitative Enlargement of the Companies Falling under the Obligation of Information over their Environmental Impact

In fact, these duties are no longer limited to the only public company but any company that would have a sufficient number of salaries and turnover, based on the *Conseil d'État* decree No. 2012-557, consolidated in the article R.225-104 of the Commercial Code. It determined that all public companies and *Sociétés anonymes*[45], whose turnover exceeds 100 million of euros and have more than 500 employees would be burdened by these obligations. Noteworthy, all newly admitted companies were not required to proceed to this non-financial declaration immediately: most of them benefitted from some delay to bring their internal policies in.

[44] Law No. 2010-788, *on the National Commitment for the Environment, "Grenelle Law II"* (Jul. 12, 2010).
[45] Commercial Code, Art. L.225-1, defines *Société anonyme* as: "The [société anonyme] is the company whose capital is divided into shares and which is constituted between partners who bear the losses only up to the amount of their contributions. It is formed between two or more partners." It could then be considered as an equivalent of the American model of general corporations.

Furthermore, companies are now also responsible to provide information on the doing of their subsidiaries and companies under their control, in the sense of the article 233-1 and 233-3 of the commercial Code. Thus, with these two provisions, the legislative authority has ensured an increased importance of the non-financial declaration duty on the environmental impact of companies, in terms of quantity.

Despite this first enlargement, a substantial number of companies are still excluded from this duty. From the threshold defined by the decree, it can be inferred that all micro, small and medium-sized companies are being persistently excluded. It is understandable since they are not significant actors of climate change and might pollute as much as some households, which are not required to produce such. Additionally, for a company composed of only 5 people, it might be unreasonable to ask for the production of such reports that require a very precise and detailed assessment of one company's environmental impact. The EU recognized such obligations could be burdening[46]. Thus, and as it will be studied below, it has refused to impose such duty on micro-sized companies.

b. The Qualitative Improvements Ensuring a Better Enforcement of the Duty of Information

With regard to the quality, it can be argued that there was a significant improvement as well. The duty is still to explain:

> *the actions and directions taken by the company and, where applicable, by its subsidiaries within the meaning of Article L. 233-1 or by the companies it controls within the meaning of Article L. 233-3, to take into account the social and environmental consequences of its activity and fulfill its societal commitments in favor of sustainable development*[47].

The following paragraph also made it mandatory for companies to provide a justification about the information they failed to provide, because they could either not be communicated or are not relevant with regards to the company's organization or activities[48]. There is then both a positive and negative duty of information, the negative duty bringing some form of control over the sincerity of the declaration.

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[46] Directive 2022/2464/EU, §22.

[47] Article R.225-105§1 Commercial Code, as modified by the article 1 of the Decree No. 2012-557 of April 24th, 2012.

[48] *Ibid*., §3.

Nevertheless, the required information is now more organized and precise thanks to the newly created article R. 225-105-1 of the Commercial Code. It would consequently reflect on the quality of those reports, since companies would be influenced by the structure of the law in an effort to ensure compliance with it. It is also interesting to notice that public companies have a heightened duty of information compared to the rest of companies. In the following table, there is a representation of the duties of information, which once again, encompass both an assessment of their environmental impact and the measures taken in favor of sustainable development:

Table No.2: List of duties of companies depending on their social form – Law Grenelle II.

Matters	Sections	List of Duties	Public companies	General Corporations
Environmental Information	General Environmental Policies	The organization of the company to take into account environmental issues and, where applicable, the environmental assessment or certification procedures	Yes	Yes
		Employee training and information actions carried out in terms of environmental protection	Yes	Yes
		The means devoted to the prevention of environmental risks and pollution	Yes	Yes
		The amount of provisions and guarantees for environmental risks, provided that this information is not likely to cause serious harm to the company in an ongoing dispute	Yes	No
	Pollution and waste management	Measures to prevent, reduce or repair discharges into the air, water and soil that seriously affect the environment	Yes	Yes
		Waste prevention, recycling and disposal measures	Yes	Yes
		Taking into account noise pollution and any other form of pollution specific to an activity	Yes	Yes
	Sustainable Use of Resources	Water consumption and water supply according to local constraints	Yes	Yes
		The consumption of raw materials and the measures taken to improve efficiency in their use	Yes	Yes
		Energy consumption, measures taken to improve energy efficiency and the use of renewable energies	Yes	Yes
		Land use	Yes	No
	Climate Change	Greenhouse gas emissions	Yes	Yes
		Adapting to the consequences of climate change	Yes	No

	Protection of biodiversity	Measures taken to preserve or develop biodiversity	Yes	Yes
Information relating to societal commitments in favor of sustainable development	Territorial, economic and social impact of the company's activity	On employment and regional development	Yes	Yes
		On neighboring or local populations	Yes	Yes
	Relations maintained with people or organizations interested in the company's activity, in particular integration associations, educational establishments, environmental defense associations, consumer associations and local populations	The conditions for dialogue with these people or organizations	Yes	Yes
		Partnership or sponsorship actions	Yes	Yes
	Subcontracting and suppliers	Taking social and environmental issues into account in the purchasing policy	Yes	Yes
		The importance of subcontracting and consideration in relations with suppliers and subcontractors of their social and environmental responsibility	Yes	No
	Fair practices	Actions taken to prevent corruption	Yes	No
		Measures taken to promote consumer health and safety	Yes	No

There are several explanations for this differential treatment, but the most significant one is that the Parliament is trying to incite and educate companies rather than forcing them to comply with this Reporting duty. To do so, it must have sought to avoid burdening too much the companies that were newly introduced to this new duty of Reporting in matters of environment. It is a way to gradually introduce these norms and ensure companies will be complying. There is then a good pedagogic purpose behind this discrimination.

Moreover, the law also enacted various interesting mechanisms allowing the exploitation of these data to the fullest extent. The paragraph 6 of the modified article L.225-102-1 says that "A *Conseil d'État* decree establishes the list of these information in line with European and international texts, as well as the methods of their presentation so as to allow a comparison of the data." In other words, the declaration was purposefully much more framed

than it used to be, to ensure data will be easily accessible to any parties that wish to exploit them. It is trying to remedy the under-exploitation of this data that was always described as one of the main flaws of the law NRE. In fact, the quality improvement of the information contained in the declaration should then *in fine* means a better use of this information. This law is then shifting the discipline from a purely theoretical and ideal field to a more practical one.

c. The Control Mechanisms Ensuring Proper Enforcement of the Law

Eventually, the Grenelle Law II, remedied the lack of control by creating an independent third-party body, that should be appointed by "the general manager or the chairman of the management board". Its mission is to verify and certify that the required information was given by the company and assess the veracity or sincerity of those. This certificate should also contain, if necessary, explanations given by the company in the absence of certain information as well as the indication of the diligence that the independent body implemented to accomplish its mission of verification.

Despite this clear duty, one might doubt the efficiency of such a body since it is directly implemented by the company under investigation itself. Various mechanisms ensuring certain checks were implemented to prevent such doubts from flourishing. In fact, this body cannot exercise for more than 6 financial years, it is selected "among the bodies accredited by the French Committee (COFRAC) or by any other accreditation body signatory to the multilateral recognition agreement established by the European coordination of accreditation bodies" and is "subject to the incompatibilities provided for in article L. 822-11 [of the commercial Code]." This May 13th, 2013, ministerial regulation provides more details on the procedures applied by the body while fulfilling its mission[49].

It created another interesting mechanism: the association of employees or any participating parties to this reporting duty[50]. They can give their opinion on the provided information, hence the steps taken by the company, in addition to the report and the certificate from the independent body. It certainly gives another perspective to these documents, and has a more internal approach, which might also pressure one company to comply with this duty.

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[49] Arrêté, *determining the methods in which the independent third-party organization carries out its mission* (May 13, 2013).
[50] *Ibid*.

Finally, every three years, the Government will provide the Parliament with a report on the application of these dispositions by the companies and on the Government's actions to promote CSR beyond France, both at European and International level. There were then concrete measures available to control the respect of these provisions thanks to the Grenelle law II, associating all stakeholders to this effort. This framework depicts a refined conception of environmental CSR.

d. Practical Limits to the Enforcement of the Environmental Grenelle"

A study published by an audit firm showed some progress in the respect of CSR. Still there were still some strong limits[51]. For example, and taking as a scale the 110 companies of the SBF120, all information neither related to a quantifiable field nor to the companies' activities were more rarely addressed by the reports and even if information were given, there was very limited data[52]. As an illustration, the information on the "[Adaptation] to the consequences of climate change" is not addressed in 50% of the reports, although it was required by the law and the *Conseil d'État* decree[53]. Taking the same example, out of the 50% that have not given information, 38,2% had not given any justifications for this absence, i.e. 19,25% of the companies had neither given information, nor the justification[54]. This is a significant number, amounting to almost one quarter of the companies under the duty. It reflects either a very little acceptance by the company, or a flaw of the law by imposing a reporting on too general information and the lack of sanctions associated with it. Noteworthy, out of 110 companies, 9 did not even publish a report, which amounts to 8,19% of the companies that have not complied with the new regulation at all.

The law is mandatory and there are now some ways to control its application. Nonetheless, it is still deemed to be imprecise and there was no way to impose any direct sanctions. The enforcement still relied on a procedure of Naming and Shaming from different parties and all the other indirect sanctions implied by the NRE regulations[55]. In fact, there were no litigations following the enactment of the Grenelle laws.

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[51] Deloitte, *Reporting RSE selon l'article 225 de la loi Grenelle 2: Bilan de la première année d'application*, p. 15 (Jun. 2013).
[52] *Ibid.*, p.19.
[53] *Ibid.*, p. 29.
[54] *Ibid.*, p. 21.
[55] *Ibid*., pp. 16-17.

Still, the law encompassed the situation in which a company would voluntarily submit itself to this duty of reporting. In these circumstances, to enhance such reports, it was decided the initiative should be highlighted, as well as the norms it relied on to submit it[56], whether they were French, International, or European standards tools[57]. The Parliament made an implicit reference to some soft law tools, which means they can be used by both companies to proceed to the report and the controlling entity to shed light on the obscure information required by law. Such voluntary reports occur very rarely as in general smaller companies neither have the means, nor the time to do so. Especially, when the Law Grenelle II is also introducing a new component to the CSR, which is the Report on Greenhouse Gas Emission called "Bilan GES".

ii. Le Bilan Gaz à Effets de Serre (GES)

The article 75 of the second law Grenelle created the article 229-25 within the environmental code, imposing a new report on the Greenhouse Gas Emission under certain circumstances. Any private legal entities employing more than 500 persons within mainland France and more than 250 persons beyond the main French territory are required to enact this new report and make it available to the public, every three years.
The type of emission was also framed by the decree n°2011-829, published on July 11th of 2011, which are the "direct emissions and indirect emissions emitted by the use of electricity, heat or steam"[58], which remains a pretty limited scope. Still, in each region of France, the "Préfet" and the President of the Regional Council will have to coordinate the collection of data, draw conclusions from these data and check their coherence. Noteworthy, this report is not limited to a brief summary of one company's emission but also contains any actions considered by the company to reduce the emissions it produces.

This new provision once again depicts the will of the State to educate all the actors of climate change about their actions and to force them to encompass measures to reduce their environmental impact. However, this report is supposed to be mandatory, despite the complete absence of sanction in case of non-respect of the provision by any of these entities. Moreover,

[56] Commercial Code, Art. R.225-105.
[57] Global Reporting Initiative; ISO 26000; Guiding Principles of the OECD.
[58] Décret n° 2011-829 du 11 juillet 2011 relatif au bilan des émissions de gaz à effet de serre et au plan climat-énergie territorial

the recipient of this duty is not clearly specified, which would make it difficult to determine on which person does this duty bear. Traditionally, the stakeholders, namely the company's directors and managers, were the one in charge of any reporting duties. Shareholders were not associated much with it, they only had a presentation of the report by the directors or managers, before it was published. Stakeholders then had a prominent role. This time, it is not mentioned which entity will bear the responsibility of this duty. In other words, it might be difficult to engage either criminal or civil liability as previously discussed in this section.

As exposed in the annotated version of the article 229-25 of the environmental Code, only 56% of the companies under the obligation were complying with this disposition. In 2018, this number even dropped at its lowest, since only 35% of the companies were complying with this duty[59]. Thus, the Ordinance n°2015-1737 of December 24, 2015, taken in application of the Law n°2015-992 on the energy transition, modified few elements. This report should be produced every four years and the non-respect of this disposition is sanctioned by a fine that could not exceed 1,500 euros. Being obviously not deterrent enough, the fine was later increased to 10,000 euros and 20,000 euros in case of recidivism[60]. Noteworthy, there were no cases delivered on the basis of this article so far: the respect of this disposition has yet to be controlled by French Courts. In fact, this article is more often invoked as part of urbanization litigation[61].

Eventually, to remedy the limited scope of application, the decree No. 2021-1784, in application of the article 244 of Finance Law for 2021 on the "plan de relance", has created a simplified and mandatory report on Greenhouse Gas emissions for all companies with more than 50 employees, benefitting from State financial support through the "plan de relance".

iii. The Creation of a Liability Regime in Corporate Social Responsibility

The Grenelle Law II has also created the article L.512-17 of the environmental Code which recognizes the liability of a company for their subsidiaries, if there either are a substantive threat or actual damage to the environment. Although the scope is very limited, it depicts for the first

[59] Editions Législatives Lefèbvre Dalloz, Bilans d'émission de GES : un taux de conformité incroyablement faible, Environnement, Le Veille Permanente (Sept. 23, 2019; accessed Jul. 5, 2023).
[60] Law n°2019-2014 on the Energy and Climate, on November 8th, 2019
[61] Conseil d'État, 9ème chambre, 7 février 2018, 400890 ; CAA de NANTES, 4ème chambre, 18 novembre 2022, 21NT01301; CAA de VERSAILLES, 6ème chambre, 22 décembre 2022, 20VE01315

time an intent to go further into CSR, by creating a liability regime. Being a huge step towards a stronger CSR, some substantial limits were added to this regime.

In fact, only companies operating "Installations Classées pour la Protection de l'Environnement" (ICPE), which translates as "Classified Installations for the Protection of Environment", are falling under this law. It significantly reduced the field of application to a particular kind of company.
Additionally, this liability can only be argued if the subsidiary is undergoing a liquidation which is a significant procedural limit. The company, to be liable, must also be the author of a *faute caractérisée* which can be defined as a fault that exposed a third person to a particularly serious risk that the author could not ignore. This is then a heightened standard of liability, which makes it in practice impossible to sue a company based on this article. Especially when only the subsidiaries targeted in the article L.233-1 of the commercial code are targeted. This limitation excluded all companies controlled by other means than their capital[62].

Eventually, if liability is still established, the parent company will only have to pay for the rehabilitation measures. There would be no fine or any other deterrent, punitive measures. The scope of this article is then extremely limited and triggered a lot of disappointment[63]. However, this article opened the gate for a new era of CSR in France, one that includes more duties at the very minimum and liability to some extent. It also reflects the very specific French and European approach to create a regime step by step, ensuring a balanced evolution for companies and all other actors.

The question of subsidiaries is then quite disregarded by the Parliament. Its laws spoke in general or abstract terms for the duty of information, and they do not allow a practical form of liability. Yet, most pollution and environmental threats are realized in foreign countries nowadays, since the production of primary resources and goods are mostly in developing countries because of the delocalization of production facilities phenomenon. As an illustration, to produce electric cars' batteries, rare metals are needed. Still, the exploitation of mines to obtain these metals is mainly in developing countries that do not implement environmental CSR.

[62] Commercial Code, Art. L.233-3.
[63] Pierre Alexandre De Maurey, *The Environmental Responsibility of Parent Companies : The Painful Utopia of the Grenelle Law II.*, Lettre de Juristes de l'Environnement, (Nov. 3, 2010).

Such production is also both extremely dangerous for the workers and the environment[64]. Still, these threats and damage to the environment and human rights usually escaped the French environmental CSR because of the extra-territorial component, although French companies might be the controlling entity. New evolutions were then needed following this step-by-step method.

II. The New Era of Environmental Corporate Social Responsibility through Revolutionary Tools

The Duty of Vigilance (A) and the law PACTE (B) were both enacted in 2017 and 2019 to answer pressing circumstances to improve environmental CSR legal framework.

A. Duty of Vigilance Law

Following the Rana Plaza dramatic incident in April 2013, in Bangladesh, causing the death of more than 1,100 employees, most European countries were outraged. This local factory was mandated by major European textile industries to employ local workers to produce European brands' clothes. In fact, none of these companies, namely Mango and other clothes companies, owned or built factories in these traditional areas of delocalization of industries. Instead, they rely on local employers and factories, disregarding the reality of working conditions there. In other words, they consciously disregarded mistreatments, extremely low wages, unsanitary and unsafe working conditions. This factory eventually collapsed, causing this dramatic outcome[65]. It is only one example among other factories of that kind.

The French Parliament was the first authority in the world to take action to prevent such situations from occurring again, by enacting the Duty of Vigilance for ordering companies and parent companies on March 27th, 2017[66]. It is a new kind of companies' due diligence in France. The scope of the law should be determined (1) before the examination of the sanctions (2) and the practical applications that were already made (3).

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[64] UNCTAD, *Developing countries pay environmental cost of electric car batteries* (Jul. 22, 2020).
[65] Le Monde, *Effondrement du Rana Plaza, la mort de l'industrie,* Économie, Chronique (May 26, 2013), https://www.lemonde.fr/economie/article/2013/05/26/rana-plaza-la-mort-de-l-industrie_3417734_3234.html.
[66] Law No. 2017-399, *on the duty of vigilance of parent and controlling companies* (Mar. 27, 2017).

1. The Scope and Content of the Duty of Vigilance Law

The law is more concise than all other laws on environmental CSR. Still, in its first article, creating the article L.225-102-4 of the Commercial Code, it defines in a very efficient way the wide scope of companies impacted by this new law:

> *Any company that employs, at the end of two consecutive financial years, at least 5,000 employees within it and in its direct or indirect subsidiaries whose registered office is located on French territory, or at 10,000 employees within it and in its direct or indirect subsidiaries whose head office is located in France or abroad, establishes and effectively implements a vigilance plan*[67].

If the companies fit these requirements, they will have to enact a vigilance plan to monitor their action and the actions of their subsidiaries, as defined by the article L.233-1 of the commercial code, the companies they directly or indirectly control, as defined by the article L.233-3, L233-4 and L233-16 II of the same code, "as well as the activities of subcontractors or suppliers with whom an established commercial relationship is maintained, when these activities are related to this relationship.[68]" The scope is then quite broad since it encompasses French companies having subsidiaries both in France and foreign territories. There is then an extra-territorial effect to environmental CSR.

The plan must also include any "reasonable measures to identify risks and prevent serious damage to (…) the environment[69]", resulting from the company's, and all of the previously listed companies, activities. The very first limit appears in these words. There is no obligation of result but only an obligation to use every necessary and reasonable means. Damage to the environment can still occur and a company will not be held liable as long as it took what a judge will decide as reasonable, which can vary a lot from one judge to another depending on their sensibility. Noteworthy, this plan can be created in collaboration with any interested parties of the companies, whether they are the employees or the shareholders. It is then trying to create an inclusive place, so that all can feel concerned by this duty. The law also provides a list of five elements that must appear in the plan, although they will be later defined in a decree. They are the following:

> *1° A mapping of risks, for their identification, analysis and prioritization;*

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[67] *Ibid.*, Art. 1.
[68] *Ibid.*
[69] *Ibid.*

2° Procedures for regular assessment of the situation of subsidiaries, subcontractors, or suppliers with whom an established commercial relationship is maintained, with regard to risk mapping;
3° Appropriate actions to mitigate risks or prevent serious harm;
4° An alert mechanism and collection of reports relating to the existence or occurrence of risks, established in consultation with the representative trade unions in the said company;
5° A system for monitoring the measures implemented and evaluating their effectiveness.

It then appears to provide every key feature a vigilance plan should have to ensure its efficiency and concrete application. Still, no government regulation, which is supposed to allow or ease the practical application of the law and define the details of it, was ever created as of this day. This article is the only guidance given to companies to enact their own vigilance plan. There is as a consequence substantial room given to companies to decide how they will proceed with regards with it, without a significant risk of being held liable for the violation of this newly created article.

2. The Sanctions of the Violation of the Law

The vigilance plan, and the report on the application of this plan, must be made available to the public and included in the financial report of the article 225-102 of the Commercial Code, along with the article 225-102-1 report.
It allows any person with interests to review the information and if necessary, they can introduce two different types of action in front of the competent jurisdiction. The first one, consists in asking the tribunal to issue an injunction to one company to comply with the duty it has violated regarding the law. If after the three months following the injunction, no action was taken by the company, it will be held liable and another injunction assorted of a penalty fine will be issued, mandating the company to comply with the obligations. The second one, displayed in the second article of the law on duty of vigilance, created the article L225-102-5 of the commercial Code, which introduces the possibility to sue a company for failure to respect its obligation and force it to repair the damage that would have otherwise been avoided. It is however the common regime of civil liability, which implies that fault, damage, and causation between the two must be demonstrated. Still, from the very beginning, concrete ways to hold a company liable for the wrongdoing of its subsidiaries, or any company under its control or influence, were created. The Parliament also tried to enact a significant civil fine, amounting from 10 to 30 millions depending on the circumstances and the occurrence of a damage that could have been avoided,

that would deter any companies to disregard their newly created civil obligations. Still, the Constitutional Council censored this provision since it was not respecting the principle of legality of criminal offenses[70].

Despite this great ambition, this law is full of disappointment for environmental CSR. First of all, by imposing the common regime of French civil liability it can be made difficult by any person with an interest to demonstrate lack of one company with regards to its plan. In fact, most subsidiaries or other targeted companies are abroad. It may not be always easy to acquire information of how things are operating there, and the vigilance plan might appear sufficient in a French context. Furthermore, not all States in which these subsidiaries are located may be cooperative and support fact-finding. This standard might then be too high to be met by any interested parties. Especially when no guidance was given on the actual content of the vigilance plan, which renders almost impossible the determination of a violation unless it is substantial. Companies have then a very wide scope of action and may not face any type of liability as long as they include the five features discussed above. Especially, when the principle of criminal legality is a constitutional principle: no judge will agree to hold a company liable for lack of its plan if it does not provide enough, as long as the five points are mentioned in the vigilance plan.

Eventually, it is once again unfortunate the Parliament has not defined with more details the content of the vigilance plan. If it had done so, the penalty fine would not have been the only means to sanction one company for its violations of its obligations. The significant fine could have been held constitutional since the scope would have been precisely defined, in accordance with article 8 of the Declaration on Human and Citizens Rights. Thus, the only sanction left is the penalty fine, if one company has not enacted a vigilance plan, given the freedom they have on its content thanks to the Parliament and Government's inaction.

3. Practical Impact of the Law: The Example set by the case *Les Amis de la Terre*

The recent cases based on these articles are a great illustration of the limitations discussed above. The very first case in front of French jurisdiction involved Total Energies SE against several associations, including the Association "Les Amis de la Terre – France", which is the

[70] Décision n° 2017-750 DC, Abstarcts, 4. DROITS ET LIBERTÉS, 4.23. PRINCIPES DE DROIT PÉNAL ET DE PROCÉDURE PÉNALE, 4.23.2. Principe de la légalité des délits et des peines, 4.23.2.1. Compétence du législateur, 4.23.2.1.2. Applications, 4.23.2.1.2.2. Méconnaissance de la compétence du législateur" (Conseil Constitutionnel, Mar. 23, 2017).

French representative for the association Friends of the Earth – International. Total Energies is a company fitting the scope defined by the article 225-102-4 of the Commercial Code. It has subsidiaries on every continent. But the main focus is on this company's subsidiaries in Uganda, Russia, and Tanzania. It has indeed published a vigilance plan in March 2019 in accordance with the article L225-102-4 of the commercial code, but the different environment association found it insufficient. As a reaction, they introduced an action before the Judicial Court of Paris in October of the same year requiring an injunction and a penalty fine for non-compliance. This case was the very first one, so it had to be decided first whether civil or commercial jurisdictions were competent. After, many twists, the commercial chamber of French Supreme Court of the private order, *la Cour de Cassation, chambre commerciale*, declared that the plaintiffs bringing a claim against a merchant and the vigilance plan being a non-commercial act, they had the opportunity to choose between the civil and commercial order. Thus, the jurisdiction in front of which the claim was first brought was competent to hear the case[71]. It took a little bit over two years to reach this first competence judgment, which depicts the hardness of the issue. In reaction to this situation, the article L211-21 of the Code of the Judicial organization was created by the law No. 2021-1729 so as to set in stone the competence of Paris Judicial Tribunals to hear about actions based on the duty of vigilance and its articles L.225-102-4 and L.225-102 of the Commercial Code[72]. It then took over two years to reach the final decision on the actual matter, after the decision was finally delivered by the Judicial Tribunal of Paris on February 28th, 2023[73].

This decision could be perceived as demonstrating both significant limits of the duty of vigilance and hope with regard to its future. First of all, the action was rejected since none of the association had standing. None of them were direct victims, or represented victims of Total Energies and their social purpose was too wide to allow such action. Additionally, they made a mistake by introducing an action requiring an injunction and a penalty fine, while they should have waited for the judge to first enact the injunction and then require the penalty fine if within the three months following the decision the company had not complied. The action ought to have been rejected. Still, the judge proceeded with the examination of the vigilance plan under controversy so as to set an example on the limits of the Law on the Duty of Vigilance. It concluded that none of the provisions were violated since none of them imposed a definite content for the vigilance plan and Total Energies had addressed all five points with enough

[71] Cass. Com. n° 21-11.882, n°21-11.957 (Dec. 15, 2021).
[72] Law No. 2021-1729, Art. 56 (Dec. 22, 2021).
[73] TJ Paris, No. 22/53942 (Feb. 28, 2023).

details. The decree missing and the law failing to make any reference to any soft law tools, it was impossible to expect more from any company. It continued by saying that the Duty of Vigilance is not an obligation of results but an obligation to put all reasonable means to prevent the damage. However, there is no principle emphasizing on what those means should be, there is no independent mechanism controlling the enforcement and efficiency of such duty. There was then absolutely no room for the association to bring such claims.
Once again, this duty of vigilance depicts environmental CSR as an empty shell. There is an intent to trigger changes into the practices of companies. Yet, there is very limited mandatory effect, and these dispositions mostly rely on the will of companies and their awareness over the environmental issues[74]. A concrete example of this reliance on the will of companies is the fact that companies also implemented these kinds of plans before legislation even existed. See for example Switzerland multinational companies that enacted such a due diligence plan before any hard law being created by its legislative Power[75].

There was however hope in 2021, since a law revising this provision among others was about to intervene. However, it only extended the companies included in that scope without emphasizing on the extent of the obligations[76]. Still, there is hope for any future litigations since more cases are coming before Courts and the most recent one involves Danone, which was assigned in front of the French judiciary tribunals in January 2023 for not addressing the politics of *deplastification* in its vigilance plan[77]. There is still room for the judge to intervene and, over time, precise the extent of the obligations[78]. This law also succeeded in obliging companies to provide vigilance plans, which force them to think about these policies and include them in

[74] *Ibid.*, pp.14, 17: "Corporate social responsibility, which is part of this development, refers to a concept according to which companies integrate social, environmental and economic concerns into their activities and their interactions with stakeholders, initially based on a voluntary approach gradually supplemented by a legal and regulatory framework aimed at better overseeing the measures deployed and evaluating their effectiveness.(…)
It should be considered that if the legislator did not intend to give a precise outline to the general measures which are imposed on certain companies within the framework of the duty of vigilance, he has on the other hand expressly expressed his intention to see this plan of due diligence developed within the framework of co-construction and dialogue between the company's stakeholders and the company"

[75] Katrin Deckert, *Devoir de vigilance des sociétés mères et des entreprises donneuses ordre un exemple à suivre ?*, CCI Paris Île de France & Centre de Recherche sur le Droit des Affaires (Jun. 14, 2017), https://www.cci-paris-idf.fr/fr/prospective/creda/devoir-vigilance-societes-meres-entreprises-donneuses-ordre.

[76] Law No. 2021-1104, Art. 273(V) (Aug. 22, 2021).

[77] Cynthia Picart, *Devoir de Vigilance : assignation de Danone*, Picart.Blog (Feb. 28, 2023; accessed Jun. 20, 2023), https://www.picart-law.com/blog/devoir-de-vigilance-assignation-de-danone/.

[78] Ana Maria Ilcheva, *What application of the duty of vigilance after the judgments of February 28, 2023*, Dalloz Actualité (Apr. 13, 2023): "The judge's door is therefore not closed; it is ajar... It is now up to the trial judge to take on the interpretation of the texts, however imperfect they may be, in order to control the implementation of the vigilance obligations"

their management. Additionally, because of the social conjecture, third parties may pressure companies to improve the quality of their report.

The government and Parliament have also published two analytical reports on the evaluation of the effect of the law, published in both 2020[79] and the other in 2022[80]. Similar findings were highlighted but it allowed to determine the scale of the respect of the law by French companies. It indeed emphasized on how young and immature this law is in the context of French company law. First, there is no formal list of companies impacted by this duty which makes it difficult to determine whether some companies that are borderline should enact a vigilance plan or not. In the same way, the investigation of the respect of this duty is made extremely difficult since one should first determine whether there is such a burden. As a result, NGOs proceeded to this determination and found that in 2021 only 263 companies were under this obligation and 17% were not publishing any vigilance plan[81]. The lack of guidance is also highlighted but counterbalanced by the preexisting practices by companies that enacted such plans at their own initiative. Additionally, companies must rely on older CSR instruments, such as the reporting duty since they are complementary tools and are based on the same rationale. Companies should also rely on international norms and soft laws[82]. This complementary relationship was then the trigger of some confusion between the reporting and vigilance duty as highlighted by a French newspaper[83].

There are numerous other barriers. For example, some actions expected by companies would

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[79] Anne Duthilleul & Matthias De Jouvenel, *Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, Ministère de l'Économie et des Finances, Conseil Général de l'Économie de l'Industrie, de l'Énergie et des Technologies (Jan. 2020).

[80] Coralie Dubost & Dominique Potier, *La mission d'information sur l'évaluation de la loi du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, Assemblée Nationale: Commission Des Lois Constitutionnelles, De La Législation Et De L'administration Générale De La République (Feb. 24, 2022).

[81] *Ibid.*, p.17.

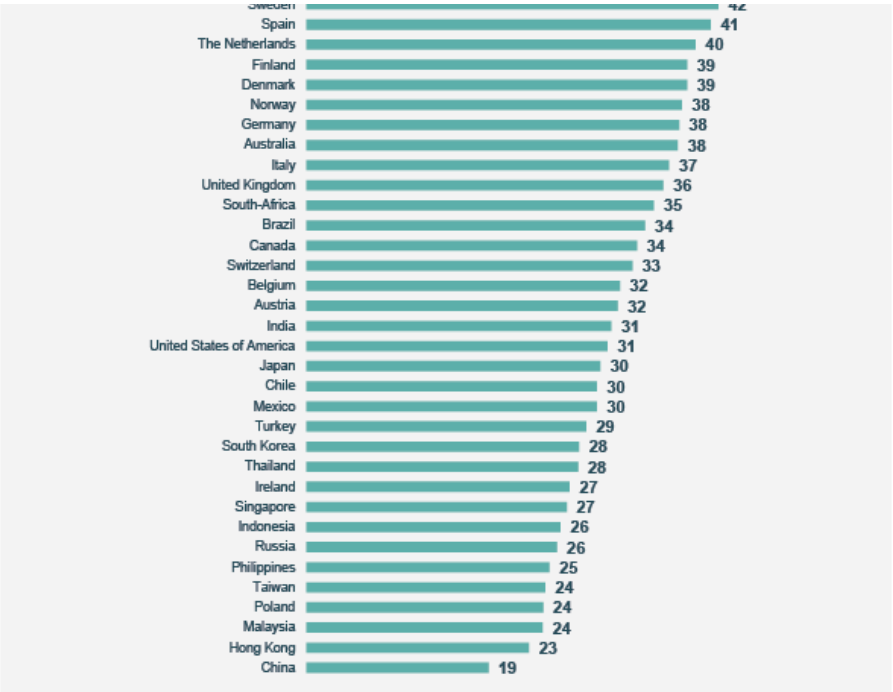
[82] *Ibid.*, pp. 35, 59:
"point 2.4 of the OECD Due Diligence Guidance for Responsible Business Conduct recommends, "based on the information obtained on the actual and potential negative impacts of the company, [to] classify, if necessary, the risks of impacts on CRE issues (2) in order of priority, and [to] define the measures to be taken according to the seriousness and the probability of the latter."

[83] Marie Bellan, *Devoir de vigilance : les nouvelles contraintes qui vont peser sur les entreprises*, LesEchos (Dec. 26, 2017, accessed Jun. 20, 2023), https://www.lesechos.fr/2017/12/devoir-de-vigilance-les-nouvelles-contraintes-qui-vont-peser-sur-les-entreprises-190559: "For some large French groups, the law is not experienced as a threat but rather as a deepening of already old practices. Which says a lot about the discrepancy that is sometimes observed between the discourse of employers' organizations and the actions carried out by certain companies in the field"

be illegal in certain countries because of a different limit of freedom of speech[84], the fact that these plans are only read by investors[85], or even that the dialogue with NGO was broken which threatened the duty of vigilance of becoming "a paper obligation, a "tick the box" type compliance, and not a real daily risk reduction policy.[86]" In fact, the association of interested parties which ranges from employees to NGOs was free to be determined by companies. In the end, instead of involving them throughout the process, companies in general only informed them. Eventually, alert mechanisms within companies were developed thanks to the Reporting duty and the fight against corruption[87]. The vigilance Duty also benefits from this new mechanism although it suffers from great inefficiency since they are also the vector for other reclamations, such as employee claims.

The reports are still trying to remain optimistic, especially when the law was new, and the report intervened only three years after its enactment. France was also quite isolated, which made it more difficult to enact more laws so as not to impair European harmony. Other European Nations decided to follow the movement and implemented by the duty of Vigilance in the following years[88]. Thus, there is still room for progress. Looking at data depicted below and from the VIGEO EIRIS study[89], it can also be argued this law had a positive impact over the policies of French Companies. Although the study was on Human Rights matters, it can be argued the evolution should be about the same over the environmental impact of companies. As a matter of fact, France was rated the first with 48 after the law was enacted, when the US was 31 and China 19. It cannot be denied there was progress thanks to this law.

[84] Anne Duthilleul & Matthias De Jouvenel, *Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, pp. 38.
[85] *Ibid.*
[86] *Ibid.*
[87] Law No. 2016-1691, *On the Transparency and Fight Against Corruption and the Modernization of the Economic Life: "Loi Sapin II"* (Dec. 9, 2016): it provides a protection of whsitleblowers, bringing closer the French model to the American one, whether they are internal or external to the company.
[88] Osborne Clarke LLP, *The 'duty of vigilance' regulation in four European countries compared with the draft EU directive and the UK Modern Slavery Act 2015* (Oct. 2021).
[89] Vigeo Eiris, *The human rights responsabilities of business in a changing world / How companies across the globe are addressing key areas of human rights* (Feb. 2017).



It still proceeded to make certain recommendations to the French legislative authority[90]. In conclusion, the Duty of Vigilance Law appears to be a revolutionary tool since it is for the first time implementing positive obligations on companies regarding their extra-territorial impact. Still, the same flaws CSR has been suffering from for two decades are persistent: reliance on the will of companies, impreciseness, lack of exploitation of these data, lack of control and effective sanctions. In an attempt to overcome these issues, the PACTE law was enacted to merge environmental concerns, among other objectives, to the DNA of French companies.

B. Loi PACTE: Plan d'Action pour la Croissance et la Transformation des Entreprises

This law intervenes after president Macron was elected in 2017. It was indeed part of his electoral campaign promises to stimulate the economy through the support of the growth of small and medium size companies. The PACTE law, which can be translated as the Action Plan

[90] Coralie Dubost & Dominique Potier, *La mission d'information sur l'évaluation de la loi du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, p. 16.

for the Growth and Transformation of Companies, has four main objectives[91]: easing the creation of companies[92], reducing the barriers to the growth of one company[93], the privatization of some companies to allocate their benefits to the "breakthrough innovation fund"[94] and transforming the role of companies within the society in general[95]. The article 169 of the PACTE Law indeed modified the article 1833 of the Civil Code so as to encompass the fact that a company should now be "(…) managed in its social interest[96], taking into consideration the social and environmental issues of its activity". It even goes further with the modification of the articles 1835 and 1844-10 of the same Code, implying a reshaping of the Civil Code to integrate this new objectives (1), followed by the transformation of the commercial Code (2) and sanctions (3)

1. Environmental Concerns Integrated to the DNA of Companies through the Civil Code

This newly transformed article 1833 infers a very interesting progress. Before 2019, social and environmental concerns used to burden companies that exceeded thresholds set by the reporting and the vigilance duty laws. Smaller companies were then escaping any duty towards the environment, except for the respect of general environmental law. This article introduced the obligation for every company to have regards to environmental issues during its daily managerial decisions, since it is contained in the general chapter of the Title dedicated to the definition and framing of every company. This duty now applies to all companies without any regard for their social form. It is then both a declaration of intent and a general objective for companies to comply with this climate change context.

[91] Le Monde, *Comprendre la loi Pacte, censée « transformer les entreprises*, Économie Française (Oct. 15, 2018), https://www.lemonde.fr/economie-francaise/video/2018/10/05/comprendre-la-loi-pacte-censee-transformer-les-entreprises_5365297_1656968.html.

[92] Law No. 2019-486, *on the Growth and transformation of Companies*, "*PACTE Law*", Art. 56-70 (May. 22, 2019).

[93] *Ibid.*, Art. 11-12.

[94] *Ibid.*, Art. 130-51.

[95] *Ibid.*, Art. 169-92.

[96] Definition of Social Interest by Report Viennot, Marc Viénot, *Rapport Viénot sur le conseil d'administration des sociétés cotées*, RIDC, pp. 647-655 (1996): "the social interest can thus be defined as the superior interest of the legal person itself, that is to say of the company considered as an autonomous economic agent, pursuing its own ends, distinct in particular from those of its shareholders, those of its employees, its creditors including the tax authorities, its suppliers and its customers, but which correspond to their common interest, which is to ensure the prosperity and continuity of the company."

The Legislator also went further by adding a second part to the article 1835 of the civil code which traditionally emphasized on the content of articles of association, that may now also "specify a *raison d'être*, made up of the principles with which the company adopts and for the respect of which it intends to allocate resources in the performance of its activity." This *raison d'être* is however a foggy notion, that was never defined in the French case law so far. It is difficult to grasp the practical differences with the general article 1833. Still, this article does not refer to some vague and general management objectives. The company can now include in its articles of association a new purpose, that can be the protection of the environment. In other words, it acquires a mandatory effect since it was set in the law of the company by the will of its owners at its incorporation. As a consequence, it must will be bound to take any necessary means to complete its purpose and "affirm a singular strategy which will then constrain its actions.[97]" Some authors also argued this disposition was trying "to go beyond the shareholder reason that has structured the value creation model since the industrial era, in favor of an entrepreneurial reason that adds, to the contract between the partners, an overall benefit for the company[98]". Being a company with a *Raison d'être* also provides a certain number of advantages that should not be undermined since they work as incentives. These advantages range from improved image of the company in the public, to protection against hostile takeover[99]. That's why companies decided to voluntarily submit themselves to this article. For example, the French National Rail Company, La SNCF, has proceeded to adopting a *Raison d'être* after the PACTE Law was promulgated[100].

Thus, this article is not a fictional hope of the Parliament, but an example of successful general association of companies to environmental and social concerns. CSR might now be

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[97] Arnaud Raynouard & Antoine Le Grix, *Raison d'être : réflexion autour d'une notion encore énigmatique*, Deloitte Société d'Avocats (Nov. 19, 2020), https://blog.avocats.deloitte.fr/raison-detre.

[98] R. Durand et P. d'Humière, *L'entreprise et la « gestion des communs »*, Le Monde, Tribune (Apr. 19, 2018, accessed June 22, 2023), https://www.lemonde.fr/idees/article/2018/04/19/l-entreprise-et-la-gestion-des-communs_5287718_3232.html.

[99] *Ibid*.

[100] See the new Articles of Association of the French National Railway company, SNCF, *Quelle Raison d'Être pour le Groupe SNCF?*, (Feb. 16, 2022, accessed Jun. 22, 2023): "The SNCF Group's mission is to contribute to the vitality of society and its regions. We offer transport services essential to economic dynamism and social ties, essential to the development of territories as well as to the well-being of their inhabitants on a daily basis, finally essential for a successful ecological transition. The public service mission entrusted to SNCF when it was created in 1938 continues today in the commitment of the men and women of the company, serving the general interest. Guarantors of safety, we imagine and implement for our customers, with professionalism and a sense of community, 21st century mobility and logistics solutions, innovative and central to the decarbonization of transport.
The performance and integration of all of our rail-related businesses aim to optimize the cost and overall impact of transport for customers, taxpayers and citizens. Our infrastructures and our services, which are part of the long term, constitute a common good to meet social, ecological and economic challenges, and thus act for a society in motion, united and sustainable." [Translation from the French website].

seen as a general practice of companies in France. A list of companies with a Raison d'Être can also be found on the website Société À Mission.com[101].

This new era, where CSR has integrated the civil code, is extremely striking because it used to be disseminated across the various Codes. As an illustration, looking at article 169, it is already made reference to the Civil Code, the Commercial Code, *Mutual Insurance* Code. It then gives more consistency to the discipline and attempts to solve one of its flaws. Vagueness is still a key word of CSR, but companies now do bear the responsibility to merge into their effective management any environmental and social issues, which certainly has an educational purpose. This new integration is then a revolution of the rationale of Corporate law in France, a transition that was started in 2001 and slowly but surely evolved into a wider discipline.

2. The Transformation of the Commercial Code

The Commercial Code also benefited from some changes. Its article L.210-10, created by the article 176 of the PACTE Law, is creating a new regime of company with a mission, status that can be claimed publicly. At first, the difference with the article 1835 of the Civil Code does not appear self-evident. Still, there are many different advantages if one company benefits from such status. It can improve the image of one company and then as a consequence improve its economic performances, protect a company from Hostile Takeover[102] and the company can also benefit from an interesting fiscal regime, with for example tax abatement[103].

It then appears evident why one company would like to be publicly qualified as a company with a mission. To do so, it must fulfill the conditions set by the article.
First, it must specify a *Raison d'être* as specified by the article 1835 if the Civil Code and it should at the very minimum include one social and environmental objectives the company will pursue while performing its activities. It shall then detail the procedure on which it will rely to monitor the execution of the mission. The newly created Mission Committee will be exclusively

[101] Sociétés À Mission.com, *Liste des Sociétés À Raison d'Être* (last accessed Jun. 22, 2023), https://societeamission.com/liste-societe-re/.
[102] Bercy Infos, *Comment devenir une société à mission?*, Ministère de l'Économie des Finances et de la Souveraineté Industrielle et Numérique (May 3, 2022), https://www.economie.gouv.fr/entreprises/societe-mission.
[103] Christian Nouel & Didier G. Martin, *L'appréciation de la conformité à l'intérêt social après la loi PACTE et ses incidences sur le plan fiscal, II.De Quelle Manière Doivent Êtres Traités Fiscalement, Après la Loi PACTE, les Actes de l'Entreprise qui Tiennent Compte des Enjeux Sociaux et Environnementaux*, GIDE Actualités et Publications, ESG, RSE, Développement durable (Oct. 4, 2021).

and solely in charge of that mission. Thus, there is a clear separation with the other corporate bodies of the company. It allows the procedure to benefit from a certain independence that implies in theory a complete absence of biases towards the effectiveness of the mission. It will then publish every year a report on the current state of the mission, a report that will be joined to the management report issued by the board of directors or managers every year according to the article L.232-1 of the Commercial Code. It will eventually be presented during the meeting in charge of the approbation of the company's accounts. Noteworthy, this committee has the power to do any needed verification and ask for any documentation that would be necessary to the determination of the fulfillment of its mission. Its powers are then large within the organization of the company. It will surely transform the internal governance of companies falling under such qualification. This procedure also helps shareholders or any interested parties within the company to determine whether it is respecting its duties and using all necessary means to fulfill its mission. Furthermore, at the fourth paragraph, an independent third-party body, framed by a decree in "Conseil d'État"[104], should be created to monitor the respect of the qualification. This law is then once again offering a new rationale to CSR, relying to some extent on the former technique previously used by other CSR tools. This body's opinion will also join the management report previously cited, along with the report from the internal committee. These companies are then strictly controlled in exchange for their numerous advantages. A list of companies with a mission can also be found on the website Société À Mission.com[105]. They amount to more than 1,000 companies, which is a significant number of French companies.

Yet, the reporting obligation was short of sanctions and the one contained in the vigilance duty law was ineffective. What are the ways to sanction one company that would violate the civil and commercial dispositions?

3. The sanctions of the Violation of the Civil and Commercial Dispositions

The article 1844-10 also enshrines deeper this obligation to take into consideration by imposing a concrete sanction in case a company would completely disregard environmental issues, in violation of the article 1833: such violation is a new cause of nullity of a company. In other words, if one company has a complete disregard for social and environmental issues while

[104] Décret No. 2020-1, Art. 3 (Jan. 2, 2020).
[105] Sociétés À Mission.com, Liste des Sociétés À Mission, (accessed Jun. 22, 2023), https://societeamission.com/liste-societes-a-mission/.

pursuing its activities, it can be liquidated, and all of its contracts and commercial relationship will immediately be ended by the judicial decision. This sanction appears severe and not economically desirable for the innovation objective France had taken over. A lower sanction can be found in the common regime of company law, in a management fault attributable to the directors, as it may impair the interests of the company and thus of its owners[106], in the sense of the articles L.225-251, L.223-22 of the Commercial Code and 1850 of the Civil Code. A third party on the other hand would have to prove a separate fault that has caused him a direct damage, following the general liability regime displayed at the article 1240 of the Civil Code, which would be substantially more difficult[107]. Otherwise, there is no special sanction attributed to the violation of both of these articles.

For the violation of the provision on companies with a mission, a sanction was this time created by the article L.210-11 of the Commercial Code. If one of the article L .210-10 criteria is not respected or that the independent third-party body concludes that the self-assigned missions are not respected, an emergency procedure in front of the President of the Commercial Tribunal can occur. The party or public minister will then ask for an injunction for the suppression by the company of its title, which will imply supplementary costs for the company. If necessary, this injunction will be assorted with a penalty fine.

Because of the limited sanctions, some authors were asking themselves whether this law was not pursuing a greenwashing effect to some extent[108]. I partly disagree with that statement. The Parliament surely sought to give a greener impression of France and French companies, without compelling them to include these environmental and social concerns to their Articles of Association. It also failed to implement specific sanction tools. Although one does exist against companies with a mission, it is not enforcing any kind of deterrence or retaliation, only the fair removal of this title. But once again, it follows the path CSR has been taking for decades. It has rather focused on changing the will and practices of companies over time, instead of revolutionizing these elements overnight. It will allow greater acceptance, and companies will

[106] Didier Poracchia, *De l'intérêt social à la raison d'être des sociétés*, BJS, No. 119w8, p. 40 (Jun. 2019): "For the damage arising out of the decision to be repaired, it ought to be demonstrated that, if the decision taken would have been taken in the diligent consideration of the social and environmental consequences of the company's activities, a different decision, less damaging to the interests of the owners of the company and the company itself, would have been reached."

[107] *Ibid.*

[108] Isabelle Desbarats, *De l'Entrée de la RSE dans le Code Civil : Une Évolution Majeure ou Symbolique ? (Article 61 du Projet de Loi PACTE)*, Toulouse Capitole Publications, p.14 (Jan. 10, 2019).

internalize these objectives without destabilizing the model of governance of companies. In fact, the fault regime, the various duties of reporting and vigilance and the obligation to take any necessary steps, including the creation of new organs, can represent significant hardships for companies, especially to smaller ones. The current framing of the law seems pretty reasonable, and an increased number of companies are incorporating environmental CSR into their practices, whether in the daily management decisions or their articles of association.

Several observations can be inferred from this entire section. The CSR movement was certainly initiated by the NRE Law, since it had set the grounds for the CSR on the duty of Reporting. However, the Grenelle laws tried to perfect the information duty these companies had. Other laws or regulations followed this example, such as the article 29 of the law No. 2019-1147 on the energy and climate which extended the scope of companies impacted by reporting duties[109]. The décret No. 2022-982 also updated the report on Greenhouse Gas Emissions. Thus, environmental CSR is a constantly growing and evolving field. Yet, there is an adverse effect to this growth. The discipline is suffering from great disorganization. Its rules are diffused across the different codes and are frequently updated. For example, to determine which companies are impacted by the Reporting duties, it is necessary to search in the Commercial Code, Environmental Code, Monetary and Financial Code, Insurance Code, and any other relevant Codes. It is hardening the task for both companies under the obligation to report on environmental information and the controlling authorities, especially when no list of the companies impacted was ever produced under French law. Eventually, hidden environmental CSR references can be found through the prism of Consumer Law. In its article L121-2, consumers are protected against deceitful commercial practices when the company lies or induces mistakes on the essential characteristics of the good or service, especially on its environmental impact. Thus, companies are responsible for giving reliable information on their activities' environmental impact and any greenwashing efforts that are *in fine* detrimental to consumers, will be fined 300,000 euros and up to two years of imprisonment as stated by the article L.132-2 of the same Code.

The PACTE law, although perceived as disappointing with regards to the lack of strong enforcement mechanism, has the merit to create a general obligation upon companies at the

[109] Marianne Fournier, *Décret d'application de l'article 29 de la loi énergie-climat*, Mayer Prezioso (last accessed Jun. 27, 2023), https://mayerprezioso.com/2021/06/28/decryptage-decret-dapplication-de-larticle-29-de-la-loi-energie-climat-toujours-plus-dinvestisseurs-concernes-par-les-obligations-de-reporting-environnemental-b/.

article 1833 of the Civil Code. Thus, French companies still substantially rely on non-binding recommendations issued in 1995 and frequently updated by the French patronal union for companies whose shares were admitted on the stock market[110]. As a consequence, France persistently relies on the will of companies[111] and soft law tools that have almost acquired the force of law for companies[112].

An interesting and recent evolution relies on the "say on climate" practice which is allowing shareholders to take a more active role in the CSR[113]. This practice consists in seeking shareholders' opinion on the environmental policies enforced by the company. It can be at the initiative of either the company or the shareholders themselves. They are taking a more proactive role, which may unbalance the equilibrium of companies as set by the law. It was however confirmed as being lawful, since even if the shareholders were asked about the validity, the opinion would not be binding[114].

The CSR is also a European project, since Germany has published in 2021 its own version of the law on the duty of Vigilance, followed by the Netherlands in 2023 and other EU countries[115]. With such consensus and will being built within the European Union, it has started to develop its own set of rules on the matter. As a matter of fact, there were references to European Union influence as early as in the Grenelle Law II, in the modified article L.225-102-1 of the Commercial Code.

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[110] Afep-Medef, *Public Companies Code of Governance*, Code AFEP-MEDEF (1995).
[111] Vincent Pacheco, *La RSE des entreprises en France : guide historique*, Diligent (May 27, 2021), https://www.diligent.com/fr/blog/rse-entreprises-france-guide-historique/.
[112] Bruno Dondero, *Le Code Afep-Medef : presque une loi !*, Les Échos (Oct. 16, 2013), https://www.lesechos.fr/2013/10/le-code-afep-medef-presque-une-loi-330030.
[113] Ifa, *Assemblée générale annuelle : qu'est-ce que le say on climate ?*, (accessed June 30, 2022), https://www.ifa-asso.com/mediatheques/assemblee-generale-annuelle-quest-ce-que-le-say-on-climate/.
[114] Haut comité juridique de la place financière de Paris, *Rapport sur les résolutions climatiques say on climate*, pp. 2, (Dec. 15, 2022); exposed in Bénédicte François, *La RSE et les enjeux climatiques au coeur de la version révisée du Code AFEP-MEDEF*, Revue des Sociétés, p.2 (Dec. 15, 2022).
[115] Osborne Clarke LLP, *The 'duty of vigilance' regulation in four European countries compared with the draft EU directive and the UK Modern Slavery Act 2015* (Oct. 2021).

Section 2 - The European Union Concept of Environmental Corporate Social Responsibility

France being a member State of the European Union (EU), its law should not be ignored since it necessarily had consequences over the French legal system. The EU started to have regard for the incorporation of environmental CSR into business law around the same time France did with the first law in May 2001. It was published in July of the same year as the Green Paper, Promoting a European framework for Corporate Social Responsibility[116]. This introduction depicts how the EU was aiming at maintaining CSR as a soft law discipline, even though it was starting to address the matter in its political institutions[117]. It had become necessary at this time since various institutions and instruments were starting to address the issue. The EU also seems to be promoting CSR through voluntary actions of companies, free of any legal constraints. It went on by saying CSR is[118]:

> *20.(…) a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.*
>
> *21.Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing "more" into human capital, the environment and the relations with stakeholders.*

However, on the 23rd of February 2022, the European Parliament and Council, adopted a resolution on Corporate Sustainability Due Diligence[119], aiming at amending Directive (EU) 2019/1937. The EU Parliament indeed issued a proposal for a new directive that will be

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[116] Commission of the European Communities, *Green Paper Promoting a European Framework for Corporate Social Responsibility*, Com (2001), §§ 8-9 (Jul. 18, "2001): 8. Corporate social responsibility is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment. At a time when the European Union endeavours to identify its common values by adopting a Charter of Fundamental Rights, an increasing number of European companies recognise their social responsibility more and more clearly and consider it as part of their identity. 9.These developments reflect the growing expectations that European citizens and stakeholders have of the evolving role of companies in the new and changing society of today. This is in line with the basic message of the Sustainable Development Strategy for Europe agreed at the Göteborg European Council of June 2001, that in the long-term, economic growth, social cohesion and environmental protection go hand in hand."

[117] *Ibid.*, Introduction, §2. "As early as 1993, the appeal to European business of President Delors to take part in the fight against social exclusion resulted in a strong mobilisation and in the development of European business networks. More recently in March 2000, the European Council in Lisbon made a special appeal to companies' sense of social responsibility regarding best practices for lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development."

[118] *Ibid.*, §§ 20-1.

[119] European Commission, *Proposal For a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending the Directive (EU) 2019/1937*, COM(2022) 71 Final, 2022/0051 (COD) (Feb. 23, 2022).

examined throughout the summer 2023 to determine whether it will be adopted as a formal and mandatory tool across the EU. The proposal enlightens on the direction the EU is taking since it wishes to improve CSR and integrate risk management and mitigation of them by addressing the issue of value chains, harmonize the various European CSR rules, ensure coherence and increase accountability, and all other necessary means[120]

That is to say, the EU first lacked the political will or leverages to implement a constraining CSR law. It has since then significantly evolved on the matter and environmental CSR was the subject of a European construction (I) that gradually allowed to compensate for the French laws flaws through effective regulations (II)

I. The Genesis of the Environmental Corporate Social Responsibility in the EU

In 2011, the Commission delivered a new definition of CSR as "the responsibility of enterprises for their impacts on society"[121]. This sentence alone emphasizes how CSR departed from its traditional perception of being soft law, deprived of any legal constraints or accountability. Still, the European Community had to wait until 2013 for the very first legal base to be set through the Directive 2013/34/EU (A), followed by the Directive 2014/95/EU (B).

A. The Directive 2013/34/EU

The Directive 2013/34/EU of the European Parliament and of the Council of June 26th of 2013 relating "the annual financial statements, consolidated financial statements and related reports of certain types of undertakings" was the first one to incorporate environmental CSR into a European legislative text. This directive pertained to amending and merging three former directives[122] on the matters of European companies' annual accounts and consolidated accounts, each of them seeking to ensure better transparency and true and fair picture of businesses' acts and financial position among other objectives. None of them ever made any reference, even implicit, to any type of the CSR principles. Noteworthy, a directive is a mandatory tool under

[120] *Ibid*., p.3.
[121] European Commission, *Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final (Oct. 25, 2011).
[122] Directive 2006/43/CE; Directive 78/660/CEE; Directive 83/349/CEE.

EU law that should be enforced in all EU countries through the transposition instrument of their choice. However, only the goal of the directive is mandatory. The means to reach that end are free to be determined by each States[123]. This new directive reversed the tendency and included it at two locations. First in paragraph 26 of the preliminary comments[124] and then in the article 19.1 paragraph 1 of the chapter 5 of the Directive[125]. In parallel to France, the EU is now considering imposing a similar burden to all European companies. It stated that these annual reports should also consider "non-financial information" such as environmental and social concerns. It is then introducing the duty of companies to assess their impact on the society overall. It also highlighted in paragraph 26 the issue of parent society and subsidiaries. "Greater emphasis" should be given to this non-financial information since "the consolidated management report and the parent undertaking management report are presented in a single report". The EU is then grasping the risk of such corporate organization. But it does not go further by explaining the risks or the extent of the concern.

The text was indeed full of limitations. First, small, and medium companies are excluded from any reporting duty relying on article 19.4, following the same path as French law. Yet, paragraph 26 provides a rather convincing explanation that was also argued in France: Such reporting duty could burden these kinds of companies by implementing unnecessary burdens. As discussed above, these companies do not always have the means to enforce and respect these duties, and they are usually limited contributors to Climate Change. Such duty on them would not be very relevant, especially in the context of the EU which gathered 28 member States in 2013. All of them are not on the same scale of economic and political development. Imposing burdens on all kinds of European companies, including those from least developed States, could damage smaller companies, and even kill them which would eventually threaten the economic status of some States and the balance of the EU. This limitation is then understandable. Only larger and stronger companies should be under such a burden.

[123] See the EU, *Types of Legislation*, Directorate-General for Communication (last accessed Jun. 23, 2023), https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en.

[124] Directive 2013/34/EU, §26.

[125] *Ibid*, Chapter 5 Management Report, Art. 19.1, §3: "To the extent necessary for an understanding of the under taking's development, performance or position, the analysis shall include both financial and, where appropriate, non- financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters. In providing the analysis, the management report shall, where appropriate, include references to, and additional explanations of, amounts reported in the annual financial statements."

Yet, the directive is only speaking in vague words, setting some objectives. It has not intended to create mandatory effects of any sort. It still gave companies a significant role to willfully comply with these goals, setting no frame and leaving them free from defining it. It then failed to create a uniform frame for environmental CSR throughout the EU and triggered inequality among companies. Some were more familiar to this concept than others due to various internal and external pressures (NGOs, employees' pressure, societal and political context of the State…) which allowed them to benefit from this past practices at the expense of other companies to which it was a completely foreign concept. See for example the data on CSR rating of 13 EU countries gathered between 2003 and 2010, made available in 2015 by a study led by two French Professors[126]. It shows great disparity between EU countries[127], especially between Ireland and France in the matter of environmental CSR score (see table No. 4).

Table No.4: Notation of E.U. countries on CSR performances: focus on the environmental indicator.

This table presents descriptive statistics of the CSR score and of each dimension of CSR scores for the 1071 firm-year sample observations between 2003 and 2010. It provides number of observations (Obs.), percentage (%), mean, first quartile (Q1), median, third quartile (Q3), and standard deviation (SD) of the CSR score by country. HR is human resources rating, ENV is environment rating, BB is business behavior rating, CG is corporate governance rating, CIN is community involvement rating, HRTS is human rights rating.

			Overall CSR score					HR	ENV	BB	CG	CIN	HRTS
Country	Obs.	%	Mean	Q1	Median	Q3	SD	Mean	Mean	Mean	Mean	Mean	Mean
Austria	24	2.24	1.66	1.33	1.75	2.00	0.47	1.70	1.54	1.5	1.87	1.33	2
Belgium	49	4.57	1.62	1.16	1.50	2.00	0.59	1.79	1.63	1.61	1.38	1.69	1.59
Denmark	8	0.74	1.29	1.00	1.16	1.58	0.35	1.62	1.25	1	1.25	1.25	1.37
Finland	75	7.00	1.93	1.33	1.83	2.50	0.70	2.17	1.98	1.81	2.06	1.69	1.88
France	353	32.95	2.35	1.83	2.50	2.83	0.66	2.77	2.43	2.30	1.70	2.45	2.44
Germany	214	19.98	2.03	1.33	2.16	2.66	0.69	2.18	2.07	2.02	1.64	1.96	2.12
Greece	20	1.86	1.47	0.66	1.16	2.16	0.99	1.45	2	1.2	.85	1.65	1.7
Ireland	36	3.36	1.26	0.50	1.16	1.33	0.89	1.19	1.16	1.11	1.63	1.22	1.25
Italy	62	5.78	1.83	1.16	1.66	2.50	0.73	2.01	1.69	1.90	1.38	2.14	1.85
Luxembourg	17	1.58	1.88	1.33	1.83	2.16	0.56	2.05	1.94	2.05	1.41	1.94	1.88
Portugal	18	1.68	1.75	1.50	2.00	2.00	0.60	2.05	1.94	1.77	1.27	1.77	1.72
Spain	82	7.65	1.84	1.16	1.83	2.50	0.73	1.92	1.91	1.76	1.51	2.02	1.91
The Netherlands	113	10.55	2.32	1.83	2.33	2.83	0.65	2.20	2.28	2.41	2.46	2.38	2.31
Total	**1071**	**100.0**	**2.05**	**1.50**	**2.16**	**2.66**	**0.74**	**2.26**	**2.10**	**2.02**	**1.72**	**2.09**	**2.11**

Being aware of this issue, and in an attempt to harmonize the situation, the EU enacted its first mandatory tool a year after this declaration of intent.

B. The Directive 2014/95/EU

This directive furthers the project started in 2013 although its content remains full of flaws (1), with one inherent to the nature of the instrument since it relies on the member States transposition of the directive into their respective national laws (2).

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[126] Karim Ben Khediri & Souad Lajili Jarjir, *New Insights on Corporate Social Responsibility and Country-level Institutions in Western Europe*, Bankers, Markets & Investors, n°136 (May-Jun. 2015).
[127] *Ibid*, III. Data and Variables, 3. Descriptive Statistics, §2.

1. The Imperfect Duty Set by the Directive

This Directive is also often called NFRD since it relates to "the non-financial report directive". It was adopted by the European Parliament and Council on October 22, 2014. The purpose of this directive is to implement a mandatory reporting duty on environmental and social matters and rename it as Non-Financial Reporting. The preliminary comments are full of information setting the tone for the future of environmental CSR within the EU, following the political impulse given by the European Parliament's resolution of 2013[128]. With this directive, the EU is aiming at creating a greater harmony[129] among EU countries while ensuring transparency of the information for all[130] and ensuring all interested parties have all the necessary information[131]. At the ninth paragraph, the directive is also expressly acknowledging its reliance on soft law, national law, and international framework tools[132]. In other words, the EU has explicitly been one step behind some countries' laws, such as the French Legislature that systematically enacted similar instruments before the EU could, and other instruments.

The directive then proceeded in its article 1 to amend the directive 2013/34/EU, previously studied. It inserted article 19a on the Non-financial Statement. The bone structure is very similar to the one used by the French Legislature in 2001 and 2010. It first defines a scope of companies that will be impacted by this new directive, then sets a general objective of CSR and provides two situations in which the company will be exempted from producing a signle information or the entire document.

In fact, only large public entities, defined as "companies with a significant public interest because of the nature of their business, size or number of employees or corporate status, including banks, insurance firms and listed companies"[133], having more than 500 employees are under this duty. This directive is then sparing small and medium companies as announced

[128] European Parliament, *Resolution on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth*, (2012/2098(INI), 2016/C 024/06 (Feb. 6, 2013).
[129] Directive 2014/95/EU, §1.
[130] *Ibid*, §3.
[131] *Ibid*, §7.
[132] *Ibid*, §9; article 19a.1.§5.
[133] EU, *Rules for Statutory Audit of Public-Interest Entities – Regulation (EU) No 537/2014*, Summaries of EU Legislation: Key Terms (Last updated Jul. 7, 2020, accessed June 24th 2020), https://eur-lex.europa.eu/EN/legal-content/summary/rules-for-statutory-audit-of-public-interest-entities.html#:~:text=Public%2Dinterest%20entity%3A%20companies%20with,insurance%20firms%20and%20listed%20companies.

by the former directive and done by French law. This will is expressly stated in this directive at several occasions as well[134]. As a matter of fact, the current scope already includes around 11600 companies, which does not appear significant compared to the over 25 millions European companies. Still, in that number, many small and medium companies are included and their importance for environmental CSR was determined as inexistent with regard to the real cost of such a burden to them. As evidence, the average number of people employed by companies exercising in the industry is 13[135].

With regard to the content of the obligation, the targeted companies:

> *Shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to (...) environmental, (...) matters, including:*
>
> *(a) a brief description of the undertaking's business model;*
> *(b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;*
> *(c) the outcome of those policies;*
> *(d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;*
> *(e) non-financial key performance indicators relevant to the particular business.*

The reporting duty is then detailed by the directive only with regard to the form. The content of those boxes should be determined by member States. In other words, each States will have to determine which environmental impact information it will be expecting from companies. It is a severe flaw for the discipline, since as studied under French National Law, it lacked preciseness, consistency, and relevance. Data were also not analyzed as much as they ought to be. It once again created inequality among European countries since some will create more heavy reporting duties than others, that may unbalance the relationship between companies within the EU or at least threaten the harmony within the EU. The EU was indeed under the threat to be a "Multi-Speed Europe"[136] in one more field.

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[134] Directive 2014/95/EU, §§8, 13, Art. 19a, 29a.

[135] Eurostat, *Business Demography Statistics*, (Dec. 2022, accessed Jun. 25, 2023), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Business_demography_statistics.

[136] For more information on this concept of "Multi-Speed Europe" see, Kinga Brudzińska, *Multi-Speed Concept is in the European Union's DNA*, GLOBSEC DIFF GOV—European Governance: Potential of Differentiated

It then provided two exceptions for non-compliance. The very first one is identical to the French one: if one company fails to pursue one of these policies, it could be free from liability as long as they give a "clear and reasoned explanation". The second one is leaving the door open for States to allow the omission of certain information under exceptional circumstances:

> *where, in the duly justified opinion of the members of the administrative, management and supervisory bodies, acting within the competences assigned to them by national law and having collective responsibility for that opinion, the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking, provided that such omission does not prevent a fair and balanced understanding of the undertaking's development, performance, position and impact of its activity.*

This disposition gives sufficient freedom to both States and companies under the duty to arrange their own regime with consideration to local pressures. As discussed, such freedom is double edged as it answers one European truth, which is diversity, and fails to blur differences. Thus, this genesis of environmental CSR had no significant impact for French law.

Still, the EU also addressed the issue of subsidiary companies in article 19a, which exempt the subsidiaries from this duty, and article 29a, which designates the parent companies as the only responsible entity for producing such a report. Additionally, this last article mentions that in case of a chain, a parent company that is in fact the subsidiary of another parent company, will be exempted from that duty, only if this first company and its direct subsidiary are included in the report of the second parent company. If not, the dual title company will have to provide a report for itself and its subsidiary.
This disposition highlights the fact that companies might have a very complex organization, especially in the European context, where cooperation and relationships between companies are encouraged beyond the territory of their State. By enacting this disposition, the EU had anticipated potential practical issues in the European Non-Financial Reporting duty. France only comprehensively addressed this issue in 2017, inferring that for once, the EU was playing one step before France.

Eventually, a measure to control the efficiency of the implementation of this directive must be created by each States, according to the inserted article 19a. §5. A statutory auditor or audit

Cooperation (Sept. 18, 2018), https://www.globsec.org/what-we-do/publications/multi-speed-concept-european-unions-dna.

firm must be mobilized to check whether the non-financial report matched the requirement set in the first paragraph of the same article. The member States are then the one to decide how to control the respect of the directive by the companies under the duty. It is another significant limit of the directive, added to the fact that there is no apparent mandatory sanction mechanism that should be created by the States, meaning the information is the only obligation of companies followed by no mandatory accountability. But these limitations are also a result of the tool used by the EU. They used a directive, which is a mandatory tool with regard to the goals. However, the means are determined by the States. It is a way for the EU to address issues they think are important to address at the European level, but might not be able to do so through a stronger tool because of legal and political constraints. A European regulation is a much stronger tool since both the goal to achieve and the means to reach that goal are mandatory for each member State. However, the EU might not have the competence to enact such a document over matters based on its "Constitution" or because a consensus among the twenty-eight countries could not have been reached at that time. As a matter of fact, the EU was certainly following the example set by some of its member States, especially with regards to the French National Laws previously studied and other countries such as the Netherlands which also have a good CSR score on environmental matters based on the table No. 4. The will of the EU to gain importance on the matter is still noticeable in the article 2 of the Directive, which states that the Commission will publish non-binding guidelines to support and facilitate environmental CSR. The Commission published these guidelines in 2017[137], directing the action of States and companies, on the purpose of this statement, the key points that should appear and the reasons behind. These guidelines were inspired by the indicators contained in the own guidelines of the Taskforce on Climate-related Financial Disclosures (TCFD)[138].

Still, this directive will be useful only if the member States comply with it and transpose it by the 6th of December 2016, relying on the deadline set by the article 4 of the Directive.

[137] European Commission, *Guidelines on non-financial reporting (methodology for reporting non-financial information), Information from EU institutions, bodies, offices and agencies*, (2017/C 215/01) (Jul. 5, 2017).
[138] Ministère de la Transition Écologique et de le Cohésion des Territoires & Ministère de la Transition Énergétique, *Le Rapportage Extra-Financier des entreprises*, Les référentiels et indicateurs de rapportage extra-financier (Mar. 17, 2021, accesses Jun. 26, 2023), https://www.ecologie.gouv.fr/rapportage-extra-financier-des-entreprises.

2. The Transposition Tools Implemented by France

To comply with the EU directive, the French Parliament started by incorporating the directive in the article 216 of the law No. 2017-86 on equality and citizenship, on the 27th of January 2017. Thus, the French Legislature was two months late and the law contained no definition of the measures taken to comply with the Directive.

Compliance with EU rules was finally supplemented in July and August of 2017 with two instruments: the Ordinance No. 2017-1180[139] and the Decree No. 2017-1265[140]. Neither of these instruments have significantly changed French law. The article L.225-102-1 of the Commercial Code remained about the same. The wording and organization were the main changes. The traditional report was renamed as the Declaration of non-financial performances and the independent third-party body, which was transferred by the article 2 of the decree to the article R.225-105-2 of the same Code. There were also few changes regarding the thresholds, which were all lowered. At the article R.225-104 of the same Code, public companies should employ at least 500 employees and have 20 million euros of turnover after deduction of all charges or at least 40 million euros for the net amount of the turnover. The rest of companies are also concerned as long as they employ more than 500 employees and have a turnover exceeding 100 million euros a year. This includes significantly more companies, and the threshold is lower than the one set by the European Directive which points out French authorities are taking initiatives to improve their environmental CSR regime.
Other changes are intervening through the article 1 of the decree, modifying the article R.225-102 of the Commercial Code. It slightly modified the structure and content of the requirements set by the Grenelle Law II for the new redaction of the Declaration of non-financial performances (see Table No. 5, which is the new version of the Table No. 2, on the next page[141]). It has also abolished the discrimination between public and general corporations in terms of environmental obligations. Most importantly, it added three sentences that allow us to

[139] Ordinance no. 2017-1180, *The publication of non-financial information by certain large companies and certain groups of companies*, (Jul. 19, 2017).
[140] Decree No. 2017-1265, *For the application of Ordinance No. 2017-1180 of July 19, 2017 relating to the publication of non-financial information by certain large companies and certain groups of companies*, (Aug. 9, 2017).
[141] It was indicated which provisions were modified or moved to allow an easier comparison.

understand more clearly what is expected from companies and the overall purpose for providing all of this information[142].

Table No.5: List of duties of companies depending on their social form – Directive 2013/34/EU.

Matters	Sections	List of Duties	
Environmental Information	General Environmental Policies	The organization of the company to take into account environmental issues and, where applicable, the environmental assessment or certification procedures	
		The means devoted to the prevention of environmental risks and pollution	
		The amount of provisions and guarantees for environmental risks, provided that this information is not likely to cause serious harm to the company in an ongoing dispute	
	Pollution *[MODIFIED]*	Measures to prevent, reduce or repair discharges into the air, water and soil that seriously affect the environment	
		Waste prevention, recycling and disposal measures [MOVED & MODIFIED]	
		Taking into account all forms of pollution specific to an activity, in particular noise and light pollution *[MODIFIED]*	
	Circular Economy *[NEW]*	Waste Prevention and Management *[MOVED & MODIFIED]*	Measures for the prevention, recycling, reuse, other forms of recovery and disposal of waste *[NEW]*
			Actions to combat food waste *[NEW]*
		Sustainable Use of Resources *[MOVED]*	Water consumption and water supply according to local constraints
			The consumption of raw materials and the measures taken to improve efficiency in their use
			Energy consumption, measures taken to improve energy

[142] Commercial Code, Art. R. 225-105.-I: "The declaration of extra-financial performance mentioned in I of Article L. 225-102-1 and the consolidated declaration of extra-financial performance mentioned in II of the same article present the model of business of the company or, where applicable, of all the companies for which the company draws up consolidated accounts.
They also present, for each category of information mentioned in III of the same article:
1° A description of the main risks related to the activity of the company or group of companies including, where relevant and proportionate, the risks created by its business relationships, its products or its services; 2° A description of the policies applied by the company or group of companies including, where applicable, the due diligence procedures implemented to prevent, identify and mitigate the occurrence of the risks mentioned in 1°; 3° The results of these policies, including key performance indicators.
When the company does not apply a policy regarding one or more of these risks, the statement includes a clear and reasoned explanation of the reasons justifying it."

			efficiency and the use of renewable energies
			Land use
	Climate Change	The significant sources of greenhouse gas emissions generated as a result of the company's activity, in particular through the use of the goods and services it produces; "- the reduction targets set voluntarily in the medium and long term to reduce greenhouse gas emissions and the means implemented to this end; "- measures taken to adapt to the consequences of climate change *[MERGED & MODIFIED]*	
	Protection of biodiversity	Measures taken to preserve or develop biodiversity	
Societal Information	Societal commitments in favor of sustainable development *[MODIFIED ORGANIZATION]*	The impact of the company's activity in terms of employment and local development	
		The impact of the company's activity on neighboring or local populations	
		The relationships maintained with the company's stakeholders and the methods of dialogue with them *[MODIFIED]*	
		Partnership or sponsorship actions	
	Subcontracting and suppliers	Taking social and environmental issues into account in the purchasing policy	
		Consideration in relations with suppliers and subcontractors of their social and environmental responsibility *[MODIFIED]*	
	Fair practices	Measures taken to promote consumer health and safety	

As a conclusion, the Directive has not brought major changes in French law. In fact, the law is still quite imprecise and relies on soft law tools for the guidance of companies while fulfilling their information duty. The tools range from the Commission's guidelines and other repositories such as the Global Reporting Initiative or the Sustainability Accounting Standards Board[143]. This directive rather triggered a slight enlargement of the mandatory reporting duty, renamed as Declaration of non-financial performance. The number of companies concerned by this duty in France would be around 3.800 following the directive[144].

Still, there was significant progress in the following years through the implementation of Regulations and other Directives, which demonstrates the importance the EU is gaining over the matter.

[143] Ministère de la Transition Écologique et de le Cohésion des Territoires & Ministère de la Transition Énergétique, *Le Rapportage Extra-Financier des entreprises*, Les référentiels et indicateurs de rapportage extra-financier (Mar. 17, 2021, last accessed Jun. 26, 2023), https://www.ecologie.gouv.fr/rapportage-extra-financier-des-entreprises.

[144] *Ibid*, §. Le cadre juridique du rapportage extra-financier des entreprises.

II. Continued Progress Through a Wider Range of Environmental Corporate Social Responsibility Subjects

As stated in the previous section, Regulations are much stronger European tools and some were finally enacted starting the year 2017 (A). A directive allowed to revalorize the role of shareholders in environmental CSR, since they were in general excluded from such duties (B). A significant breakthrough also occurred in 2022 with the Corporate Sustainability Reporting Directive (CSRD) (C).

A. The First European Regulations on Environmental Corporate Social Responsibility

The 2017 Regulation revolutionized the state of mind of the EU in CSR by addressing the problem of supply chains (2) and was then followed by two taxonomy Regulations issued in 2019 and 2020 (1).

1. The Taxonomy Regulations

These two Taxonomy Regulations are enlightening on two aspects of CSR in the EU[145]. For the first time, a Regulation was enacted, and the EU went further than most States did, by imposing not a duty of transparency on the sustainability of one company's investment, within the business world. In other words, companies now owe to investors a clear and detailed disclosure on the environmental sustainability of their investment. There are clear practical and economic consequences, since some investors might be deterred from completing their investment after receiving these information. Then, businesses are then incentivized to take more active actions, rather than publishing a report on some public dedicated space, a report that may never be read by anyone as depicted by the EU[146]. However, the regulations came into force in two times. There was first the Regulation in November 2019 and then the one in June 2020. The first one was disappointing since the language was really confusing. It referred to

[145] Regulation (EU)2019/2088; Regulations (EU)2020/852.

[146] Regulation (EU) 2020/852, §13: : "If financial market participants do not provide any explanation to investors about how the activities in which they invest contribute to environmental objectives, or if financial market participants use different concepts in their explanations of what an environmentally sustainable economic activity is, investors will find it disproportionately burdensome to check and compare different financial products."

sustainability in most parts, but this concept only refers to "the quality of causing little or no damage to the environment and therefore able to continue for a long time[147]". The second Regulation is much more polished and deserves more attention, especially when it modified and replaced the first one after less than a year.

The preliminary comments summarize the evolution of the environmental crisis awareness with the different tools used to fight against climate change in the corporate sphere. It also acknowledges the importance of pursuing these goals since "[s]ustainability and the transition to a safe, climate-neutral, climate-resilient, more resource-efficient and circular economy are crucial to ensuring the long-term competitiveness of the Union economy[148]." If the EU does not proceed to such adjustment, the long-term effects for companies could be disastrous as shown by scientific studies[149]. The first articles officially state the purpose of the present regulation which is establishing "the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable." But as with every CSR instruments, a scope was defined at the article 2 of the Regulation. In fact, it only applies to financial markets participants defined by the first regulation as an investment firm or any other investment related institutions[150]. The article 3 provides the four cumulative criteria that will allow one participant to benefit from the label of environmentally sustainable investment[151]. The criteria are the following:

> *(a) Contributes substantially to one or more of the environmental objectives set out in Article 9 in accordance with Articles 10 to 16*
> *(b) Does not significantly harm any of the environmental objectives set out in Article 9 in accordance with Article 17*
> *(c) Is carried out in compliance with the minimum safeguards laid down in Article 18*

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147 Cambridge Dictionary, *Sustainability*, (last accessed Jun. 26, 2023).

148 Regulation (EU) 2020/852, §4.

149 The Economist, *Climate Change and the Threat to Company*, Leaders:Business Risks (Feb. 21, 2019, last accessed Jun. 26, 2023).

150 Regulation 2019/2088, Art. 2(1): "'financial market participant' means: (a) an insurance undertaking which makes available an insurance-based investment product (IBIP); (b) an investment firm which provides portfolio management; (c) an institution for occupational retirement provision (IORP); (d) a manufacturer of a pension product; (e) an alternative investment fund manager (AIFM); (f) a pan-European personal pension product (PEPP) provider; (g) a manager of a qualifying venture capital fund registered in accordance with Article 14 of Regulation (EU) No 345/2013; (h) a manager of a qualifying social entrepreneurship fund registered in accordance with Article 15 of Regulation (EU) No 346/2013; (i) a management company of an undertaking for collective investment in transferable securities (UCITS management company); (j) a credit institution which provides portfolio management;".

151 *Ibid.*, Art. 4.

(d) Complies with technical screening criteria that have been established by the Commission in accordance with Article 10 (3), 11(3), 12(2), 13(2), 14(2) or 15(2).

It then sets clear conditions for one company to reach this label with limitations that are also clearly defined in other articles. It is avoiding the traditional vagueness and ensuring there is a harmonious rule on the matter throughout the EU. The Regulations also provide a precontractual duty of disclosure[152]. Publishing a report once a year is not sufficient anymore, they should now disclose information each time an investor would be interested in their products. The Non-financial Statement should also include two new information:

(a) The proportion of their turnover derived from products or services associated with economic activities that qualify as environmentally sustainable under Articles 3 and 9; and
(b) the proportion of their capital expenditure and the proportion of their operating expenditure related to assets or processes associated with economic activities that qualify as environmentally sustainable under Articles 3 and 9.

Noteworthy, these last two pieces of information seem to require a lot of fact finding and might even be difficult to assess with all the necessary information, since these matters depend on multi-factorial circumstances. Still, the transparency and information duties are pushed even further. There is of course a control mechanism, called *Platform on Sustainable Finance*, that was created at the article 20. This time, it leaves no room for States to organize it. The only initiative left to the States is the establishment of penalties for this regulation to be "effective, proportionate and dissuasive[153]".

As a conclusion, these regulations, which are of direct application within member States, are overall directing investments towards environmentally sustainable financial markets participants, which allows the EU to get closer to its New Green Deal Objectives and the six objectives set in the article 9 of this regulation[154]

[152] *Ibid.,* Art. 6, 7.
[153] *Ibid.,* Art. 22.
[154] Directive (EU) 2022/2464, Art. 29(b)(2)(a): "(i) climate change mitigation; (ii) climate change adaptation; (iii) the sustainable use and protection of water and marine resources; (iv) the transition to a circular economy; (v) pollution prevention and control; (vi) the protection and restoration of biodiversity and ecosystems."

2. The Supply Chain Problem Addressed with the Regulation (EU) 2017/821

This Regulation is another example of how the EU is following the same path as France since it published two months after the French law on the duty of vigilance, this regulation on supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. This Regulation is also of direct effect, which means there are no transposition tools enacted in French national law for its efficiency on the French territory.

It also starts at the first paragraph with an assessment of the issues in this market and acknowledges the great threat it can represent. It refers to the child labor in mines, the dangerous working conditions with the numerous collapses in mines and the conflicts to gain control over these strategic resources. However, no reference is ever made to the protection of the environment, although it is making one reference to sustainable economic development. Still, this regulation is much more concerned about social and human rights. It is still relevant to study it since its content is ambitious, although limited to certain categories of companies and other areas of CSR. Still, the scope might later be extended, to include environmental concerns.

The article one declared that EU importers of these metals should be under the supply chain due diligence, as long as they exceed the threshold set by the first Annex in terms of metals imports. It aims at preventing or at least limiting the opportunity for armed groups to trade and earn benefits from the exploitation of these metals in those horrific conditions. It is also trying to enhance transparency within the EU. The following articles set the obligations, especially its article 3 stating that the targeted companies shall:

> *comply with the supply chain due diligence obligations set out in this Regulation and shall keep documentation demonstrating their respective compliance with those obligations, including the results of the independent third-party audits.*

The respect of these provisions and the others, which are the obligation of the implementation of a management system, risk management and disclosure obligation, should be under the supervision of member States, that will control the respect of these obligations according to articles 3 and 11.

For the first time, the EU is also remedying one issue of CSR, since its Commission will publish and update a list of undertakings under that duty[155]. Although this regulation does not directly concern environmental responsibility of companies, it depicts how much the EU has matured on the subject and is willing to occupy bigger responsibilities. The content has also significantly improved, since at the difference of French National Law, it is trying to detail it as much as possible, making explicit references to soft law tools and guidelines the Commission might publish to guide the action of companies and member States[156]. The discipline is not as vague as it used to be.

B. The Directive (EU) 2017/828: a Revalorization of the Role of Shareholders and Investors in the Matter of Environmental Corporate Social Responsibility

Board of administration and directors were always at the very heart of every CSR regulation under French law. Shareholders, although they are the true owners of companies, were neither associated with these issues, nor to the general governance of the company. The Directive (EU) 2017/828 amended the Directive 2007/36/EC on the encouragement of long-term shareholder engagement. It is aiming at encouraging long-term shareholder engagement and to enhance transparency between companies and investors. It has also inserted environmental concerns of shareholders and investors with regard to the environmental impact of the company:

> *Effective and sustainable shareholder engagement is one of the cornerstones of the corporate governance model of listed companies, which depends on checks and balances between the different organs and different stakeholders[157]. (…)*
>
> *The remuneration policy should contribute to the business strategy, long-term interests and sustainability of the company and should not be linked entirely or mainly to short-term objectives. Directors' performance should be assessed using both financial and non-financial performance criteria, including, where appropriate, environmental, social and governance factors[158].*

These elements were translated in the article 3g on the engagement policy and article 9a (4), (6) on the right to vote on remuneration policies. There is now a duty of information from shareholders on their engagement policy, policy that must encompass environmental concerns and ought to be explained. The remuneration should not be arbitrary and reflect this sustainable

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155 Regulation (EU) 2017/821, Art. 9.
156 *Ibid.*, Art. 11, 14, Preliminary §§ 5, 9, 10
157 Directive (EU) 2017/828, §14.
158 *Ibid.*, §29.

behavior of companies. Moreover, managers can derogate to the voting policy of the remuneration if it protects the long-term sustainable objective of the company.

Shareholders are then one more entity integrated into this CSR discipline, although their implication only implies some limited duty of information compared to the non-financial report owed by the company under National French Law and European Law.

Still, being a Directive, it had to be integrated into French National Law, which was eventually accomplished by the Decree No. 2019-1235 of November 27, 2019, with the objective to promote long-term shareholder engagement, and the Ordinance No. 2019-1234 of November 27, 2019, relating to the compensation of corporate officers of listed companies. They modified the pertinent dispositions of the Code without adding any substantial improvements to the current directive.

The association of shareholders remains then quite limited since there is only a very abstract and general duty of disclosure and the other means of association is through the remuneration, which does not require any active efforts from shareholders. Indeed, they are not the ones to direct the company, but they are still the true owner of the company and consequently might have a certain influence on it[159]. It is especially true in the French context, since the shareholder assembly is the one to confirm the non-financial report of the article L.225-102-1 of the commercial code, according to the article L.225-100 of the same Code. The integration of companies to these environmental efforts, through CSR, might have been slowed down by this limited inclusion of shareholders in that field. In fact, if they are not educated to CSR, they might confirm a report that is not promoting progress or even that will lack initiatives.

C. The New Corporate Social Responsibility Directive

> *The Green Deal is the new growth strategy of the Union. It aims to transform the Union into a modern, resource-efficient and competitive economy with no net emissions of greenhouse gasses (GHG) by 2050*[160].

With the Green Deal, the EU is advancing further on the goal of a sustainable EU. It is even more true with the Green New Deal. This directive is the one that will replace the Directive

[159] See for example this study, which explains the evolution of the place given to shareholders in France and in the US: Forrest G. Alogna et al., *The Shareholder in France and the U.S.: Comparing Corporate Legal Priorities*, Columbia Law School's Blog on Corporations and the Capital Markets (Apr. 2, 2021).
[160] Directive (EU) 2022/2464, §1.

2013/34/EU and 2014/85/EU once transposition instruments are created in France. So far France has only adopted one law, the law No. 2023-171 of March 9, 2023, whose article 12 recognizes that by December 2023, the French government should adopt a decree to transpose the directive and harmonize it with the current National laws. Thus, it has not yet become effective in France, although it is bound by law.

The content of the reporting directives discussed above have not greatly changed overall. The major change regards the great enlargement of the scope. Now, small and medium-sized companies are also included, although micro-company are excluded. As defined by the article 3 of the Directive 2013/34/EU, all companies with more than 50 employees, a balance sheet total of 4 million euros and net turnover of 8 million, are now under this duty. The other enlargement regards the issue of subsidiary and parent companies. It is now including the reverse situation in which the subsidiary is in the European territory and the parent company in a third country: whether the subsidiary is registered or has an office, it will also be under the same duty as one parent company located within the EU would be. This is a significant extra-territorial effect of the reporting duty, and a great achievement of the EU's will.

Yet, there is still a differentiated regime for small and medium sized companies as stated by the article 19a.6.§2, which also refers to the article 29c newly created. However, it is yet to be announced what the new required information will be for small and medium companies as the Commission guidelines, on the extent of duties, ought to be published by June 30th, 2024[161]. The Commission is still finalizing its decision regarding the standards after receiving guidance from the EFRAG pursuant to article 49.3.b. This article also provides that it could require assistance from other organizations and even member States. The Standards are then to be decided by enhancing and supporting the participation of all interested parties. Still, the Commission has published these guidelines, the European Sustainability Reporting Standards (ESRS), on July 31st of 2023 with regard to large companies' duties[162]. The content is rather classic and does not make any significant changes. It only formalizes the practices from companies and across European laws.

[161] *Ibid.*, Art 29c.

[162] European Commission, *The Commission Adopts the European Sustainability Reporting Standards*, European Commission: Finance (Jul. 31, 2023), https://finance.ec.europa.eu/news/commission-adopts-european-sustainability-reporting-standards-2023-07-31_en.

There are however some limits to the text. It does not really clarify the role that stakeholders, namely directors and managers, and shareholders have. The EU does not answer whether the shareholders should be more associated with the entire process and held accountable. It could be explained by the great diversity in the practices of the 27 member States and also the will to accommodate some national particularisms, to avoid any impractical decisions. Another limit is the absence of European sanction. Each States is free to determine which one will be used in case of failure to comply with the duty set in the Directive. It can unbalance the equilibrium between companies since some countries might be more lenient. Noteworthy, it is a constant principle that the EU is only setting a minimum and as seen with the example of France, countries are free from going further.

This topic is especially important for the EU, since during the summer 2023 a new version of the Directive CSRD will be under examination and negotiation to substantially improve the Corporate Sustainability Due Diligence, especially on the matter of supply chains[163]. This proposal will be studied in the second part of this paper, after the American and Chinese regime are both examined.

[163] Stefano Spinaci, *Corporate sustainability due diligence*, European Parliament Research Service (May 2023).

Chapter 2 – The Common Law Example of Environmental Corporate Social Responsibility Practices: the United States

"To what extent can corporate involvement in social problem-solving be justified when such activity lies outside the usual framework of the marketplace?[164]"

As early as the 1970's, academics' work started to address the need for companies to incorporate the impact they have on society, especially on social issues. In fact, some companies started to commit to philanthropic actions or bear the weight of their responsibility and some American thinkers were advocating to support the birth of a discipline independent from environmental law. Hence, this concept of Corporate Social Responsibility is far from being new in American doctrine. Yet, the environmental Corporate Social Responsibility has a very different story from the French one. In fact, making a comparison with foreign countries, the social aspect of Corporate Social Responsibility, which is to say quality of life and education, is the focus of the United States, while the environmental aspect is the most frequently addressed issue in other countries, such as France[165].

Culture and the political system must then have an influence on such policies. America also has some particularisms of its own, which prevents its deep rooting within the American legal corporate tradition (section 1). Still, some regulations over the matters do exist, whether they were created by the States or the Federal State (section 2).

[164] William J. Baumol et al., *A New Rationale for Corporate Social Policy*, Committee For Economic Development, Supplementary Paper No. 31 (Dec. 1970).

[165] Dr. Almerinda Forte, *Corporate Social Responsibility In The United States And Europe: How Important Is It? The Future Of Corporate Social Responsibility*, International Business & Economics Research Journal, V.12, No. 7 (Jul. 2013).

Section 1 – Introductory Considerations

There is a will from American academics and companies to enshrine Corporate Social Responsibility within their practices, including with regards to environmental aspects. Their intellectual debates and companies' practices fostered the discipline and created an impulse throughout the United States (I) that the Federal authority could not give because of its traditionally limited powers over corporate law (II).

I. The Will of Companies and Academics Creating and Fostering Corporate Social Responsibility Duties

Despite companies' active participation in the establishment of environmental Corporate Social Responsibility (B), this concept was formally introduced by the doctrine (A).

A. A Brief Introduction to the Concept of Corporate Social Responsibility in the United States

> *Reforming our corporate governance system starts with operating companies. If companies do not make sustainable profits by selling useful products and services and treating their workforces well, our economy will not work. For institutional investors to support companies that behave in a socially responsible manner, they need the right information to hold companies accountable if they don't. And all Americans deserve quality information about how influential businesses treat their workers and consumers, and respect our environment, laws, and ethical standards*[166].

This article dived deeply in the steps that should be taken for the United States to firmly establish CSR. It was aiming at offering a new organization and structure of corporate law, by enhancing reporting duty, by "Strengthening Institutional Investors' Obligations To Promote Sustainable, Long-Term Growth And Serve The Interests Of Human Investors[167]" and reforming the electoral system. Numerous other articles developed on the same content and recognize the desirability of this movement, each bringing an interesting new reflection.

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[166] Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism*, Roosevelt Institute, p.8 (Aug. 2020).
[167] *Ibid*, p. 14.

The American Law Institute (ALI), a research group gathering lawyers, judges and all other legal practitioners, also created the non-binding Principles of Corporate Governance, in which they summarize the current situation of CSR and provide analysis and recommendations to companies[168]:

> *ANALYSIS AND RECOMMENDATION*
>
> *(a) Subject to the provisions of Subsection (b) and § 6.02 (Action of Directors That Has the Foreseeable Effect of Blocking Unsolicited Tender Offers), a corporation [§ 1.12] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.*
>
> *(b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:*
> *(1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law;*
> *(2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and*
> *(3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.*

These dispositions are similar to a general guide, which is supplemented by comments from this research group. The main interesting idea for the matter of this paper remains in the consideration given to ethical questions. First, the group reminded that these questions and the conduct of business are not opposed to one another. Rather they work as a symbiosis most of the time, since it will most often be beneficial to companies to have such considerations in the long run. Additionally, "Corporate officials are not less morally obliged than any other citizens to take ethical considerations into account, and it would be unwise social policy to preclude them from doing so[169]." The ALI standards are then trying to connect corporations to ethical regards. They should take into consideration all reasonable considerations with regards to their businesses and ensure they put all reasonable means to act ethically.

The recognized lawfulness of a company philanthropic action was also highlighted. The case *State ex rel. Sorensen v. Chi., B. & Q. R. Co.,* [170] was the one to confirm it. Such action is

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[168] ALI, 1-2 Principles of Corporate Governance § 2.01 § 2.01 The Objective and Conduct of the Corporation (2023, accessed Jul. 1, 2023).
[169] *Ibid*, §h.
[170] *State ex rel. Sorensen v. Chi., B. & Q. R. Co.,* 112 Neb. 248 (1924).

still framed as it should be reasonable. The reasonableness standard was defined as something reasonably in relation with the company's interest, relying on *Hutton v. West Cork Ry.*, [171]. In fact, by maintaining this link with the "ordinary scope" of the company, it bars any discontentment from shareholders. However, this standard does not mandate direct profits[172]. Nevertheless, this authorization does not refer directly to CSR. It appears closer to some greenwashing or other brand perception efforts[173], than a true environmental policy about minimizing a company's environmental impact and framing the corporation activities. However, a case recognized that a pension plan created for the employees by a company was in "accords with present day notions of justice to superannuated employees.[174]" Thus, thanks to analogy, it can be argued that an environmental plan by a company about minimizing its impact, disclosing information on that matter and reorganizing its decision-making structure to enhance these objectives, would receive a similar treatment and would be validated.

This academic work and non-binding guidelines reflect the current state of the American environmental CSR legal framework. Legal rules are not widespread and generally justify their existence in the interest of the corporations. Thus, environmental CSR has been in the past decades more of a voluntary field in the USA than a legal regime. This prominent role of companies has evolved in recent years, so as to create a coexistence between legal rules and the deeply rooted and strong companies' impulse.

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[171] *Hutton v. West Cork Ry*., 23 Ch. D. 654, 672 (1883) ; in *Prunty, Love and the Business Corporation*, 46 Va. L. Rev. 467 (1960).

[172] *Ibid*, *Reporter's Note*, §4.

[173] Sarah Gibben, *Is Your Favorite 'Green' Product As Eco-Friendly As It Claims To Be?*, National Geographic, Environment : Explainer (Nov. 22, 2022), https://www.nationalgeographic.com/environment/article/what-is-greenwashing-how-to-spot.

[174] *Fogelson v. American Woolen Co.,* 170 F.2d 660 (2d Cir. 1948).

B. Companies' Impulses

The ALI once again relied on the will of companies, which was never at issue[175]. There is also very limited content on environmental CSR although Companies publish "Corporate value statements". This document emphasized on their ethical behavior and is the basis for all of their ethical decisions. Authors would define this practice as "corporate citizenship[176]", which is the voluntary endorsement of ethical causes. Companies indeed understood at a very early stage that investing in CSR would improve their financial performance, their image and reputation, it would increase the sales and customer loyalty because of consumers' awareness on societal issues, among many other benefits that were already discussed in the introduction: "The business sector is gradually recognizing the positive aspects of the corporate commitment process." CSR is not only a societal need but mainly a strategy for U.S. companies. It enhances sustainable development and the corporation's welfare. That is why significant voluntary practices developed among American companies.

There is much evidence of companies' impulse towards corporate social responsibility. Deloitte published a study demonstrating that 93% of business leaders believed the company itself was not only producing wealth but "stewards of society"[177]. 95% were planning to assume a greater role in creating and enforcing substantial socially responsible plans[178]. Social interests were the traditional focus of companies[179], but it has now been extended to environmental concerns and the wish to achieve a more sustainable model of governance within the company. The U.S. Chamber of commerce, a patronal lobby, also decided to support this transition and

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[175] Mark Anthony Camilleri, *Corporate Social Responsibility Policy in the United States of America*, Idowu S., Vertigans S., Schiopoiu Burlea A. (eds.) Corporate Social Responsibility in Times of Crisis. CSR, Sustainability, Ethics & Governance. Cham, Switzerland, Springer Nature. DOI (2017, accessed Jul 1. 2023), https://doi.org/10.1007/978-3-319-52839-7_7.

[176] National CSR Network, *Analysis Of CSR Practices In India And USA*, accessed through LinkedIn (Jan. 13, 2022, last accessed Jul. 1, 2023), https://www.linkedin.com/pulse/analysis-csr-practices-india-usa-national-csr-network/#:~:text=CSR%20in%20the%20USA%20is,also%20called%20a%20corporate%20citizen.

[177] Matt Gavin, *5 Examples Of Corporate Social Responsibility That Were Successful*, Hbs Online, Business Insights (Jun. 19, 2019, Accessed Jul. 2, 2023), https://online.hbs.edu/blog/post/corporate-social-responsibility-examples.

[178] *Ibid*.

[179] Dr. Almerinda Forte, *Corporate Social Responsibility In The United States And Europe: How Important Is It? The Future Of Corporate Social Responsibility*, International Business & Economics Research Journal, V.12, No. 7 (Jul. 2013); see also note 185, *Analysis Of CSR Practices In India And USA*: "US markets for labor and money are less regulated as there are lower levels of social provision. Many social issues, such as education, health care or public investment have traditionally been the core of CSR in the American context."

the fight against climate change[180]. This Chamber gathered both professionals, such as Karen Fang, the head of Global Sustainable Finance in the Bank of America, and academics to develop three key aspects that should be developed to enhance environmental CSR. The first one is ensuring "short-term investments and actions toward long-term sustainability goals" and "The finance sector must [also] take responsibility in the fight against climate change". Still these actions should be backed by an intertwined relationship with the public sector, so that collaboration can increase the efficiency of these measures. The guest speakers also depict how deeply companies are concerned about it. The Bank of America is a good concrete example, since one of the guest speakers was the head of their sustainable finance department. It has expressed the will to commit to environmental sustainability by ensuring it will have a zero-carbon footprint by 2050 in their financing activities, operations, and supply chain. They also contemplate enforcing a one trillion dollars plan by 2030 to support this transition[181]. The Lego company is also one of the biggest contributors of climate change because of the scale of their production. They however committed to reduce their impact and reduced the size of their boxes by 14%, saving 7,000 tons of cardboards[182]. To summarize these pieces of information, 90% of the S&P companies, which comprises 500 companies, mostly in the United States, are now complying with the ESG requirements[183].

Such decisions were made possible through the business judgment rule. The board of directors indeed benefit from a specific kind of presumption which prevents any claims against their decisions as long as they act in good faith, enforcing the standard of care of a reasonable person in the same circumstances. The Court must also be convinced that the directors were acting in the corporation's best interest. Thus, as long as their actions are reasonably related to the interest of shareholders, even if they are aiming at a long-term impact, the action will be upheld by the Court[184].

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[180] Neil Bradley, *3 Ways Businesses Can Address Climate Change and Support Sustainability*, U.S. Chamber of Commerce (Sept. 21, 2021), https://www.uschamber.com/on-demand/energy/3-ways-businesses-can-support-climate-change-and-sustainability.

[181] Bank of America, *Environmental Sustainability*, Making an Impact (accessed Jul. 2, 2023), https://about.bankofamerica.com/en/making-an-impact/environmental-sustainability.

[182] Matt Gavin, *5 Examples Of Corporate Social Responsibility That Were Successful*.

[183] Lucy Pérez et al., *Does ESG really Matter – And Why?*, McKinsey & Co. Sustainability (Aug. 10, 2022), https://www.mckinsey.com/capabilities/sustainability/our-insights/does-esg-really-matter-and-why#/.

[184] *Paramount v. QVC Network*, 637 A.2d 34 (Del. 1994).

Relying on all of this information, there seems to be a paradox. CSR is in every large company's mind and its influence on the governance of companies is growing. The public and private sectors are also increasing collaboration, especially with NGOs[185]. Still being mostly based on voluntary behavior, with few detailed regulations or binding norms and principles, environmental CSR will reach its limit because of the corporations' reluctances. Taking the example of the Bank of America again, it does indeed publish a report every year on its environmentally related information. The Task Force on Climate-Related Financial Disclosures (TFCD) report[186] which is born directly out of the TCFD recommendations, is indeed published every year and made available to the entire public. It is also publishing 2022 Performance Data Summary and Global Reporting Initiative Index[187] in which it details all of its emissions. There is however no such report for the Lego company. It only provides the very general steps it will take in the future to decrease its greenhouse gas emission, enhance the circular economy and all other sustainable objectives. The voluntary enforcement of environmental CSR appears relatively aleatory.

The success of environmental CSR is then mainly relying on stakeholders and their degree of corporate citizenship, partly because of the absence of a Federal impulse.

[185] Daniel Arenas et al., *The Role of NGOs in CSR: Mutual Perceptions among Stakeholders*, Journal of Business Ethics, Vol. 88, No. 1, pp. 175-191 (Aug. 2009).
[186] Bank of America, *Task Force on Climate-Related Financial Disclosures (TFCD) Report*, Managing our Future (2022, accessed Jul. 2, 2023), https://about.bankofamerica.com/content/dam/about/pdfs/BOA_TCFD_2022%209-22-2022-VOX220929%20split%20paragraph%20Secured.pdf.
[187] Bank of America*, 2022 Performance Data Summary and Global Reporting Initiative Index*, Managing our Future (2022, accessed Jul. 2, 2023), https://about.bankofamerica.com/content/dam/about/pdfs/BofA_2023_PDS_GRI_secured.pdf

II. The Limited Powers of Congress over Corporate Law and Corporate Social Responsibility

In fact, Congress does not seem to have the direct power to regulate over the matter of environmental CSR. It can only enact regulations on corporate law through other means, such as the Commerce Clause or other instruments. It is an American particularism linked to federalism, which might be implying additional difficulties for CSR implementation, but should still be included in the analysis. Despite the U.S. Congress being traditionally prevented from enacting corporate law, it found indirect ways to regulate the matter (A), although States remain the preferred lawmakers on corporate law and thus environmental CSR regulations (B).

A. The Traditional Exclusion from Corporate Law Ended by Other Congress' Powers

Article I, section 8 of the U.S. Constitution enacts an exhaustive list of the powers attributed to Congress. All of the powers non included in that list shall be attributed to States. The Power to enact on Corporation law and governance is not included in that list. Thus, in theory, Congress should not be able to regulate corporate governance.

However, this principle of non-intervention over corporation law was bypassed during the last century. Following the 1929 stock market crash which started the Great Depression in the 1930's[188], which itself was a strong factor leading to the Second World War[189], Congress enacted Federal Security laws thanks to the Commerce Clause[190]. The States' corporation laws having failed the market, Congress used a back door to protect commercial and financial stability in the U.S. through the regulation of corporate law and corporate governance[191]. To reach this goal it enacted the Securities Act of 1933 among other Acts. This evolution opened the gates for further Federal regulations over the matter, especially the Sarbanes-Oxley Act

[188] Jill E. Fisch, *Leave It To Delaware: Why Congress Should Stay Out Of Corporate Governance*, Delaware Journal Of Corporate Law, Vol. 37, pp. 731-782, p.732 (2013, accessed Jul. 1, 2023).
[189] U.S. History Primary Source Timeline, *Great Depression and World War II, 1929 to 1945: Overview*, Library of Congress (Accessed, Jul. 2, 2023), https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/overview/.
[190] U.S. Constituion, article I, Section 8, §3.
[191] Jill E. Fisch, *Leave It To Delaware: Why Congress Should Stay Out Of Corporate Governance*, pp. 731-782, p. 732-36.

which modified the accounting and auditing process. This last regulation enshrined this movement of federalization of corporate law since it dealt with one of the very fundamental matters of corporate laws and tried to create a better control over corporations. Many other instruments are supporting this movement of federalization of corporate law and corporate governance law[192]. In fact, even before 1934, Congress has tried to enact 24 bills over the matter of corporate governance although they all failed[193]. It depicts an intent of Congress to assume a greater role in corporate governance and thus environmental CSR, attempt that was nonetheless failed, until 1933. It consequently launched debates in the academic sphere as to whether this evolution was desirable[194]. Professor Fisch is firmly opposed to this movement in its article, despite the more recent States failures[195]. The author affirmed "the continued superiority of Delaware's approach to regulating corporate governance, relying on the qualitative law-making procedures, and other evidence[196].

Noteworthy, analyzing the 2012 Dodd–Frank Wall Street Reform and Consumer Protection Act, it can be inferred consumer law also paved a path for Environmental CSR to be regulated by Congress. This act is enhancing the power of shareholders through the "say on pay" practice[197] and required the Securities and Exchange Commission (SEC) and stock exchanges to adopt additional corporate governance disclosure requirements[198]. It is then introducing the concept of CSR governance at the Federal level, while expanding the role of shareholders. They now have the power to introduce a request to express themselves on the remuneration decision, one of the former exclusive powers of the directors. The Shareholders' place is as a consequence revalorized. Working by analogy, it can be anticipated that it might evolve to a practice of "say on climate"[199] or any other of the CSR concerns. Especially with the current context of rising awareness on the subject of climate change.

There is also clear evidence of Federal law gaining interest in that field. The Securities Exchange Commission (SEC) published a non-binding Guidance regarding the disclosure

[192] For more details, see the following article, Marc Steinberg, *The Federalization of Corporate Governance*, Harvard Law School Forum on Corporate Governance (Jun. 21, 2018), https://corpgov.law.harvard.edu/2018/06/21/the-federalization-of-corporate-governance/.
[193] *Ibid.*, §2.
[194] *Ibid*, p. 738; see also Gordon G. Young, *Federal Corporate Law, Federalism, And The Federal Courts*, Law And Contemporary Problems, Vol. 41, No. 3 (Summer 1977).
[195] *Ibid*, p. 735, §2.
[196] *Ibid*, p. 735, 740-82.
[197] *Ibid*, p. 734.
[198] *Ibid*.
[199] See Chapter on French law, p.52.

related to climate change. It is assessing the current state of CSR law under Federal Law so that companies can comply with every potential CSR duties created under the Federal securities laws and regulations. Thus, the Federal State is not absolutely precluded from intervening in corporate governance and thus environmental CSR. It has felt free from regulating this area for around a century now.

However, because of Federalism, the regulation by Congress is only possible through indirect means, namely Commerce Clause, the securities laws and other Federal powers, that will be detailed further in the paper. Hence, it might be making it more difficult to fully grasp the extent of the field and norms are usually merged into a broader act, which does not render them visible. The conclusion given by the SEC is especially enlightening on the direction the Federal State is taking:

> *This interpretive release is intended to remind companies of their obligations under existing federal securities laws and regulations to consider climate change and its consequences as they prepare disclosure documents to be filed with us and provided to investors. We will monitor the impact of this interpretive release on company filings as part of our ongoing disclosure review program. In addition, the Commission's Investor Advisory Committee [78] is considering climate change disclosure issues as part of its overall mandate to provide advice and recommendations to the Commission, and the Commission is planning to hold a public roundtable on disclosure regarding climate change matters in the spring of 2010. We will consider our experience with the disclosure review program together with any advice or recommendations made to us by the Investor Advisory Committee and information gained through the planned roundtable as we determine whether further guidance or rulemaking relating to climate change disclosure is necessary or appropriate in the public interest or for the protection of investors.*[200]

Yet, the States are still the one with the direct authority to regulate Corporate Social Responsibility and thus environmental CSR. Their actions remain pretty limited to this day, and an explanation can be found in the doctrine of liberalism which is deeply enshrined within the DNA of American laws.

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[200] SEC, *17 CFR Parts 211, 231 and 241 - Commission Guidance Regarding Disclosure Related to Climate Change*, Federal Register, Vol. 75, No. 25, V. Conclusion (Aug. 2, 2010, accessed Jul. 1, 2023), https://www.federalregister.gov/documents/2010/02/08/2010-2602/commission-guidance-regarding-disclosure-related-to-climate-change.

B. "Leave It To Delaware: Why Congress Should Stay Out Of Corporate Governance[201]", an Expression of an American Particularism

With this title only, the author expressed the preeminence of State law. In fact, it expressly mentioned the superiority of Delaware in terms of knowledge and abilities to enact new laws. There are indeed strong elements supporting this affirmation[202]. Delaware has an excellent lawmaker which published a statute establishing the Delaware General Corporation Law, which has influenced half of the American States corporate laws. It also created a very active Court, the Court of Chancery which has developed since the 18th century a strong and developed analysis of Corporate Law. With the constitutional reform of 2007, the SEC and Courts from other jurisdictions were also authorized to ask emergency questions to the Chancery court, seeking advice in its centuries-old expertise. It has then of course much more legitimacy, besides the constitutional provisions, to develop corporate laws than Congress does, especially when it uses a backdoor. So do the States following its guidance, which includes the States of New York and California.

Another explanation besides these constitutional questions is the lack of political will. The United States is a deeply liberal State. This doctrine, developed by Adam Smith, has a great impact on one legal system since it will impose limited State intervention. In fact, there is a generalized mistrust against the States and a belief that the market is able to regulate itself. However, it is sometimes needed for the States to intervene, as the Federal State did during the first market failure in 1929. Not intervening could on the contrary on some occasions enhance socially and environmentally objectionable situations. CSR is a direct evidence of this "dark side" of this relationship between law and liberalism[203]. Congress and States might be very reluctant to intervene so as to stay true to this doctrine. However, the author argued that "Modern social welfare states demonstrate that liberalism and capitalism can be constructed in ways that provide for social welfare without lapsing into government tyranny[204]".

Not intervening can also be seriously detrimental to some companies. Only large-scale companies are able to reply to the society's expectation to enact environmental reports, thanks

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[201] Jill E. Fisch, *Leave It To Delaware: Why Congress Should Stay Out Of Corporate Governance*, pp. 731-782, 740-44 (2013, accessed Jul. 1, 2023).
[202] *Ibid.*
[203] Brian Z. Tamanaha, *The Dark Side Of The Relationship Between The Rule Of Law And Liberalism*, NYU Journal Of Law And Liberty, pp. 516-547, 543 (2008, Accessed Jul. 2, 2023).
[204] *Ibid*, p. 544.

to their big structure and great financial status that can support such tasks. It then limits the scope of CSR in the United States. It can be perceived as either very reasonable or unfair.

Regarding reasonableness, even if a law was enacted, it would probably exclude micro and small companies since it is a highly burdening duty to them, with regards to their means. In fact, reporting efforts could be burdening since companies must investigate themselves and create a framework from the grounds. They should also invest in the means to analyze these data and control their sincerity. Additionally, it is fair since they are not the one contributing the most, if at all, to climate change. Large and medium-sized companies are the biggest contributors.

On the other side, one might perceive it as unfair, without even mentioning the great positive impact on the environment the United States are missing. In fact, not enacting such regulations is reinforcing inequalities between companies. Only wealthier and more financially stable companies can invest in these efforts, whether as part of a greenwashing campaign or an interest in climate change. In both situations, the company will eventually benefit from many advantages: enhanced profits, better relationship with employees and consumers by reinforcing fidelity. Thus, medium-sized companies, without mentioning smaller companies, are excluded from these benefits because of the expenses and efforts implied by environmental CSR and most importantly the fear of failure. By enacting a mandatory regulation, the States would free the companies from all of these framework building efforts and the reluctances. They would only have to use the model set by the regulation. The States could also create support mechanisms to help smaller companies to make the correct transformations to be in compliance with these regulations. Solely relying on the civil society for CSR could in fact be detrimental to most companies.

This reflection brings another paradox. The United States, whether the Congress or the States, have been regulating some matters related to corporate laws, such as accounting to avoid a side effect of companies' behavior: corruption. Should it not be the same for the side effect of companies' development, namely climate change?

Section 2 – Environmental Corporate Social Responsibility Direct and Indirect Regulations in the US

In fact, some limited regulations do exist whether they were introduced in the practice of various States' corporate laws (I), or through indirect means at the Federal level (II).

I. Regulations Initiated by State Laws

It is impossible to analyze all of the States regulations over CSR matter. Few States must be selected in a way that would represent a general trend among them. As previously stated, the Delaware corporate law is a model for most states and has a great expertise over corporate law. It is then important to determine how such an expert on corporate law deals with the recent CSR movement (A). Then, two states that have been very active on the matter should be studied, especially when they are very much threatened by climate change. Those two States are the State of California and New York (B).

A. The Model Set by the Delaware Jurisdiction

There are two apparent ways for environmental CSR to be introduced into Delaware law. There is either the influence of the corporation's actors (1) or the new concept of Public Benefit Corporations, introduced at the Title 8 of the DGCL (2).

1. The Powers of the Various Corporate Actors under Delaware Corporate Law

An article emphasized on the power of shareholders to elect their directors and consequently chose the company's orientation. In fact, through their vote they can elect environmentally friendly directors[205]. Doing so, Delaware law does recognize profits are not the exclusive goal of companies. They should also have room for other interests more beneficial to the society overall, as long as it is the will of shareholders. In other words, it translates Delaware's wish not to enact or create any systematic controlling norms, forcing companies to have other

[205] Geoffrey Rapp, *A New Direction for Shareholder Environmental Activism: The Aftermath of Caremark*, Wm. & Mary Envtl. L. & Pol'y, Vol. 31, pp. 163-81, p. 165 (2006), https://scholarship.law.wm.edu/wmelpr/vol31/iss1/6.

concerns than their own interests. Still, if CSR is part of the company's interest and activism, then it should be allowed within the company.

Shareholders is one of the main paths of CSR within corporate law. Their "activism[206]" is however in conflict with the powers of the directors, who are the one to lead the strategy and decide of the priorities of the company, unless otherwise decided by the company's articles of association [207].

The Chancery Court is however protecting shareholders' activism. In the case *In re Williams Companies*[208], the shareholders tried to pressure the actions of its directors. It was perceived as a threat by the directors because of the short-term view they may have, the risk of creeping control, especially with regard to the economic damage they had suffered as a result of the global pandemic of covid-19. The directors hence enacted a poison pill, which are defensive measures against hostile takeover, which were deemed extreme. They completely shut down any communication and activism from any shareholders for a year. It was deemed unreasonable by the Court and in breach of the fiduciary duties of the directors, based on the *Unocal criteria*[209].

For directors to enact such a pill and respect their fiduciary duties, they must have reasonable ground supporting the existence of a threat to the company's strategy. Then, the pill or plan adopted as a response should be reasonable and proportionate to the threat. In this situation, despite its successfulness[210], the plan was not reasonable since shareholders could not even communicate their opinion. Thus, fiduciary duties, which includes the duty of care and loyalty in the Delaware jurisdiction[211], were breached thus protecting shareholders' activism. In other words, their activism and impulses over CSR matters can be legally protected through directors' fiduciary duties. CSR does not solely rely on internal political pressures anymore, although it is the way CSR orientations are born within a company. By doing so, the Delaware is ensuring the very basis of CSR is the will of the company's owners, while as a side effect it is limiting

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[206] *Ibid.*

[207] DGCL, Directors and officers, §141

[208] *In re Williams Cos Stockholders Litig.*, 2021 WL 754593 (Del. Ch. 2021).

[209] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)

[210] Ryan Brady, *Hard Pill to Swallow: In re Williams Companies Stockholder Litigation*, Villanova Law Review (Jun. 3, 2021), https://www.villanovalawreview.com/post/1001-hard-pill-to-swallow-in-re-williams-companies-stockholder-litigation.

[211] See in that sense, DGCL, §102(b)(7); §141(e); §172; §225(c); §365(c).

the traditional monopoly of directors over the company's strategy. It does not impose shareholders to commit to such activism.

The Court's decision in favor of CSR norms is not an isolated one. As early as 1996, the Court has implicitly incorporated CSR duties in the case *In re Caremark International*[212]. In this case, the directors' breach of fiduciary duties was established following the violation of several regulations on health care providers by their employees. This case implied a duty of oversight of the entire scope of activities, to ensure their efficient compliance with norms, the monitoring of their responsibilities and to avoid any disregard for their wrongdoings' negative consequences. This duty of oversight, arising out of the fiduciary duties, was also extended to corporate officers in a later case involving a complete disregard for sexual harassment issues[213]. The Court concluded that by doing so the defendant did not "further the best interests of the company, and therefore acted in bad faith.[214]" Once again, if CSR further the interest of the company, it will be protected thanks to the fiduciary standards. Taking another concrete example of an earlier case[215], directors were in breach of their fiduciary duties following the crash of two of Boeings' airplanes which resulted in the death of all crew members and passengers. In fact, the breach was caused by the directors' "complete failure to establish reporting system for airplane safety [and] turned a blind eye to a red flag representing airplane safety problems." It also confirmed that applying the standard set in the case *Marchand v. Barnhill*[216], the board oversight should be "rigorously exercised" on "intrinsically critical" missions of the company. It then, implicitly introduced the beginning of the notion of duty of vigilance on the company's wrongdoing, mainly on social and compliance issues. Environment wrongdoings were never explicitly protected by these fiduciary duties so far, although it has now a path to use.

Another substantial evolution occurred in the case *Simeone v. Walt Disney Co*[217]. In this case, the Walt Disney Company emitted an opinion on the recent bill enacted by the Florida State Legislature, restricting education over sexual orientation and gender identity. It first

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[212] *In re Caremark Int'. Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996); See also *Teamsters Local 443 Health Servs. & Ins. Plan v. Chou*, 2020 Del. Ch. LEXIS 274 (Del. Ch. 2020).
[213] *In re McDonald's Corp. Stockholder Derivative Litig*.,2023 LEXIS 23 (Del. Ch. 2023).
[214] *Ibid*., *1.
[215] *In re The Boeing Co. Derivative Litig*., C. A. 2019-0907-MTZ (Del. Ch. Sep. 7, 2021).
[216] *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).
[217] *Simeone v. Walt Disney Co.,* 2023 Del. Ch. LEXIS 154 (2023).

remained silent but because of public pressure it expressed itself and stood against this bill. It depicts the commitment of the company to encompass social issues as part of a societal need. Noteworthy, Walt Disney Co. had certain connections with the State legislature because of its lobbying activities and the advantages they were given with regards to tax and other matters. In other words, it had the means to lobby the Florida Legislature so that it would reverse this law. Following the statement, the State Legislature decided and effectively suppressed in less than forty-eight hours all of these fiscal advantages. Shareholders decided to introduce an action for the breach of the directors' fiduciary duties. Yet, the judge reminded that:

> *"Delaware law vests directors with significant discretion to guide corporate strategy—including on social and political issues. Given the diversity of viewpoints held by directors, management, stockholders, and other stakeholders, corporate speech on external policy matters brings both risks and opportunities. The board is empowered to weigh these competing considerations and [*3] decide whether it is in the corporation's best interest to act (or not act).*[218]"

It eventually concluded that such breach did not occur since the claimant failed to bring credible evidence of mismanagement, contrary to the interest of the corporation. The action was only a criticism of a business decision, which can have negative consequences without sufficient proof of mismanagement.

This decision expresses a big tension within the Court of Chancery. On one hand, it limited in 2021 the discretion of directors to act in the best interests of the company, which benefited to the shareholders. On the other hand, in 2023, it is reaffirming the superiority of the discretion of the directors for all matters dealing with the best interests of the company. The second decision is very surprising, since it framed the fiduciary duty while recognizing the need for companies to have regard to political and social issues. It then proceeded to protect this need, even when such considerations can damage the economy of one company. In fact, because of this frontal opposition to the Florida legislature, their long-standing partner, the Walt Disney Company lost a significant financial advantage in the present time. It immediately reduced the profits of the company. Moreover, one of the shareholders' critics was the fact that the decision to make a public statement was made shortly after the public reproval, which may imply it was a careless decision, not in the best interest of the company. Still, it appears the Court favored the social and political considerations before the economic performance of the company, and uphold the directors decision. There are two explanations to this outcome. Either the Court tried

[218] *Ibid*, *2-3.

to reaffirm directors are the one that should lead the strategy of the company and shareholders can only control this orientation through limited speech and the election of the board. Or it is trying to enhance the consideration given to ESG standards within companies, by protecting directors' initiatives as well.

2. The Public Benefit Corporation Model

This second thesis does not seem unreasonable, since in 2013, Delaware created a public benefit company with Senate Bill 47, with an almost unanimous vote[219]. It is defined at section 362(a) as "a for-profit corporation (…) that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner[220]". It is an example of the introduction of mandatory CSR norms in the United States, which is especially interesting for this paper as it has also introduced the concept of sustainability. It directly refers to the obligation for companies that will choose to have a positive effect on the society, to include one or more considerations, such as environmental or health considerations, in all of their daily decisions[221]. As it will be later described this obligation is however very limited in terms of impact, since there is no proper means to enforce it.

Section 365 defines the duties of directors in this kind of company. They should conduct the company in a "manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.[222]" Therefore, there should be some balance, which is strictly framed in the third paragraph. In fact, the decision should not be one that "no person of ordinary sound judgment would approve[223]". Public benefits should never be favored over the economic welfare of the company[224]. After all, it is still a company that needs to survive and thus make some profits. Furthermore, in the

[219] 147th General Assembly (2013 - 2014), SB 47, *An Act To Amend Title 8 Of The Delaware Code Relating To The General Corporation Law*, https://legis.delaware.gov/BillDetail?LegislationId=22350 .
[220] DGCL, §362(a).
[221] *Ibid.*, §362(b): this article gives a non-exhaustive lists of all the considerations that can be picked by this kind of company.
[222] *Ibid.*, §365(a).
[223] *Ibid.*, §365(b).
[224] *Ibid.*

absence of conflict of interest from directors, the failure to satisfy the balance can never be a breach of fiduciary duties[225]. It then limits the responsibility of such companies.

The section 366 also implies duties that the company should respect. It should include in every notice of a shareholders' meeting a statement declaring its quality of public benefit corporation. Within the statement the following information should be provided:

> *(1) The objectives the board of directors has established to promote such public benefit or public benefits and interests;*
> *(2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests;*
> *(3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and*
> *(4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.*[226]

This section implies a reporting duty on the information related to the public benefit they chose to pursue. It also opens the possibility for these companies to choose to insert in their certificate of incorporation more obligations that will later be mandatory. For example, they can rely on a "third-party standard". It directly refers to some soft law tools that can be found in environmental CSR.

Eventually, section 367 provided an enforcement mechanism of section 365(a), on the directors' duty to strike a balance. The person introducing the action should either own individually or collectively two percent of the company's shares, or, if the shares are listed on a national securities exchange, own shares with a market value of at least two million dollars at the date of the filing. Then, the same condition applicable to derivative action and the rules of the court in which it is filed should be enforced. The condition does not seem too unreasonable and unreachable. Yet, any suit against a director is unlikely to ever succeed. In fact, directors only have to demonstrate their decision was "both informed and disinterested and not such that no person of ordinary, sound judgment would approve[227]", which is a rather low standard to reach.

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[225] *Ibid.*, §365(c).
[226] *Ibid.*, §366.
[227] *Ibid*., §365(b).

As evidence, very few caselaw or data can be found over the matter. There should be around 3,000 companies in the United States, divided in the 37 States that have adopted these models of corporation[228]. Since 2013, there was only one case citing section 367. Yet the case only defined that the threshold set by the law should be respected and that breach of fiduciary duties could be admitted in case of violation of these duties[229]. There is in consequence a very limited impact of that new model of corporation. Reinforcing that fact, Public Benefit Corporation can choose one or more purposes. In other words, if companies do not choose to have regards for the environment, they will not be obliged to do so.

As a conclusion, CSR might be protected by the Delaware precedents through shareholders activisms and fiduciary duties. These duties burden both directors and corporate officers, by imposing a duty of oversight over their company's wrongdoings. It then can be reasonably inferred that because of the global awareness over climate change, this precedent will later be extended, so that it will be a breach of fiduciary duties to fail to oversee one's company's negative environmental impact. Yet, even in Public Benefit Corporations, no special provision on environmental CSR was enacted. Such companies can only be created based on the own free will of the founders of a company, which also limits the impact of such a model. No person can be obliged to create a Public Benefit Corporation. This discipline then remains mainly subject to the will of companies, although a legal frame was created for when entities decide to undertake environmental CSR goals.

[228] USDN, *B Corps and Benefit Corporations*, Sustainable consumption toolkit (accessed Jul. 3, 2023), https://sustainableconsumption.usdn.org/initiatives-list/b-corps-and-benefit-corporations#:~:text=There%20are%20now%20over%203%2C000,incentives%20or%20other%20tax%20implications.

[229] *New Enter. Assocs. 14 v. Rich*, 2023 Del. Ch. LEXIS 102 (Del. Ch. 2023).

B. The New York and California Jurisdiction over Environmental Corporate Social Responsibility

These two States should in theory be especially concerned by the impact their companies have on climate change: one is burning throughout every summer, and the other is extremely threatened by the sea-level rise[230]. It can indeed be found in these States' legislative activities evidence of recent interest in environmental CSR (1), as well as in the precedents of both of these jurisdictions (2).

1. The Legislative Initiatives to Regulate the Environmental Impact of Companies and the Activism of American Companies

The California Senate Bill 261 stated this truth through the comments of its author:

> *It is abundantly clear the worsening effects of climate change pose numerous environmental risks that include extreme drought, rising sea levels, catastrophic wildfires, and extreme weather events. These impacts not only a]ffect our environment but they also a]ffect how we live, what services we rely upon and which investments make the most sense. Major corporations and financial institutions face climate related financial risks in their business making decisions, so it is important for these businesses and institutions to assess and share the risks they have identified, and what efforts they are employing to mitigate them[231].*

In fact, both of these States' Legislatures are very much active on Corporate Social Responsibility.

Starting with California, it has successfully concluded a fuel efficiency deal with five automakers, imposing them to reduce their carbon footprint by a certain deadline[232]. It is of course one of the final objectives of environmental CSR. Yet, it failed to create standards to which these companies should abide by in their daily decisions. It also tried in 2021 to create a

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[230] Anagha Srikanth, *This map shows you where to move once climate change make parts of the U.S. unlivable*, The Hill, Changing America (Feb. 06, 2020), https://thehill.com/changing-america/sustainability/climate-change/481857-where-will-you-go-when-sea-level-rise-floods/.

[231] 2023 Legis. Bill Hist. CA S.B. 261.

[232] Rebecca Beitsch & Rachel Frazin*, California finalizes fuel efficiency deal with five automakers, undercutting Trump*, The Hill, Energy en Environment (Aug. 17, 2020), https://thehill.com/policy/energy-environment/512414-california-finalizes-fuel-efficiency-deal-with-five-automakers/ ; Phil Covington, *A Short Story of Fuel Efficiency Standards and America's Auto Industry*, Triple Pundit : The business of doing better, Energy and Environment (Feb. 09, 2021**),** https://www.triplepundit.com/story/2021/fuel-efficiency-standards/718221#:~:text=Firstly%2C%20the%20agency%20relaxed%20fuel,designed%20to%20defang%20California%27s%20influence.

Climate Corporate Accountability Act[233], which failed at the stage of the third lecture in November of 2022. Still, the Legislature persevered and introduced a new bill on climate-related financial risk[234]. It establishes a duty for large companies, exceeding a 500 million USD turnover per year, to report every year on their climate-related financial risk. The scope is extremely narrowed by this last disposition. However, it does implement duties to yearly summarize the collected data, analyze "the systematic and sector-wide climate-related financial risks (…), including, but not limited to, potential impacts on economically vulnerable communities". Companies are also under the duty to determine whether some reports are inadequate or insufficient.

Some comments should be made. First, the bill does provide some definition of what climate related financial risks are[235], but in a very minimalistic way. It does not list the information that should be found on the report. It would allow companies to have greater guidance. Instead, it does rely on other standards set by the Final Report of Recommendations of the Task Force on Climate-Related Financial Disclosure, which is similar to other soft law tools developed. It also took an example set by the United Kingdom on their mandatory TFCD disclosures.

Still, the bill prepared a way to sanction companies acting in violation of this potential new duty. The Attorney general could indeed bring a civil suit and seek a penalty fine that could not exceed 500,000 dollars. This is very limited compared to the annual turnover of these companies that exceed 500 millions dollars. For the least wealthy companies included in this bill, the penalty would be at most 0.001% of their turnover. In other words, companies not complying will be able to afford such penalties, which will fail to deter companies. As a result, the enforcement mechanism solely relies on the will of the company.

Still, a bill with flaws is better than no actions taken by the Legislature to match national and international legal and *de facto* movements. This bill would indeed allow formalization into a legal framework and uniformize behaviors from companies within the defined scope in California. It is currently referred a second time to the Committee on natural resources and has high chances to reach the next phase. Noteworthy, the Court has already adopted the California

[233] 2023 Legis. Bill Hist. CA S.B. 260.

[234] 2023 Legis. Bill Hist. CA S.B. 261.

[235] *Ibid.*: "material risk of harm to immediate and long-term financial outcomes due to physical and transition risks, including, but not limited to, risks to corporate operations, provision of goods and services, supply chains, employee health and safety, capital and financial investments, institutional investments, financial standing of loan recipients and borrowers, shareholder value, consumer demand, and financial markets and economic health."

Transparency in Supply Chain[236], which focuses on Human Rights violations. The environment is excluded from its scope, but it is still a matter of accountability of companies in the CSR field.

Similarly to Delaware, both California and New York have adopted public benefit corporations[237] as a model of corporations. The essence remains the same, which is to create sustainable corporations that are aware of their societal impact.

CSR also appears to be in the very heart of the New York State missions, because of the local activism[238]. Its current aim is to create a Transparency in Supply Chain Act with an Assistance program. Two bills were introduced in 2021, to support this aim. They recognized the emergency of climate change, and the threat supply chains can be on that matter. They would have been similar to the vigilance duty found across Europe since it was influenced by the regulations issued on the other side of the Atlantic. The aim is to oblige companies to be careful about their environmental and other socially desirable impact. The duty would also bear on all companies no matter what their size is. It was pretty ambitious, especially when they tried to create an assistance program that would support both materially and substantially the companies eligible to such assistance. The bills were both failed in 2021 and 2022. A similar bill was introduced in 2023, and its chances to make it through the next stage are very low relying on analysis provided by legal databases such as LexisNexis.

It could be argued that these outcomes were predictable because the scope was too broad as it encompassed every company and all ethical matters. It was not limited to Human Rights or Environmental issues. This last hypothesis is wrong since more specific bills were introduced and still failed or have very low chances to be enacted.

In fact, New York tried to enact the Fashion Act[239], which imposed due diligence of companies on their supply chains, positive action to improve their environmental and human rights impact, with an ambitious enforcement mechanism involving the attorney general. This bill however

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[236] Cal. Civ. Code § 1714.43 (West).

[237] Cal. Corp. Code, Title 1, § 5000-10841; Jeremy Chen, What Is California Benefit Corporation?, The Law Office of Jeremy Chen (accessed Jul. 6, 2023), https://jeremychenlaw.com/what-is-a-california-benefit-corporation/.

[238] Jill, Carvajal, *The Power of New York corporations' impact on New York city*, Politics NY (Feb. 6, 2023), https://politicsny.com/2023/02/06/the-power-of-new-york-corporations-impact-on-new-york-city/.

[239] The Fashion Act, *Backgrounder: A deeper dive on the Fashion Act* (last accessed Jul. 3, 2023) https://www.thefashionact.org/backgrounder/#tfa5 ; see also Nicole Greenfield, *New York Is Exposing the Fashion Industry for What It Is: a Climate Nightmare*, NRDC (Feb. 13, 2023), https://www.nrdc.org/stories/new-york-exposing-fashion-industry-what-it-climate-nightmare

failed, although it was focused on companies in the fashion industries, which significantly limited its scope. Another bill strictly focused on human trafficking and corporations' accountability[240], has been introduced but also has very low chances to be adopted.

Achieving some legal standards of environmental CSR appears to be difficult in the New York context. It is probably because the legislature is dreaming too big by enacting a first legislation over the matter with an extremely broad scope. Additionally, the support system that was contemplated would have implied significant funding from the State, which can only be a disincentive to the New York Legislature. Noteworthy, the New York bills were for most of them relying on consumer protection grounds. They are also the grounds for most of the lawsuits brought in the States of New York against great polluters.

2. The Use of Precedents as an Environmental Corporate Social Responsibility Instrument

The State of New York has brought civil charges against ExxonMobil and other multinational petrol-oriented companies[241], for deceiving New York consumers and investors on their environmental impact, in violation of the Martin Act and the Executive Law §63(12). The State is alleging that these companies are systematically and intentionally disclosing false information on the environmental impact of their fossil energies, by omitting their real effects., which ultimately was detrimental to consumers. However, in 2019, the New York Supreme Court concluded that the State neither brought sufficient evidence of misrepresentation or elements supporting that investors were misled by this omission.

The State still brought similar civil charges against other oil companies, such as Chevron Corporation and ExxonMobil again[242]. It depicts a clear policy from the State of New York and strong activism. However, this suit was met with more frustration. The United States Court of Appeals concluded that global warming and climate change were issues of federalism since it is an international and foreign policy by essence. Thus, Federal laws preempted any State laws. Moreover, it is neither the State or Federal laws to impose reduction measures on companies with regards to their greenhouse gas emissions. It decided it was in fact a power of the Environmental Protection Agency. This decision was surely a great restraint to the development of Courts' activism throughout the country, but also of States Legislatures. It embodies one of

[240] NY SB S4442.
[241] *People v. Exxon Mobil Corps.,* 2019 N.Y. Misc LEXIS 6544 (2019).
[242] *City of New York v. Chevron Corp.*, 993 F.Sd 81 (2d Cir. , 2021).

the great American paradox: Despite a clear political intention, it does not have the means to transform this intention into binding rules.

However, there was a recent breakthrough to the California San Mateo County activism and other California cities. It has indeed brought charges against multinational oil companies for breach of California private nuisance law, before State Courts. In fact, by accelerating climate change and lying on their emissions to the population, the county argued conditions to introduce a private nuisance claim against these companies would be met. They also sought to make them materially accountable by forcing them to pay more in sea walls and other protections against the rise of the sea level. The issue was later brought in front of Federal Courts. The outcome was very much different from the New York cases. The solution was also confirmed by the U.S. Supreme Courts on April 24th, 2023[243], giving a new birth to environmental CSR throughout the United States. The 9th Circuit Court of Appeals concluded in 2022[244] that Federal law did not preempt State law on such cases. In fact, it is trying to come back to a strict interpretation of the "removal statutes". They "should be construed narrowly in favor of remand to protect the jurisdiction of state courts. *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 698 (9th Cir. 2005)[245]" The Federal Courts have indeed threatened this principle of mutual independence of State and Federal law, by stating that matters of environmental CSR were by essence foreign policies and international matters mandating Federal preemption[246]. It was not. Corporate law, as it has been studied, is not one of the powers allocated to the Federal state. Thus, as determined by the tenth Amendment to the U.S. Constitution, it should be reserved to the States. Federal Courts only used the international aspect of CSR, as it was advocated on international forums, to prevent any actions at the State level. It also denied as a consequence the existence of CSR and environmental law as being a concern of national interest, impeding efficient regulations and Courts activities. Nevertheless, the U.S. Supreme Court confirmed that "[Their] adherence to this doctrine does not change merely because plaintiffs raise novel and sweeping causes of action[247]." The Circuit Court then reversed their long-standing position to rebalance the powers and allow such claims before States Courts.

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[243] *Chevron Corp. v. San Mateo Cnty*., 2023 U.S. LEXIS 1719 (2023).
[244] *Cnty. of San Mateo v. Chevron Corp.,* 32 F.4th 733 (9th Cir., 2022).
[245] *Ibid.*, §764
[246] U.S. Constitution, art. VI, §2.
[247] 32 F.4th 733, §764.

All of these back-and-forth evolutions revolutionized the prospects of CSR throughout the United States, launching debates in Courts and empowering States. There are still significant steps to be taken for environmental CSR to be established permanently. The Federal Power has then given up a monopoly, but is not without Powers over the matter.

II. Corporate Social Responsibility Entering Federal Law Through Crossroads

A recent study of the Pew Research Center showed that America is one of the countries suffering the most from internal cleavages[248]. President Biden has made it its purpose to close the gap during his term. However, Americans converge on the question of environmental law:

> *"[h]istorically, the United States prides itself of a long tradition of environmental leadership, that dates back to President Teddy Roosevelt. As a matter of fact, in the 1960s and 1970s the U.S. established a series of progressive laws and institutions. For example The National Environmental Policy Act (NEPA) of 1969 committed the United States to sustainability, declaring it a national policy "to create and maintain conditions under which humans and nature can exist in productive harmony that permit fulfilling the social, economic and other requirements of present and future generations" (NEPA, 1969).[249] »*

It is then surprising that CSR was not already enforced in a more rigid way although the strong practice of environmental law should have supported this goal (A). In fact, CSR also started to be introduced in American law through other media, such as consumer law (B) and securities regulations (C).

[248] Michael Dimock & Richard Wike, *America Is Exceptional In The Nature Of Its Political Divide*, Pew Research Center, Political Polarization (Nov. 13, 2020), https://www.pewresearch.org/short-reads/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/.

[249] Mark Anthony Camilleri, *Corporate Social Responsibility Policy in the United States of America*, Idowu S., Vertigans S., Schiopoiu Burlea A. (eds.) Corporate Social Responsibility in Times of Crisis. CSR, Sustainability, Ethics & Governance. Cham, Switzerland, Springer Nature. DOI (2017, accessed Jul 1. 2023), https://doi.org/10.1007/978-3-319-52839-7_7.

A. Environmental Law

The United States has demonstrated a very early interest in environmental issues. The first major regulations can be found in the 1963 Clean Air Act[250]. It was later supplemented by the Environmental Protection Agency (EPA) in 1970, which committed to:

> *use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can exist in productive harmony that permit fulfilling the social, economic and other requirements of present and future generations[251].*

The Agency gathers all of the environmental acts and imposes a strict compliance program for a limited number of industries, such as the construction or mining industries and other highly polluting industries[252]. The aim is to regulate the greenhouse gas and wastes emitted by big polluters, alongside other objectives such as protecting waters from chemical contamination. It is a general environmental agency pursuing the protection of the environment and the growth of sustainable development.

It has direct implications on environmental CSR, since it has also implemented a mandatory CSR duty of reporting for certain facilities deemed high polluters. The report aims at assessing the emission by one facility, in a national effort to identify which entities are the biggest emitters[253]. To complete this report, the agency provides guidelines on how to proceed to the calculation of emissions[254]. All of the obligations in relation to the report are also detailed in the title 40, part 98 of the Code of Federal regulations, which provides a strict frame[255]. This is a 784 pages-long authoritative document, which highlights the unique structure of this reporting duty. There are indeed general provisions on the duty to report on emissions, but it later breaks the various productions in different blocks, each having specific duties attached to them[256]. For example, facilities producing aluminum and electricity are not under the same

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[250] 42 U.S.C. §7401 et seq. (1970).

[251] 42 U.S.C. §4331(a), National Environmental Policy Act (NEPA), (1969).

[252] EPA, *Law & Regulations* (last accessed Jul. 14, 2023), https://www.epa.gov/regulatory-information-sector/construction-sector-naics-23.

[253] EPA, *GHGRP and the U.S. Inventory of Greenhouse Gas Emissions and Sinks*, Greenhouse Gas Reporting Program (GHGRP) (last accessed Jul. 14, 2023), https://www.epa.gov/ghgreporting/ghgrp-and-us-inventory-greenhouse-gas-emissions-and-sinks.

[254] EPA, *Greenhouse Gas Reporting program: Emission Calculation Methodologies*, (last accessed Aug. 6, 2023), https://www.epa.gov/sites/default/files/2017-12/documents/ghgrp_methodology_factsheet.pdf.

[255] 40 CFR Part 98 (last amended, Jul. 13, 2023, accessed Jul. 14, 2023).

[256] *Ibid.*, §98.3. ; EPA, *Greenhouse Gas Reporting Program : Resources by Subpart for GHG Reporting* (last acessed Aug. 6, 2023), https://www.epa.gov/ghgreporting/resources-subpart-ghg-reporting.

exact duty. The Agency is trying to create an efficient reporting duty, taking into account the specificities of each production. In fact, while both of these industries emit greenhouse gas, the cause is not the same because they do not use the same materials, procedures of extractions or manufacturing. In other words, these specific and additional duties allow to identify the source of emissions and are not only limited to the outcome. Noteworthy, the EPA website provides a test to determine whether a facility would be under the duty to report under these provisions[257]. It also created a portal to which industries may connect and communicate their reports. Every step was taken to ease the process of this duty and make the information available to the entire public. They can indeed all be found on the website of the Agency, with detailed maps of nearby facilities and degree of compliance with the regulations. This act enhances sustainable development practices within companies and associates the people to these efforts. There peer pressures and pressures of stakeholders is after all the traditional component of environmental CSR in the United States, through voluntary actions by companies.

The EPA has also developed a strong compliance program by creating technical assistance and guidance resources and compliance assistance centers, which ensure solid communications with the companies under this duty. The monitoring program is also a means made available to the Agency to ensure the enforcement of these provisions[258]. It involves inspection, the Clean Air Act Evaluation, civil investigations, record reviews, information requests, an audit procedure developed by the EPA and the new Next Generation Compliance tool. These means are very heterogeneous as they imply various actors and ways. It should ensure a quasi-perfect monitoring of these reports.

However, having an efficient compliance program is not of any use unless enforcement mechanisms or sanctions are also made available to the Agency. The section 113(b) of the Clean Air Act[259] gives the administrator of EPA the authority to introduce a civil action to recover the civil penalty in case of the breach of the duty. It amounts to up to 25,000 dollars per day of failing to comply. For the purpose of determining the penalty, the economic benefit that was allowed by the non-compliance, the gravity and the length of violation are considered[260]. In

[257] EPA, *Greenhouse Gas Reporting Program : Applicability tools* (last acessed Aug. 6, 2023), https://www.epa.gov/ghgreporting/applicability-tool
[258] 42 U.S.C. § 7414
[259] 42 U.S.C. §7413 (b).
[260] *Ibid.*

case of a settlement, good faith may also be taken into account, but it cannot result in the decrease of the penalty by more than 30%. Settlement procedures are the most often used. Since January 2023, three settlements were made with three American companies exploiting one of the facilities under the duty of reporting[261]. In fact, under the provision of the EPA's Consolidated Rules of Practice[262], it also has the power to enter into settlements. These settlements applied all of the Clean Air Act criteria which each resulted in either a penalty fine amounting to 382,473 or 275,000 or 247,601 dollars. The enforcement mechanism appears efficient although the responsibility of companies is most often not admitted by them and compared to their actual profits[263], these penalties cannot have any deterrence effect.

It is also important to highlight that this agency was traditionally used as a shield preventing any environmental CSR claims from rising at the State level[264]. It was finally reversed by the U.S. Supreme Courts on April 24th, 2023[265]. The resistance to the development of CSR is also noticeable in the scope of the duty of reporting. While it has very precise requirements on the reporting duty, it only burdens highly polluting industries excluding any other companies that may also emit greenhouse gas emissions from this duty. It can then be argued it is not different from a classic environmental law that is trying to protect the environment. Yet, a reporting duty is a clear element of CSR practices. The law does not only set objectives and means to protect the environment, but it is also trying to associate polluters, namely companies, to these efforts by making them accountable for their participation to Climate change. The enforcement mechanism, although not as deterrent as it should be, is still a symbol of holding companies accountable. Hence, accountability being one of the main characteristics of CSR, this report does qualify under mandatory environmental CSR duties.

As a conclusion, the EPA is trying to promote sustainable models of governance within greatest emitter companies, by implementing guidance, compliance programs and a range of other instruments.

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[261] *In re: Artsen Chemical America, LLC*, CAA-HQ-2022-8428 (Environmental Appeals Board U.S. EPA, 2023); *In re BMP International, Inc., IGas USA, Inc., and Scales N Stuff, Inc.*, CAA-HQ-2022-8429 (Environmental Appeals Board U.S. EPA, 2023); *In re: Harp USA, Inc.*, CAA-HQ-2022-8426 (Environmental Appeals Board U.S. EPA, 2023).

[262] 40 C.F.R. § 22.18(b)-(c).

[263] *In re BMP International, Inc., IGas USA, Inc., and Scales N Stuff, Inc.*, CAA-HQ-2022-8429, §F. 58(b) (Environmental Appeals Board U.S. EPA, 2023).

[264] *City of New York v. Chevron Corp.*, 993 F.Sd 81 (Cir . 2nd, 2021).

[265] *Chevron Corp. v. San Mateo Cnty.*, 2023 U.S. LEXIS 1719 (2023).

B. Consumer Rights

Consumers are also a vector used by the United States legal system to hold companies accountable for their environmental impact. In fact, companies do use greenwashing campaigns for marketing matters. Greenwashing can be defined as efforts by the company to minimize or even lie on their actual environmental negative impact through effective communication with consumers. One concrete example would be McDonald's introducing paper straws and alleging at the same time that it was taking concrete commitment to reduce their carbon footprint[266]. The reality was the opposite: Not only were the straws not recyclable, but they were also produced through the exploitation of forests. This policy in appearance was perceived as an excellent progress by consumers. However, they were being deceived by the company's false statements. Implementing such policy within the company is contrary to any environmental CSR objective, although they have the benefit from its advantages, namely enhanced profits. As explained in the previous parts of this paper, being environmentally accountable and sustainable creates a loyal consumer base and tends to aggregate more consumers from every background.

That is why the Federal Trade Commission (FTC) has been regulating green advertising at the federal level to protect consumers from greenwashing and indirectly holding companies accountable for their practices and bad governance. It is then an indirect way to implement environmental CSR in the United States legal context. The Commission has been filing suits against companies violating environmental marketing guidelines since 1992[267]. It indeed prohibits "deceptive acts and practices in or affecting commerce. A representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers' decisions[268]". It then proceeds to limit the freedom of marketing teams to ensure no misrepresentation could occur. The FTC filed a suit against Volkswagen after it lied about their cars' fuel efficiency through the "Clean Diesel" Ad

[266] BBC*, McDonald's paper straws cannot be recycled*, (Aug. 5, 2019), https://www.bbc.com/news/business-49234054.
[267] 16 CFR Part 260, *Guides for the Use of Environmental Marketing Claims; Final Rule*.
[268] *Ibid*., §260.1.

campaign[269]. As a result of the settlement procedure, the company had to pay 9.5 billion dollars to the consumers deceived by the false statement made in violation of the regulations[270].

Consumers are then a means to oblige companies to be accountable for their environmental impact misrepresentations. Still, it is only a very indirect enforcement mechanism, since the main interest remains the consumer and is not based on any reporting duty imposed on companies.

C. Securities and Exchange Commission Regulations

The Security and Exchange Commission (SEC) has published in 2010 guidance regarding disclosure related to climate change that is burdening public companies in the United States[271]. It acknowledges the threats climate change is for corporations, as it is having direct impact on consumers, which consequently impacts the markets consumers are using. For example, this federal authority highlighted the credit risks that sea-rise level poses: people will obviously continue to buy properties To do so, they will borrow from banks but might be unable to pay back the credit they took since the property might end up destroyed by the sea-rise level. It also highlighted the international movements over the matter and how other regions have gained interest on duties of corporations to fight against climate change at their own level and alongside States and the International community.

Shareholders have been calling for such disclosures as emphasized by these guidelines. It refers to numerous petitions from them to add another duty to directors[272]. In fact, it recognizes

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[269] FTC, *In Final Court Summary, FTC Reports Volkswagen Repaid More Than $9.5 Billion To Car Buyers Who Were Deceived by "Clean Diesel" Ad Campaign*, Protecting America's Consumers(Jul. 27, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/07/final-court-summary-ftc-reports-volkswagen-repaid-more-95-billion-car-buyers-who-were-deceived-clean.

[270] *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, And Products Liability Litigation*, 2672 (Federal Trade Commission's Final Status Report On Consumer Compensation).

[271] SEC, 17 CFR Parts 211, 231 & 241, *Commission Guidance Regarding Disclosure Related to Climate Change*, Federal Register, Vol. 75, No. 25, V. Conclusion (Aug. 2, 2010, accessed Jul. 1, 2023).

[272] See note 20 from 17 CFR Parts 211, 231 & 241: Petition for Interpretive Guidance on Climate Risk Disclosures, dated September 19, 2007, File No. 4-547, available at *http:// www.sec.gov/rules/petitions/2007/petn4-547.pdf*: supplemental petition dated June 12, 2008, available at *http://www.sec.gov/rules/petitions/ 2008/petn4-547-supp.pdf*; second supplemental petition dated November 23, 2009, available at *http://www.sec.gov/rules/petitions/2009/petn4-547- supp.pdf.* For other petitions on point, *see also* Petition for Interpretive Guidance on Business Risk of Global Warming Regulation, submitted on behalf of the Free Enterprise Action Fund on October 22, 2007, File Number 4–549, available at *http:// www.sec.gov/rules/petitions/2007/petn4-549.pdf*.

that soft law tools and voluntary commitment from corporations towards disclosure of their overall impact on the environment allow the gathering of strong information outside of any legal constraints. Nevertheless, it is not denying the importance of federal instruments that allow to ensure climate-related financial risks disclosure in very limited sectors. It refers to the EPA role as it was previously discussed and the implementation by the National Association of Insurance Commissions of a uniform standard for mandatory disclosure by insurance companies to state regulators of financial risks due to climate change and efforts to mitigate them. This last element emphasizes once again on the prominent role of companies as their duty does not limit to the disclosure of information, but also extends to the implementation of effective measures to mitigate their climate change impact. They do not rely on any guidelines from this authority, companies are rather untrusted with determining which actions are the best.

Coming back to the SEC regulations, it has also imposed duties on companies since the early 1970's. Throughout this decade the authority tried to apprehend a way to include environmental disclosures within companies' financial disclosure. It first tried to incorporate the impact of compliance with environmental norms on companies' financial situation. In fact, environmental law appears to have been perceived as a threat to companies at this time and it was trying to encompass the burdens on companies implied by the respect of environmental norms. The rules were finally set in 1982 through the network of general financial disclosures regulations, namely the Regulations S-K and S-X. However, it is only incorporating environmental CSR through indirect means. Only the first item, the item 101[273], directly addresses the matter of environmental impact on the company. It indeed requires companies to describe their organization, functioning, services offered, and that of their subsidiaries, including costs inferred by the compliance with environmental norms. Whereas the item 103[274] requires companies to disclose on litigations to which they are a party, and that of their subsidiaries, while the item 503[275] requires the company to disclose the risks of an investment. Eventually the item 303[276] which requires one company to disclose all information over their financial statement to provide an efficient assessment of the result of their operations to investors and other stakeholders. Through all of these disclosures, environment CSR has indirectly become a mandatory step for companies. In fact, they must disclose the impact of

[273] 17 CFR Parts 229, 101(h)(4)(xi).
[274] 17 CFR Parts 229, 103.
[275] 17 CFR Parts 229, 503(c).
[276] 17 CFR Parts 229, 303.

legislation that is aiming at reducing the environmental impact of one company over their financial status. It also implies the impact of climate change over their operations. Thus, reporting information that was found under French law must necessarily appear. But it is also different by essence from the French CSR. Companies may also assess the benefits of having concern for the environment over their operations, based on consumers and employees' incentives as discussed previously. These disclosures are then only made possible because it might benefit the company and protect the market in general, since all of these duties can be found under the SEC regulation.

As a conclusion, the United States is as of today the second biggest emitter of greenhouse gas in the world. However, it has always taken pride in its environmental laws and policies to prevent climate change. To emphasize on this paradox, the States have been struggling to implement environmental CSR at their own level. They indeed implemented a sustainable model of company but persistently failed to hold companies responsible for their environmental impacts and behaviors, that sometimes-implied lies to the public among other issues. Yet, this assessment was only accurate 2023, when the U.S. Supreme Court reversed the precedent stating environmental CSR was a matter of Federal law because of its international and foreign policy implications. As discussed in the introduction of this paper, environmental norms have first arisen from the International community, which by itself justified a federal preemption, while the Federal State had traditionally no power over corporate law. This solution is no longer true. Still, the Federal law has important implications over environmental CSR laws, because of the indirect regulations it has implemented in the broader fields of environmental law, consumer law and securities regulations. Environmental CSR cannot be said not to exist in the U.S. relying on this entire part. In fact, it is only diverging with regards to its purpose. The emphasis is certainly on companies' competitiveness and the will of companies and main, still as a result of this purpose, reporting duties and disclosures are burdening companies. The strong liberalism has then reversed the rationale behind the matter of environmental CSR without substantially shifting the result.

Still, there is another persistent shield to environmental CSR in the United States that needs to be addressed. The doctrine of *forum non conveniens* has prevented a number of cases from

succeeding. The latest and most controversial was the *Acuña-Atalaya case*[277]. The case involved a family of farmers in Peru which was threatened by the use of violence and harassment by an American company. Their property was also destroyed or stolen while their pets and livestock under attack or even killed. The case is then not on environmental CSR but still implies the social responsibility of one company over their practices. The family tried to bring a suit before American Courts but were dismissed, including their writ of certiorari before the U.S. Court of Appeals for the Third Circuit was denied, ending any possible lawsuits in the U.S. American Courts refused to hear about the CSR of companies that are operating abroad since another, and more adequate forum should exist: the forum of location of the operation. Thus, American Courts would only accept such claims regarding their companies if the forum of operation of those was not adequate. In other words, the plaintiff must prove that they would not obtain adequate reliefs from the foreign Courts because of substantial delays, circumstances rendering Courts' decisions biased against the demanding party or any other relevant circumstances. In the present case, the plaintiffs failed to demonstrate that Peruvian Courts would not be an adequate forum to hear about the present case, involving damage to a Peruvian family on the Peruvian territory by an American company. Analyzing this decision, it is evident the Courts are trying to turn a blind eye on the activities of American companies abroad, which is a significant limit to CSR in general. This decision is difficult to understand since there are no practical impediments to the other solution. In fact, the enforcement of an American decision over the CSR of one American company operating abroad is absolutely possible since the main sanctions regarding companies' violations of norms are fines or damages. Such sanctions are possible and efficient even if a company is operating abroad.

That is to say, there is some form of reluctance within the American legal tradition, that is also caused by federalism, to regulate over CSR and more precisely over environmental CSR.

[277] *Acuna-Atalaya v. Newmont Mining Corp*, 838 F. App'x 676 (3d Cir. 2020).

Chapter 3 – The Environmental Corporate Social Responsibility Practices in China: A Sui Generis Regime

China being the world's biggest polluter, with 32.9% of the worlds' emissions originating from China in 2021[278], it should be expected that China has taken a commitment towards the environment. The National People's Congress adopted in 1982 a Constitution which in its article 26 states "The state shall protect and improve living environments and the ecological environment, and prevent and control pollution and other public hazards." It has then made environmental protection a constitutional right and obligation, which responsibility bears on the State. In accordance with this provision, since 1996 China has consistently sought to implement a qualitative growth of its economy, thus referring implicitly to a concept of sustainable development[279]. However, companies do have a responsibility towards the environment and have incentives to promote CSR.

First of all, Chinese company law was not unified until 1993, although in May 1992 the two ministerial decrees, namely the Standard Opinion on Companies Limited by Shared and the Standard Opinion on Limited Liability Companies, were released and set the ground for the legal unified framework to come[280]. The National People's Congress (NPC) has indeed promulgated the Company Law in 1993. This law, that has frequently been updated since then, allowed the government to gather all of the preexisting norms and insert new norms regulating companies' behaviors and rights. However, it is limited in scope to limited liability companies and companies limited by shares[281]. Other forms of company existed and used to be regulated by special laws, taking for example the Foreign Invested Companies. Nevertheless, this model was abolished by the 2020 Foreign Investment Law, which repealed the law on Sino-Foreign Equity Joint Ventures, the law on Wholly Foreign-Owned Enterprises and the Law on Sino-

[278] Noémie Galland-Beaune & Juliette Verdes, *Union européenne, Chine, Etats-Unis… qui émet le plus de gaz à effet de serre ?*, Toute l'Europe : Comprendre l'Europe, Environnement et Pacte Vert (Last updated Mar. 27, 2023, last accessed Jul. 25, 2023), https://www.touteleurope.eu/environnement/union-europeenne-chine-etats-unis-qui-emet-le-plus-de-gaz-a-effet-de-serre/#:~:text=Emissions%20mondiales%20de%20CO2%2C%20en%202021&text=Lecture%20%3A%20En%202021%2C%20la%20Chine,des%20émissions%20mondiales%20de%20CO2.&text=Parmi%20ces%20puissances%2C%20certaines%20ont,gaz%20à%20effet%20de%20serre.

[279] China, 9th Five-Year Plan, 1996-2000; see also every following Plans.

[280] Wang JiangYu, *An Overview of China's Corporate Law Regime*, CityU - Centre for Chinese & Comparative Law, p.5 (Aug. 13, 2008), https://ssrn.com/abstract=1222061.

[281] *Ibid*., p. 6.

Foreign Cooperative Joint Ventures and entered into force in 2021[282]. Foreign-Invested Companies are now assimilated to the regime of Company Law and Partnership Enterprise Law. It is no longer governed by a special law. State-Owned Enterprises are following the same path, although the transition is not achieved. Other laws also indirectly regulate all companies, such as securities regulations[283]. Thus, despite the effort to enact comprehensive norms that would allow more transparency and understanding over companies' regulations, this objective was only partly achieved. Another element is making it difficult to grasp the extent of duties of companies, besides these special regulations. Indeed, the hierarchy of norms and the various State levels, norms imply diffused sources of law over the matter[284]. This very specific structure has obvious consequences over environmental CSR norms and behaviors that exist in China, especially with regard to its authoritarian principles leading its political life.

With this information in mind, it should then be determined through which factors environmental CSR was to be embedded within Chinese companies' obligations and traditions (section 1), before examining the norms commanding these CSR behaviors (section 2).

[282] Hawksford, *How will the new PRC Foreign Investment Law Impact your company?*, (Aug. 18, 2021, last accessed Aug. 25, 2023).
[283] *Ibid*., pp.6-7.
[284] *Ibid*., pp. 9-19.

Section 1 – The Various Factors at the Origin of Environmental Corporate Social Responsibility Embedment in China

This section will be tainted of political concepts since both the nature of the subject and the country under scrutiny mandate such considerations. This context, although only indirectly related to law, is necessary to later understand the scope of CSR within the Chinese legal tradition. Some authors are indeed referring to the concept of CSR in China as a Corporate Political Responsibility because of the substantial influence the Communist Party has over companies' behaviors and the impulses it has already created in that sense[285]. In fact, it can be argued that CSR has not originated in companies in China, but was rather commanded by the Chinese political authority and other international and foreign political pressures (I) and voluntary actions from the civil society to some extent (II).

I. The Political Pressures to Implement Environmental Corporate Social Responsibility Practices

Both the Communist Party of China (A) and the international community (B) have pushed changes within the Chinese legal system with regard to environmental CSR.

A. Domestic Pressures

In China, there was a tradition of poor governance models from companies because of certain flaws, such as corruption and the traditional reward of family businesses[286]. Yet, since the Deng Xiaoping era, China has committed itself to join the market economy and capitalism to enhance economic development and the growth of the Nation. This evolution was met with its own challenges, which ranged from substantial privatization of the economy, fraud from these newly created private companies and "increased unethical and unsupervised practices from private enterprises, resulting in heightened levels of social and environmental violations

[285] Jiangyu Wang, *CSR as CPR: The Political Logic of Corporate Social Responsibility in China*, in Symposium on The Social Role of Corporations in Asia-Pacific, USALI East-West Studies, 2, No. 5 (Mar. 23, 2022).
[286] *Ibid*., pp 27-30.

as well as environmental degradation [287]." The government necessarily had to react to this result and enact regulations to protect its economy and population, especially with regard to environmental degradation, since it causes significant diseases which may impair the workforce and then the Chinese economy[288]. Environmental CSR norms were consequently a need for the government, in order to be able to control this growth. It still succeeded in preserving the Chinese traditional political characteristics[289]. Noteworthy, CSR has also a long tradition in China that can be traced to Mao. Noteworthy, some authors alleged that the tradition of Confucianism and the Li relates to some extent to CSR practices because of the concept of social order and harmony that existed[290]. Mao was still the first authority to introduce true CSR into the Chinese legal system, since sustainable development was incorporated in its policies. He considered that "green policies […] would benefit agriculture, industry, and other aspects of society[291]". Deng Xiaoping and Hu Jintao took over this path. In 2003, the latest emphasized on the concepts of *Scientific Development* and *Harmonious society* which both depict a strong interest for CSR[292]. The State-Owned Assets Supervision and Administration Commission of the State Council has also made ESG an important part of their work which, as will be seen later on, aimed at promoting and guiding State-Owned Enterprises' CSR activities [293]. Furthermore, the Chinese government is presently putting most pressure on State-Owned Enterprises so that they comply and enforce CSR within their practices and "mitigate the impacts of neoliberal economy"[294]. It should not be undermined that CSR was also reintroduced

[287] May Tan-Mullins & Peter S. Hofman, *The Shaping of Chinese Corporate Social Responsibility*, Journal of Current Chinese Affairs, 43, 4, p. 5 (2014).
[288] May-Tan Mullins, *Successes and Failures of Corporate Social Responsibility Mechanisms in Chinese Extractive Industries*, Journal of Current Chinese Affairs (Jul. 2014).
[289] Xun Gong & Corinne Cortese, *A socialist market economy with Chinese characteristics: The accounting annual report of China Mobile*, Accounting Forum, Taylor & Francis Journals, Vol. 41, Issue No. 3, pp. 206-220 (Sept. 2017).
[290] Dongyong Zhang et al., *Corporate Social Responsibility and Sustainable Development in China: Current Status and Future Perspectives*, Sustainability 2019, Vol. 11, No. 4392, pp. 1-2 (Aug. 2019).
[291] Li H. Zhongguo, Research on the Chinese Evolving Idea of Sustainable Development, Econ. Law, Vol. 12, pp. 396)97 (2102); in Dongyong Zhang et al., Corporate Social Responsibility and Sustainable Development in China: Current Status and Future Perspectives, p. 14.
[292] May-Tan Mullins, *Smoothing the Silk Road through Successful Chinese Corporate Social Responsibility Practices: Evidence from East Africa*, Journal of Contemporary China (Jul. 2019).
[293] SASAC, China News Network: State Council Public Assets Supervision and Administration Commission Include ESG in Key Tasks of Promoting Corporate Social Responsibility, China News Network (Jul. 21, 2021), http://www.sasac.gov.cn/n2588025/n2588139/c19812324/content.html.
[294] Irina Ervits, *CSR reporting in China's private and state-owned enterprises: A mixed methods comparative analysis*, Asian Business & Management (Feb. 2021).

into modern China in the early 1990's through Foreign Invested Companies[295], companies that are registered in China but are partly or wholly invested by foreign investors[296].

Of course, besides this natural evolution of Chinese law, other circumstances such as climate change. China has taken the pledge to achieve carbon neutrality by 2060[297], while it is currently one of the worst performers in terms of environment. Relying on the Environmental Performance Index, China is the 160th among 180th classified countries on the matter of environmental performance[298]. Another incentive behind these governmental pressures is the Belt and Road Initiative. Chinese Multinational Enterprises, under the impulse of Xi Jinping, are aiming at building what is called a new Silk Road throughout Africa, Asia and Europe. The final objective is to deepen the relationship with numerous countries by creating mutual interdependence and asserting their hegemony over worldwide trade[299]. Notwithstanding, the Chinese government has grasped the need to encompass the need for sustainable development and is pressuring these companies to build a green silk road, which directly implies environmental CSR by these companies[300]. CSR has then been used as a strategic tool.

As a conclusion, there is clear evidence of a strong and deeply rooted interest in environmental CSR within the Chinese political and legal system. This interest, which results in pressures over companies and the enactment of norms by the Chinese authorities, is made especially important by the various interests at stake. Government pressures are also crucial since any influence of NGOs, and other means such as media, are made impossible by the Communist Party of China. It has taken systematic actions to prevent their growth and limit their actions[301].

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[295] Jiangyu Wang, *CSR as CPR: The Political Logic of Corporate Social Responsibility in China*.
[296] Embassy of the PRC in Nepal, *Forms of Investment in China*, China's Economy & Trade (last accessed Jul. 28, 2023).
297 Weijie Zhao, *China's goal of achieving carbon neutrality before 2060: experts explain how*, National Science Review, Vol. 9, Issue No. 8 (Aug. 2022).
[298] Environmental Performnace Index (2022, last accessed Jul. 29, 2023), https://epi.yale.edu/epi-results/2022/component/epi.
[299] European Bank for Reconstruction and Development, Belt and Road Initiative (last accessed Jul. 29, 2023), https://www.ebrd.com/what-we-do/belt-and-road/overview.html.
[300] Xin Cao et al., *The Belt and Road Initiative and Enterprise Green innovation: evidence from Chinese manufacturing enterprises*, Front. Ecol. Evol., Vol. 11 (May. 10, 2023).
[301] May Tan-Mullins & Peter S. Hofman, *The Shaping of Chinese Corporate Social Responsibility*, Journal of Current Chinese Affairs, 43, 4, pp. 9-11 (2014).

B. International and Foreign Pressures

The international community is also a strong actor supporting the growth of CSR practices. It has consistently pressured China to develop sustainable corporate governance to meet the expectations of the business world and the current market driven economy[302]. The fact that CSR was re-introduced through foreign invested companies in China, which are the favored network for foreign investors to invest in China, depicts this intent to fit within these expectations. It provided a visible framework to the international community about the will of China to comply and join this international community.

To be more precise, it is argued by a Professor that there are five different stages to CSR: defensive, charitable, promotional, strategic, and systemic. The last one is the achievement of the objective since companies would consistently lead their business through the respect of the society values, namely sustainable development, "good governance, stakeholder responsiveness and environmental improvement[303]". The International community is pushing towards this achievement[304]. China having been under the spotlight for extremely polluting industries, these pressures are very much intense. In fact, China has one of the most polluting industries because of the resources under its soil[305], and its other industries sometimes release their polluting waste into the wild, without any kind of treatment, thus threatening the environment and the health of its population and neighbors' countries[306]. It is also the largest energy consumer and producer since 2010[307] (see Table No. 6)

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[302] *Ibid*., p. 3.; see also May Tan-Mullins, *Successes and Failures of Corporate Social Responsibility Mechanisms in Chinese Extractive Industries*: on the international factors of "global market demands and socialization required by international governmental and non-governmental organizations, which prompted the passive acceptance of CSR."

[303] Wayne Visser, *CSR 2.0: Transforming Corporate Sustainability and Responsibility*, Springer Briefs in Business: Organizational Studies, p. 1 (2014).

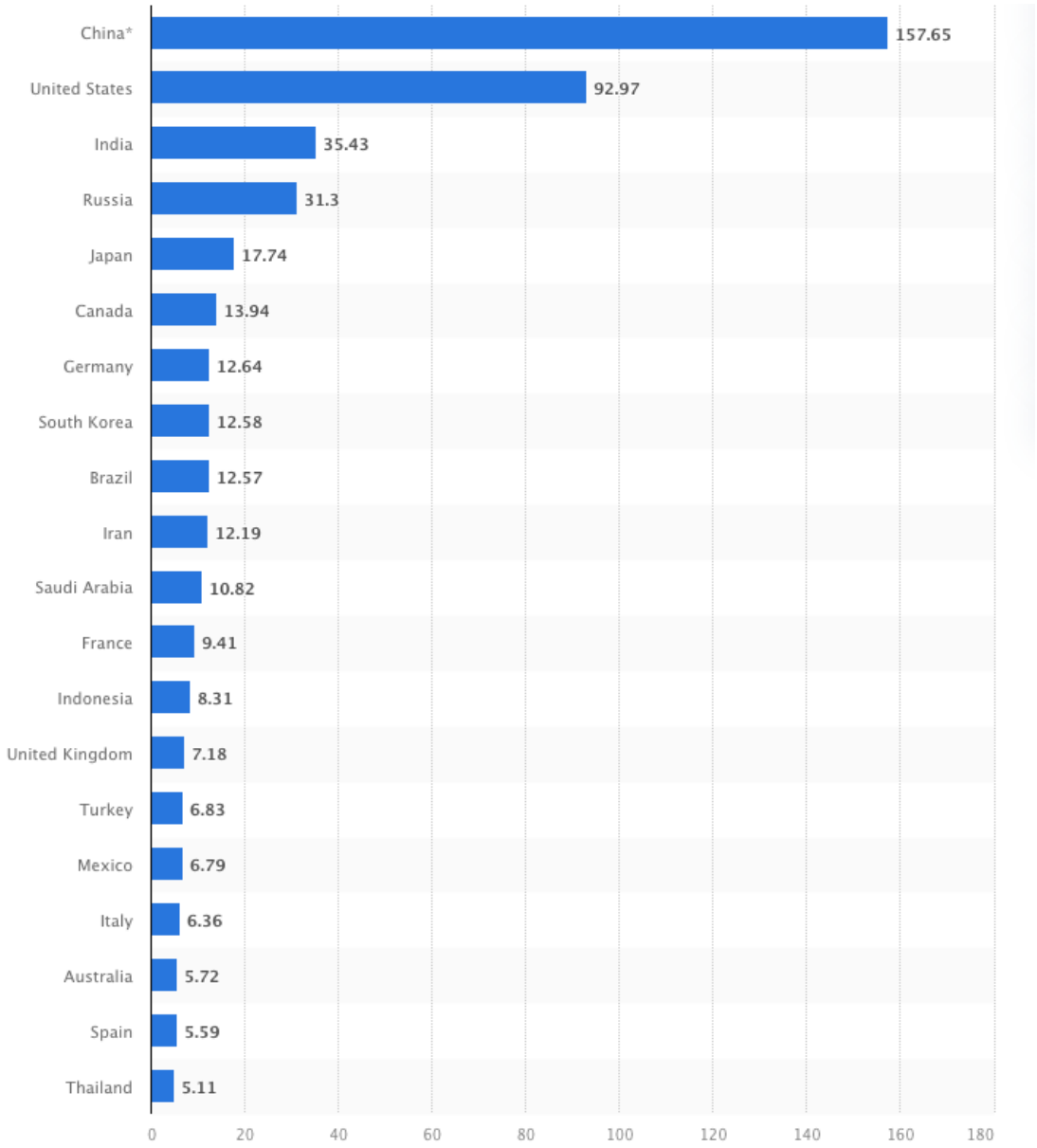
[304] Dongyong Zhang et al., *Corporate Social Responsibility and Sustainable Development in China: Current Status and Future Perspectives*, p. 17.

[305] May Tan-Mullins, *Successes and Failures of Corporate Social Responsibility Mechanisms in Chinese Extractive Industries*.

[306] BSR, *Cleaning Up Industrial Water Pollution in Southern China*, Case Studies (Jun. 1, 2009), https://www.bsr.org/en/case-studies/cleaning-up-industrial-water-pollution-in-southern-china.

[307] Lucía Fernández, *Primary energy consumption worldwide in 2021, by country*, Statista: Energy & Environment (May 31, 2021, last accessed Jul. 30, 2023), https://www.statista.com/statistics/263455/primary-energy-consumption-of-selected-countries/#:~:text=China%20is%20the%20largest%20consumer,such%20as%20oil%20and%20coal.

Table No. 6: Primary Energy Consumption Worldwide in 2021, by Country



The World Trade Organization was also a substantial vector to influence the return of CSR in China. First, by joining such an organization, agreements must be concluded between the joining State and the International organization to preserve the existing equilibrium between the already member States. China and the WTO did conclude an accession agreement and it explicitly required this country to make changes into their political and legal system, establishing a timeline to meet these expectations. Second, the WTO is starting to acknowledge

the importance of CSR in world trade relationships[308], which makes CSR a matter that countries ought to address although there is nothing set in the stone under any WTO tools. In other words, China having joined the WTO, it must now respect certain, if not all, of its requirements to fit in it[309]. CSR practices in trade is one of them. Thus companies must also follow these efforts, since without companies there can be no trade. The BRI has only reinforced this need since China ought to convince all international and foreign actors about the benefits of its project.

II. The Civil Society's impulse towards Environmental Corporate Social Responsibility

The civil society, namely consumers, workers, stakeholders and the companies themselves, is traditionally the final vector of influence over CSR practices within a State. In fact, in the recent decades, labor movements occurred in China, most likely fostered by the 1994 Labor Law. It has allowed the creation of a framework of communication with companies[310], so that workers can pressure the company to take into account their claims with regards to their labor rights and other issues deemed important to them, which could be the case of the environment. However, such intervention remains limited because of the political control that was already highlighted in the case of NGOs and media[311]. Employees may indeed organize themselves under labor trade unions, still the CPC is the one in fine to approve, or not, this organization. The CPC thus exercised a political control over the workers that will have this power of influence[312].

The other main actors within the civil society are no other but the companies. They started to act philanthropically by making donations[313], creating voluntary CSR reports[314], or even

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[308] José-Antonio Monteiro, *Buena Vista: Social Corporate Responsibility Provisions In Regional Trade Agreements*, WTO ERSD, pp. 1-37 (Mar. 30, 2021).
[309] Karin Buhmann, *Corporate Social Responsibility in China: Current Issues and Their Relevance for Implementation of Law*, The Copenhagen Journal of Asian Studies, vol. 22, pp. 62-91 (2005, last accessed Jul. 30, 2023).
[310] May Tan-Mullins & Peter S. Hofman, *The Shaping of Chinese Corporate Social Responsibility*, p. 11.
[311] Irina Ervits, *CSR reporting in China's private and state-owned enterprises: A mixed methods comparative analysis*, p. 1.
[312] Wang Jiangyu, *An Overview of China's Corporate Law Regime*, p.32.
[313] May-Tan Mullins, *Smoothing the Silk Road through Successful Chinese Corporate Social Responsibility Practices: Evidence from East Africa*, p. 215.
[314] Peter Carey et al., *Voluntary corporate social responsibility reporting and financial statement auditing in China*, Journal of Contemporary Accounting & Economics, Vol. 13, Issue No. 3, pp. 244-262 (Sept. 22, 2017).

investing in projects that contribute to the enhancement of environmental CSR[315]. In fact, following the lead of some western companies', some Chinese companies adopted CSR templates provided by soft law tools, such as the ESG criteria[316]. There are different explanations behind the companies' behaviors. Chinese companies may have sought to defend themselves against social criticisms[317], enhance their competitiveness with regards to the western companies that started to implement such efforts since it allows an increased management earnings[318]. CSR and its environmental component are then a strategic tool for companies.

This view had clear consequences on the Chinese legal system, since soft law tools were developed by the companies so that they could create a non-binding framework guiding their common efforts. Private entrepreneurs have created an environmental organization, which is fully funded and guided by them, the Alashan Society of Entrepreneurs and Ecology (SEE)[319]. It provides an insight over companies' action towards various societal subjects, such as climate change and the foundation is supporting NGOs activities in China[320]. Another organization called the China Business Council for Sustainable Development (CBCSD), was also developed by foreign and domestic invested companies, operating, and registered in China[321].

Its aims directly relates to the implementation of environmental CSR practices within Chinese companies since its aim is the following:

> *Committed to implementing the guidelines and policies of the scientific outlook on development and establishing a harmonious society, CBCSD provides a platform for exchange and cooperation among corporations,*

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[315] Jiangyu Wang, *CSR as CPR: The Political Logic of Corporate Social Responsibility in China*, pp. 1, 3, 4.
[316] *Ibid.*, p. 1.
[317] See Professor Visser's defensive prong of CSR: Wayne Visser, *CSR 2.0: Transforming Corporate Sustainability and Responsibility*, Springer Briefs in Business: Organizational Studies, p. 1 (2014); Dongyong Zhang et al., *Corporate Social Responsibility and Sustainable Development in China: Current Status and Future Perspectives*, Sustainability 2019, Vol. 11, No. 4392, p. 16 (Aug. 2019).
[318] Peter Carey et al., *Voluntary corporate social responsibility reporting and financial statement auditing in China*.
[319] Constantin Holzer, *Chinese entrepreneurs as actors of ecological conservation - the case of the Alashan SEE Foundation*, Conference Paper : Annual Conference of the Japan Forum of Business and Society, Waseda University, Tokyo, Japan (Sept. 9-11, 2015).
[320] Feng Yongfeng, *Is the Alashan (SEE) Foundation a Model for the One Foundation*, China Dvelopment Brief (Apr. 17, 2017), https://chinadevelopmentbrief.org/reports/is-the-alashan-see-foundation-a-model-for-the-one-foundation/.
[321] Karin Buhmann, *Corporate Social Responsibility in China: Current Issues and Their Relevance for Implementation of Law*, p. 70.

governments and social communities, aiming at facilitating the development of sustainable business.[322]

Environmental CSR is then in China the result of the convergence of pressures, which are all tainted by political goals the CPC is aiming at achieving. It then partially excludes most of the traditional actors from the civil society, that are in other countries relied on for the creation and implementation of environmental CSR norms, which will be studied in the next section. Thus, it cannot be denied environmental CSR is a true practice within Chinese legal tradition, which is politically and economically enshrined.

Section 2 – The implementation of legal environmental CSR norms

The Chinese legal context involves additional particularism such as the prominent position of the CPC (I) and wide range of different norms covering the concept of environmental CSR (II), which are concretized into different areas (III)

I. The prominent position of the Communist Party of China

The General office of the Central Committee of the Communist Party and the State Council[323] have published in 2020 a Guidance Notice on Building a Modern Environmental Governance System, in which concepts of environmental CSR are visible[324]. Yet, the State Council is under the direct leadership of the CPC[325]. Furthermore, China being a notoriously

[322] China Business Council for Sustainable Development, *About CBCSD: Provide Business Solutions to World Sustainable Development* (last accessed Jul. 30, 2023), http://english.cbcsd.org.cn/aboutcbcsd/.

[323] See for State Council definition Christopher H. Smith & Jeff Merkley, China's State Organizational Structure: State Council (**国务院**), Congressional-Executive Commission on China (last accessed Jul. 31, 2023) https://www.cecc.gov/chinas-state-organizational-structure#:~:text=The%20State%20Council%20executes%20laws,and%20chairmen%20of%20the%20commissions.: The State Council is the body executing laws and supervising the government bureaucracy. It then carry the administrative functions of the Chinese government.

[324]Central People's Government of the People's Republic of China, *The General Office of the Central Committee of the Communist Party of China issued the "Guiding Opinions on Building a Modern Environmental Governance System"*, Xinhuan News Agency (Mar. 3, 2020), https://www.gov.cn/zhengce/2020-03/03/content_5486380.htm.

[325] Susan V. Lawrence & Mari Y. Lee, *China's Political System in Charts : a Snapshot Before the 20th Party Congress*, Congressional Research Service (Nov. 24, 2021).

known one-party State, it is only natural that it sustains a very special role in the legal framing of environmental CSR.

Furthermore, the State had traditionally a much stronger hold on companies because of the prolific SOE model. In this model, the CPC exercises absolute control over these companies and their behaviors since it owns them, while State-Owned Enterprises (SOE) are operating as private companies in a market economy[326]. As a matter of fact, in 2019, 60% of the Chinese largest companies were SOEs[327] and in 2020 their activities represented 40% of the Chinese GDP[328]. In 2023, 96 of these Chinese SOE's were managed by the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC)[329]. Under such circumstances, their impact over company law cannot be undermined and the CPC necessarily has a privileged position, which is highlighted through the Article 19 of the Company law:

> *In companies, Communist Party organizations shall, in accordance with the provisions of the Constitution of the Communist Party of China, be set up to carry out activities of the Party. Companies shall provide the necessary conditions for the Party organizations to carry out their activities.*

This provision was later annotated by the Legislative Commission of the National People's Congress:

> *According to our country's Constitution, the basic task of the nation is to concentrate its effort on socialist modernization along the road of building socialism with Chinese characteristics. The Chinese people of all ethnic groups will continue to be under the leadership of the Chinese Communist Party to construct our country and turn it into a socialist country that is prosperous, powerful, democratic and culturally advanced. The provision of the constitution explicitly points out the leadership position of the CCP in our country's political life and economic construction. (...) The provision has a two-prong meaning. First, the CCP Charter should be obeyed to establish the CCP organization and carry out Party activities in a company. Under the CCP Charter, a grassroots Party organization should be established in an enterprise, village, (...) or other grassroots unit if the aforesaid unit has more than three official members of the Party. The CCP's grassroots organization should carry out its activities*

[326] Xiankun Jin et al., Political Governance in China's State-Owned Enterprises, China Journal of Accounting Research, Vol. 15, Issue No. 2 (Jun. 2022).
[327] Ian Hissey, *Investing in Chinese SOEs*, Factset (Dec. 17, 2019), https://insight.factset.com/investing-in-chinese-state-owned-enterprises.
[328] Amir Guluzade, *How Reforme Has Made China's SOEs stronger*, World Economic Forum (May. 21, 2020), https://www.weforum.org/agenda/2020/05/how-reform-has-made-chinas-state-owned-enterprises-stronger/.
[329] SASAC, Home: Directory (last accessed Aug. 1, 2023), http://en.sasac.gov.cn/directory.html.

according to the CCP Charter. Secondly, the company should give support, such as providing the necessary venue, to the CCP organization's activities.[330]

Hence, the political context of environmental CSR is especially important, since the CPC is, through its political statements, directly and indirectly leading the actions of companies, whether state-owned (SOEs) or privately owned (POEs). As a result, an authoritarian States brings some of its particularism to company law. Noteworthy, the 14th Five-Year Plan issued by the NPC, has made the protection of the environment one of its main goals with clear and quantifiable targets to reach[331]. Its article 38 section 5 committed to improve the modern environmental governance system, embodied in the article 39 and 41, which express the CPC's wish to accelerate the green transformation of the development model and create a qualitative BRI, by promoting environmental protection:

We will increase environmental protection information disclosure, strengthen the construction of a corporate environmental governance responsibility system, improve public supervision and reporting and feedback mechanisms, and channel social organizations and the public to jointly participate in environmental governance.

II. The sectorial norms covering the Chinese concept of environmental Corporate Social Responsibility

Surprisingly, there are no true general provisions addressing the issue of environmental CSR, only a general provision supplemented by sectoral regulations. In fact, companies are all organized under the Company Law of 1993. Still, some companies are regulated by special regulations applicable because of their nature, purpose or other circumstances. Thus, the general rules enacted under the Company law of 1993, revised in 2005 and applicable to limited companies, should first be examined (A), to then identify the special regulations attached to listed companies (B). SOEs are also a particular model of Chinese corporations receiving additional rules, although they are now almost assimilated to the general regime of company (C). Eventually, Chinese companies investing in foreign countries must also rely on specific

[330] Wang JiangYu, *An Overview of China's Corporate Law Regime*, CityU - Centre for Chinese & Comparative Law, p.33 (Aug. 13, 2008), https://ssrn.com/abstract=1222061.
[331] NPC, 14th Five-Year Plan (2021-2025) For National Economic and Social Development and Long-Range Objectives for 2035, PRC (Mar. 11, 2021).

and additional rules (D). These differences of regime necessarily have consequences over their respective environmental CSR duties.

A. The General Regime of Company Law Applicable to Limited Liability Companies

The codified Company law was considered as a big improvement for the transparency and understandability of the Chinese Company law[332]. Yet, it is very limited in terms of scope, since it will only apply to companies operating under a limited liability model. These companies are defined as independent legal persons, in which their shareholders are only liable to the extent of the contribution they made to it[333]. The company shall also be liable only to the extent of its assets. This law only applies to this kind of company. Its article 5 has a fairly interesting wording, as it states the following:

> *When engaging in business activities, a company must abide by laws and administrative regulations, observe social morals and business ethics, act in good faith, accept supervision by the government and the public, and bear social responsibilities.*

This article introduces a clear concept of CSR and consequently of environmental CSR of Chinese limited liability companies. It also directly recognizes the potential influence companies may have over society. Yet, there is no precision with regards to the extent of these duties, their nature and whether it is a mandatory or advisory disposition. Read in combination with the 14th Five-Year Plan issued by the NPC, it can be argued the government is trying to exercise an informal and broad pressure on companies so that they would implement on a semi-voluntary basis reports or improve their internal corporate governance. Additionally, the article 5 can be found in the general provisions, which means it is only a general principle to which companies shall abide in their daily operations. In other words, this provision only represents an embryo of environmental Corporate Social Responsibility and completely lacks a legally defined framework.

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[332] Hu Jintao, *Chinese Company Law*, NPC Standing Committee, 18th Meeting, Art. 1 (Oct. 27, 2005): "This Law is enacted in order to standardize the organization and behavior of companies, to protect the legitimate rights and interests of companies, shareholders and creditors, to maintain the socio-economic order and to promote the development of the socialist market economy."

[333] *Ibid.*, Art 3.

Noteworthy, a system of responsibility is already broadly encompassed in the chapter 12 of the Company law. Its articles 215 and 216 create a system of civil and criminal liability if these companies ever violate the provisions of this law. Networks of enforcement of environmental CSR are then already in place, which might ease the transition towards a more legally framed regime.

B. The Special Regulations Applicable to Listed Companies

Listed companies must be understood as the Chinese version of American listed companies. They are in sum, companies whose shares are accepted on the stock exchange market and are traded in that forum[334]. These companies are regulated by the general principles of Company Law, which apply broadly to all companies, and securities regulations. Once again, in an effort to increase the transparency of Chinese law, the corporate governance obligations of these companies were codified in the Corporate Governance Code[335]. This normative Code was published by the China Securities Regulatory Commission (CSRC). Interestingly, this Code was drafted in accordance with these two sets of rules and the international corporate governance standards. This Code particularly aimed at standardizing "the operation of listed companies and to bring forward the healthy development of the securities market of our country[336]." Nevertheless, this Code is limited to the only limited companies registered in China, which reduces the scope to only 4,694 companies relying on the 2021 data[337].

This Code in the Chapter 6 over the matter of Stakeholders, recognize that while a company must pursue the benefits of shareholders, "they shall be concerned with the welfare, environmental protection and public interests of the community in which it resides, and shall pay attention to the company's social responsibilities[338]." The next Chapter directly addresses the matter of CSR by requiring companies to disclose information and enhance transparency[339].

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334 *Ibid*., Art. 121.
335 Code of Corporate Governance for Listed Companies, Preface, §1 (Sept. 30, 2018).
336 *Ibid*.
337 Daniel Slotta, *Number of companies listed on the Chinese stock exchanges from 2011 to 2021*, Statista : Financial Instruments & Investments (Dec. 18, 2022), https://www.statista.com/statistics/225725/number-of-companies-listed-on-the-chinese-stock-exchange/#:~:text=Number%20of%20companies%20listed%20on%20the%20Chinese%20stock%20exchanges%202011%2D2021&text=In%202021%2C%20the%20number%20of,4%2C154%20in%20the%20year%20prior
338 Code of Corporate Governance for Listed Companies, Chapter 6, §86.
339 *Ibid*., Chapter 7, §87-94.

Some information is indeed required to be disclosed by laws, regulations or the company's articles of association, hence giving room to shareholders to create environmental CSR obligations at their own expense[340]. This Code also recognizes the possibility for companies to disclose more information on a fully voluntary basis, without any mandates from any of these sources, as long as this information may influence the decisions of shareholders[341]. As no regulations or laws directly mandates disclosure duties within this Code, as it does over the matter of shareholders' rights for example[342], the Chinese legal system is solely relying on either the will of shareholders to bind themselves by a special contract that are the articles of association, at the time of the incorporation of the company, or the punctual will to disclose environmental information. Despite this lack, environmental CSR being a strategic tool, such situations are not unlikely to occur and in fact does occur as it will be examined in one of the following sections[343].

A self-assessment report was however published by the China Securities Regulatory Commission, as part of the OECD-China policy dialogue on corporate governance[344]. It bears decisive information to define the entire framework of corporate governance, especially on information that was developed as part of a *coutume* and practices from companies, that are thus inaccessible by a simple reading of the laws and regulations. It also emphasizes on the corporate governance principles recognized by the OECD, such as the inclusion of any foreseeable risks in companies' disclosure reports[345]. China is also recognizing this principle since it imposes a duty of disclosure upon major risk factors[346]. This concept shall be understood as any risk that might substantially threaten the operations of one company or its organization and that in the end may alter its benefits, which would directly impact the shareholders that have invested into listed companies. Yet, Climate Change has a significant impact over the companies' activities and can enhance increased profits. Thus, it could and ought to be included as one of the major risks that should be disclosed to shareholders, with regard to the environmental impact of the companies and efforts to mitigate them. Still, nothing directly

340 *Ibid*., §87.
341 *Ibid*., §88.
342 *Ibid*., §92-4.
343 See Part B. The Successes of Environmental CSR in China.
344 OECD, *Corporate Governance of Listed Companies in China: Self-Assessment by the China Securities Regulatory Commission*, OECD Publishing (2011), http://dx.doi.org/10.1787/9789264119208-en.
345 *Ibid.*, p. 55, §4.2 China's Practices Compared with OECD principles.
346 *Ibid*., p. 52, §4.1.2 Basic Contents of information Disclosure.

addresses this thought, with concrete measures in this section of the report.

Deeper in the self-assessment, chapter 6 directly addresses stakeholders and corporate social responsibility, confirming the growing importance of environmental CSR and the transformation that is currently operating in that field in China[347]. This holistic approach is now considered in China as a Code of conduct. The self-assessment highlights the duty of companies to respect environmental standards, no matter what regulations, laws or articles of association may apply to them. It is not *per se* environmental CSR since it discusses more broadly the respect by companies of environmental norms[348]. It appears to be a confusion as to what CSR is. However, it also includes the possibility for listed companies to disclose their environmental information on their own free will, as recognized by the SEPA[349]. In 2008, the same agency enacted the mandatory duty for listed companies to "immediately disclose to investors who have no prior knowledge major events with potential substantial impacts on the transaction price of securities and derivatives, and relevance to environmental protection, illustrating the cause, status quo and possible impacts of the event[350]".

The same year, the Shanghai Stock Exchange (SSE) also issued a document clarifying the duty of environmental disclosures[351]. In fact, the SSE had previously defined CSR as "the obligations listed companies should assume for the comprehensive development of the nation and the society, for natural environment and resources, and for stakeholders including the shareholders, creditors, (…) and communities.[352]" Thus, and as detailed by the 2008 guidelines, listed companies appearing on the government list of the "most seriously polluted companies" or that have experienced major environmental events are under the mandatory duties to discloses on environmental information[353].

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[347] *Ibid.*, p. 95, Chapter 6 Stakeholders and Corporate Social Responsibility.

[348] *Ibid*., p. 98, Chapter 6, §6.1.2.1 Provisions on Environmental Protection.

[349] *Ibid*. ; See also the State Administration on Environmental Protection (SEPA), *Measures on Environmental Information Publicity (on Trial)* (Feb. 8, 2007), translated by Christopher H. Smith & Jeff Merkley, Congressional-Executive Commission on China (last accessed Jul. 31, 2023), https://www.cecc.gov/resources/legal-provisions/measures-on-open-environmental-information-trial-cecc-full-translation.

[350] SEPA, *Guiding Opinion on Strengthening the Regulatory Work on Listed Companies in Respect of Environmental Protection* (2008).

[351] SSE, *Guidelines on the Disclosure of Environmental Information of Listed Companies* (2008).

[352] [深圳证券交易所上市公司社会责任指引］- Shenzhen Stock Exchange, Social Responsibility Instructions to Listed Companies (Sept. 25, 2006), http://www.szse.cn.

[353] SEPA, *Measures on Environmental Information Publicity (on Trial)*, Art. 11, Item No. 13: "A list of the names of enterprises with serious pollution that have discharged pollutants exceeding national or local discharge standards, or whose total amount of pollutant discharge exceeds the total discharge control targets set by the local people's governments".

This self-assessment document allows to grasp the encouragement and pressures the CPC and other administrative authorities may exert on listed companies to willfully disclose on their environmental impact. Under certain circumstances, namely a history of substantial degradation of the environment by the company whether it was pointed out by the government or not, it will be under the mandatory duty to disclose. The mandatory aspect of the disclosure is then dependent on subjective factors relating to the listed company itself. Furthermore, it emphasized in the third chapter of the SEPA document, on the information that should be disclosed by the companies under the duty. For voluntary disclosures, encouraged by the State, the information are the following[354]:

> *(1) The enterprise's environmental protection guiding principles, and annual environmental protection targets and results;*
> *(2) The enterprise's total annual consumption of natural resources;*
> *(3) The enterprise's investment in environmental protection and its development of environmental technology;*
> *(4) The type, amount, toxicity, and destination of the enterprise's discharged pollutants;*
> *(5) The construction and operation of the enterprise's environmental protection facilities;*
> *(6) The enterprise's handling and disposal of waste materials generated during the production process, and the recycling and comprehensive utilization of discarded products;*
> *(7) A voluntary agreement with an environmental protection department to improve environmental conduct;*
> *(8) A description of how the enterprise fulfills its social responsibility;*
> *(9) Any other environmental information that the enterprise wishes to voluntarily disclose.*

A heightened standard is applicable to companies listed by the State as heavy polluters. They are the following[355]:

> *(1) The enterprise's name, address, and legal representative;*
> *(2) The names of major pollutants, their methods of discharge, the toxicity and amount of discharge, if they exceed standards, and the amount in excess;*
> *(3) The enterprise's construction and operation of environmental protection facilities;*
> *(4) The emergency response plan for an environmental pollution accident.*

[354] *Ibid.*, Art. 19.
[355] *Ibid.*, Art. 20.

Noteworthy, trade secrets cannot serve as a pretext for refusing the disclosure. It gives much more strength to the duty of environmental disclosure or CSR while creating a specific procedure that ought to be followed by companies[356]. Still, the self-assessment document remains silent on the accountability these listed companies may face in case of violation of such duty of disclosures. In 2022, the Ministry of Ecology and Environment has made this informal duty an express mandatory obligation towards investors of significant polluting companies[357]. Other agencies are also extremely useful in terms of environmental CSR, such as the regulations issued by the market authority, the CSRC commanding companies to disclose such environmental information to investors.

All of these national scale norms gave an impulse at the regional and local level so that three stock exchanges, the Shanghai, Shenzhen and Beijing Stock Exchange, provided detailed provisions on disclosure duties to the public and companies' stakeholders, and more broadly CSR procedures of their affiliated listed companies[358].

C. The SOEs Additional Rules

Following the new dispositions of the Company Law, the SASAC has decided to encourage SOEs to produce CSR reports. It initiated this process by the enactment of guidelines in 2008 and updated them in 2011, for an entry into force in 2012[359]. These guidelines are in theory not binding since it is neither a law nor a regulation and their scope is limited to the SOE directly under the Central Government authority (CSOE). It then introduces CSR as a way to:

> *achieve well-balance among the growth of enterprises, social benefit and environment protection. This is not only an important measure for promoting the socialist harmonious society and also an embodiment of the CSOEs to thoroughly implement the China's new ideas about economic development, social progress and environment protection.*

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[356] *Ibid.*, Art 21-3.

[357] Vibeka Mair, *China's ESG Policy Dash*, ESG Investor (Mar. 29, 2023), https://www.esginvestor.net/chinas-esg-policy-dash/#:~:text=Further%2C%20the%20China%20Securities%20Regulatory,engage%20with%20investee%20companies%20in: Further, the China Securities Regulatory Commission's (CSRC) instructs listed companies to disclose ESG information to investors, and the Insurance Asset Management Association of China encourages asset managers to incorporate ESG factors into the investment process and actively engage with investee companies in guidance on stewardship.

[358] Sustainable Stock Exchanges Initiative, *Shanghai Stock Exchange* (last accessed, Aug. 1, 2023), https://sseinitiative.org/stock-exchange/sse/.

[359] SASAC, Guidelines to the State-owned Enterprises Directly under the Central Government, [关于中央企业履行社会责任的指导意见], Laws and Regulations (Dec. 06, 2011), http://en.sasac.gov.cn/2011/12/06/c_313.htm.

Implicit pressures from the government and the CPC are noticeable from the second sentence since the implementation in China of CSR directly answers a political will. It also continues by stating that it equates to a social requirement and emphasizes on the duty to follow Xi Jinping's thoughts, who is the embodiment of the CPC[360]. CSOE does not only answer to an environmental CSR duty as the political responsibility of companies is exacerbated, more than it is for other POE companies. As a consequence, the guidelines shall not be considered as a non-binding tool, but a binding political will on CSOEs.

Still, the guidelines give very limited precision so that CSOEs can comply with these requests. It only dictates the kind of general behavior CSOEs should have. It should implement CSR practices in their daily operations, create offices within their organizations to specialize into CSR practices of the company. They should also improve their ability to make sustainable profits and ensure the respect of all environmental regulations. Eventually, it requires CSOE to create a system and mechanism for fulfilling CSR, build CSR release information and enforce inter-enterprise communication in order to ease their transformation into companies enforcing environmental CSR. In other words, the guidelines mandate the companies to build an entire environmental CSR regime on their own. CSOEs then assume a leading role in the definition of environmental CSR in China. In fact, other companies that do not belong in that system often took inspiration from the CSR reports issued by CSOEs[361]. It was indeed found in a comparative study of CSR implementation by POEs and SOEs that environmental CSR was both their second priority and that no substantial differences in terms of forms and contents existed between their CSR reports. It could either indicate that POEs that are not under the same influence that CSOEs are taking example on them or that they are under the same informal pressures from the CPC.

As a matter of fact, these guidelines were successful, since 3043 reports were published which

[360] *Ibid.*, §2.5: "CSOEs should take Deng Xiaoping Theory and the Important Thought of Three Represents as the guiding principles, thoroughly apply the Scientific Outlook on Development, adhere to the demands of human-oriented policy and sustainable development strategy from the Central Government of China, enhance their awareness of social responsibility and sustainable development, make overall planning with due consideration of every aspect. They should actively embody their responsibilities and set up good examples for other enterprises in fulfilling CSR so as to promote the construction of a harmonious and well-off society."

[361] Irina Ervits, *CSR reporting in China's private and state-owned enterprises: A mixed methods comparative analysis*, Asian Business & Management, p.15 (Feb. 2021).

represents a ten thousand-fold increase since the 33 reports in 2006[362]. CSR reports by CSOEs can even be found on the SASAC website which indicates these non-binding guidelines have in practice concrete results[363]. Taking for example the China National Nuclear Power Company, it published at the end of the 2020 year a CSR report[364]. First of all, the report is friendly to read which indicates a good understanding of the discipline and appears pretty much complete. It for example identifies all of the environmental risks, displays its environmental management strategy, which should bring all of the risks under control by 2025. It also emphasized on the implementation of an environmental impact monitoring instrument and the assessment of the amount of clean energy produced, in compliance with the political impulse given by the 14th Five-Year Plan. It should also be highlighted that the report is at the address of its shareholders, which allows it to involve all of the companies' stakeholders. This report is not an isolated case, since in another report a clear assessment of the company's emissions can be found[365].

Noteworthy, these guidelines were not the only tools encouraging CSR reports since the SASAC also carried out theoretical research and management promotion activities, published other policy documents such as the 2021 Guiding Opinions on Promoting the High-quality Development of CSOEs to Achieve Carbon Peak and Carbon Neutrality[366], formulated development strategies, among other tools[367]. Even more interesting, in 2022, the SASAC created a Bureau of Social Responsibility[368]. This new structure will allow them to frame and guide the actions of CSOEs while they implement CSR reports. It will then act as a supervisory authority.

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[362] GoldenBee (Beijing) Management Consulting Co., Ltd., *GoldenBee Research on Corporate Social Responsibility Reporting in China 2017*, China WTO Tribune (2017), http://en.goldenbeechina.com/ueditor/php/upload/file/20171222/1513910252134409.pdf.

[363] SASAC, *SOEs: CSR/ESG* (last accessed, Aug. 1, 2023), http://en.sasac.gov.cn/sasacCSR/ESG.html.

[364] China National Nuclear Power Co., Ltd, Environmental, *Social and Governance Report*, SASAC, SOEs: CSR/ESG (2020, last accessed Aug. 1, 2023).

[365] CNOOC Ltd, *Environmental, Social and Governance Report*, SASAC, SOEs: CSR/ESG, p. 55 (2021, last accessed Aug. 1, 2023).

[366] Invest in China, *Working Guidance For Carbon Dioxide Peaking And Carbon Neutrality In Full And Faithful Implementation Of The New Development Philosophy*, Policy Library (June 1, 2023, last accessed Aug. 1, 2023), https://investinchina.chinaservicesinfo.com/s/202306/01/WS647811e4498ea274927bc668/working-guidance-for-carbon-dioxide-peaking-and-carbon-neutrality-in-full-and-faithful-implementation-of-the-new-development-philosophy.html.

[367] GoldenBee (Beijing) Management Consulting Co.,Ltd, SASAC establishes the Bureau of Social Responsibility (Apr. 2022), https://en.goldenbeechina.com/News/show/id/178.

[368] *Ibid.*

As a conclusion, CSOEs had a decisive role in the framing of environmental CSR in China. Still, it was strongly pressured by the CPC to do so, before any binding norms were enacted. The CPC leading role in environmental CSR, which was already established, is still especially noticeable in the last paragraph of the guidelines, which is the following[369]:

> *Strengthening CPC organizations' role in leading the CSR work of enterprises. The CSOEs should give full play to the political core role of the Communist Party of China (CPC) branches in the enterprise; encourage CPC members to take the lead in performing CSR. Trade union, the Communist Youth League and the women's federation are also required to contribute their efforts in fulfilling CSR, and strive to create a good environment for the enterprise to fulfill CSR.*

D. The Specificities Attached to Chinese Companies Investing Abroad

Chinese Companies with an international presence in foreign countries through investment are also burdened by the political pressures to implement environmental CSR. In fact, in an effort to address the necessity to build a legitimate BRI[370] and "set up a good image for Chinese enterprises[371]" at the international scale, the CPC has taken action and enacted Guidelines for the Green development for overseas investment and cooperation[372]. The guidelines are in theory not binding since the word encouraging is used throughout the entire document. Thus, companies falling under its scope, namely companies in foreign investment and cooperation activities, are encouraged to engage in environmentally friendly behavior[373], shall respect environmental regulations in the host country[374] and enhance the systemic inclusion of environmental concerns into their operations[375]. The anticipation of risks through mechanisms

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[369] SASAC, Guidelines to the State-owned Enterprises Directly under the Central Government, [关于中央企业履行社会责任的指导意见], Laws and Regulations, §20 (Dec. 06, 2011), http://en.sasac.gov.cn/2011/12/06/c_313.htm.

[370] Christoph Nedopil et al., *What China's new guidelines on 'green development' mean for the Belt and Road*, China Dialogue (Aug. 18, 2021), https://chinadialogue.net/en/business/what-chinas-new-guidelines-on-green-development-mean-for-the-belt-and-road/.

[371] Ministry of Commerce & Ministry of Ecology and Environment, *Guidelines for Environmental Protection in Foreign Investment and Cooperation*, Art. 1 (Feb. 18, 2013), http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml.

[372] *Ibid*.

[373] *Ibid*., Art. 4.

[374] *Ibid*., Art. 5.

[375] Ibid., Art. 6.

and training of employees and deciding entities[376]. That is to say that all traditional components of environmental CSR can be found.

Identical to CSOEs, no further precision was given on the extent and content of this environmental CSR framework. Neither specific environmental goals were given. In 2021, the same authorities published an updated version of these guidelines under a different name, although the essence remains substantially the same[377]. The only difference relies on the more specific general goals given, such as the promotion of green technology.

The political will certainly does not lack in China and pressures a broad range of companies to implement environmental CSR efforts. The transition was hence intensified in the recent years, especially with regards to the BRI efforts. The Guiding Opinions on Building a Modern Environmental Governance System, published by The General Office of the central CPC in 2020, is one of the latest examples[378].

Concretely, all of these disjoined regulations and political pressures resulted in a Chinese SOEs that operated in Kenya for the building of an infrastructure to implement environmental CSR which then sought the advice of wildlife expert over the migratory paths used by animals along the railway and required that wildlife channels should be created so as to ease and guide animals to safely cross the rail[379]. Other domestic examples involve companies launching CSR programs at their own initiative, such as the China National Textile & Apparel Council[380], or even the creation of forums that were already examined, which are for example the Alashan SEE or the CBCSD. The CPC's influence is not without. Still there are over 48.4 million companies registered in China and only around 3,500 reports published during a year[381].

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[376] Ibid., Art. 7.

[377] Ministry of Commerce & Ministry of Ecology and Environment, *Guidelines for the Green development for overseas investment and cooperation* (Jul. 15, 2021).

[378] The General Office of the Central Committee of the Communist Party of China, *Guiding Opinions on Building a Modern Environmental Governance System*, Xinhuan News Agency (Mar. 3, 2020), https://www.gov.cn/zhengce/2020-03/03/content_5486380.htm.

[379] May-Tan Mullins, *Smoothing the Silk Road through Successful Chinese Corporate Social Responsibility Practices: Evidence from East Africa*, Journal of Contemporary China (Jul. 2019).

[380] See Note 140 in Wang JiangYu, *An Overview of China's Corporate Law Regime*, CityU - Centre for Chinese & Comparative Law, p.5 (Aug. 13, 2008): "To Build a Responsible Supply Chain by Putting CSR Management into Practice – Annual Conference on CSR for China Textile and Apparel Industry and Its Annual CSR Report Release", 12 December 2006, *at* http://www.csc9000.org.cn (last visited 2 August 2007).

[381] C. Textor, *Number of registered companies in China from 2016 to 2021*, Statista (Aug. 18, 2022).

Part II – Few Perspectives on the Matter of Environmental Corporate Social Responsibility

Environmental CSR laws appear to be very dynamic based on the study that has been made of these three countries. In fact, they meet at some point on their perspective of environmental CSR while they diverge on others. This comparative study should now be detailed to have a better understanding and perspective of the current state of environmental CSR throughout the world (Chapter 1), especially when environmental CSR is currently at a crossroads (Chapter 2).

Chapter 1 – Comparative Analysis of the Environmental Corporate Social Responsibility Regimes

In all three States, environmental CSR is the object of many critics despite its recognized merits (section 2). Other characteristics than the common critics can also be found (section 3). But first, the impact of the kind of legal system and State on environmental CSR laws should be determined (section 1).

Section 1 – The determination of a correlation between the legal and political system

The correlation between the enactment of environmental CSR tools and the type of legal system and the political regime should not be undermined.

First, summarizing the environmental CSR movement towards a refined legal framework it can be argued that the French legislature and government have enacted regulations and laws taking a step-by-step approach. They started with the NRE law which had a very limited framework and content to then gradually increase the quality of its legal rule. They have also taken into consideration the pre-existing practices of companies and any relevant soft law tools or international instruments that are addressing the issue. It later also relied on the impulse of the EU law, which allowed it to reach rather qualitative legal environmental CSR duties. The process can be considered as a bottom-up and top-down convergence impulse, meaning impulses towards environmental CSR rules can be found at both the National and companies' level. Noteworthy, France is a democratic State and has a liberalized legal system. It was not always the case. The French legal system had to wait until the 1960's for it to be liberalized. Before, it was characterized by a strong State intervention. Even to this day, there are some remnants of this past organization. That is why, there are in general more norms enacted than there is in the United States which has a strong liberal identity. This French identity has then necessarily eased the process and left room for the Parliament or the Government to enact on environmental CSR. Noteworthy, in 2022, the AMF, the French authority regulating the markets, had highlighted in its report that 82% of companies had implemented a "CSR

committee", 83% of which belonged to the CAC40[382]. Environmental CSR rules have then taken much importance in France.

Then, turning to China, the State is authoritarian and is neither liberalized in the American nor French sense. It also on the other hand had very limited practices from its domestic companies. In order to protect Chinese political and economic interests the CPC has then started to informally pressure first SOEs to enforce environmental CSR, before implementing some legal rules. It then gradually expanded to other types of companies. The process is then a top-down one, with a much stronger influence of the political branch than the legal branch, meaning the authoritarian organization of China has also influenced the way environmental CSR was introduced in China. Furthermore, throughout the motivations argued by the Presidents of China and the CPC, the movement appears to have been harmony driven, in the spirit of Confucianism. That is to say, that all of these characteristics allowed the rise of environmental CSR practices through the implementation of political pressures and norms a second time.

Eventually, it was highlighted by the chapter on the United States that the movement was mainly driven by American Courts through pre-existing legal concepts not exclusively specific to environmental CSR. In fact, States were prevented for a long time by the Federal State to enact environmental CSR and at all levels, such legislation consistently failed. The strong American liberalism is also a factor that prevented the deep rooting of environmental CSR in the American corporate law. In fact, authorities have always been quite reluctant to regulate the behavior of companies since the market should regulate itself. Thus, imposing such environmental CSR would threaten this ideal. That is why the American legal system appears one step behind China and France in terms of environmental CSR, unless companies have decided to incorporate environmental CSR duties based on their own free will. The tendency is however shifting with the acknowledgement that companies are playing a significant role in climate change and that this phenomenon might threaten the financial well-being of companies and the American economy at large which should induce State regulations such as the Federal State did after the financial crisis. That is why, the Supreme Court definitively reversed the

[382] AMF, *Rapport sur le gouvernement d'entreprise et la rémunération des dirigeants des sociétés cotées*, p.4 (Dec. 1, 2022); exposed in Bénédicte François, *La RSE et les enjeux climatiques au coeur de la version révisée du Code AFEP-MEDEF*, Revue des Sociétés, p.3, §2 (Dec. 15, 2022).

precedent which stated that States were preempted by the Federal States. Legislations are also being examined throughout the country. In other words, the future of environmental CSR norms in the USA is to be decided in the following years or months.

Section 2 – The Shared Critics of Environmental Corporate Social Responsibility

One of the criticisms is the absence of State financial support to ensure all companies have the concrete means to implement the environmental CSR laws at their scale. Another one regards the failure to exploit the collected data through the various reporting duties to their fullest extent, especially when very limited accountability exists. Thus, the reports and other environmental CSR instruments are in general not mobilized for the end it was created, which is to fight against climate change. Still, the three main critics rely on the limited enforcement mechanisms that exist (I), the confusion between environmental CSR norms and other sets of laws such as environment laws (II). Eventually, it is often said from environmental CSR that the laws are only created in a greenwashing effort (III).

I. The Lack of Enforcement Mechanisms

The United States only has an embryo of environmental CSR and regulates the matter through other legal vectors. In other words, there are no special enforcement mechanisms dedicated to environmental CSR monitoring and sanctioning of eventual violations.

China, despite having a stronger environmental CSR legal field, no enforcement mechanisms were enforced. Instead, as highlighted by a study, the CPC relies on its political influence and pressures to ensure the respect of the environmental CSR norms it has created[383]. Being a paralegal mechanism, it cannot be studied any further. The results are still pretty satisfying in China with regard to datas[384].

[383] Jiangyu Wang, *CSR as CPR: The Political Logic of Corporate Social Responsibility in China*, in Symposium on The Social Role of Corporations in Asia-Pacific, USALI East-West Studies, 2, No. 5 (Mar. 23, 2022).
[384] Ying Guo et al*., Corporate Social Responsibility Reporting in China: The case of 106 central enterprises*, Journal of Global Responsibility (Apr. 13, 2023).

France on the other hand does not exercise such political pressures that are inherent to the Chinese regime. As a remedy, it attempted to create a third-party independent body mechanism that should monitor the respect of the environmental CSR laws that have been created. This system was considered full of flaws, especially when the company that was undergoing the investigation was the one to appoint this body. Then, the vigilance law also attempted to create a stronger accountability of companies for their violations. Yet, the law was too broadly framed and does not allow Courts to charge a company with the violation of the law. The only duty under this law is in fact the enactment of a vigilance plan. Its content has not been precisely determined by the law, leaving room for companies to proceed as they wish. The enforcement mechanisms also rely on the general principles of directors' accountability and civil liability at large. The results are still rather satisfying, although far from perfect, as depicted by Table No. 4 on page 51 of this paper.

The question is then whether laws are truly necessary on environmental CSR to ensure better governance of companies? It is true that companies have also understood the importance of merging environmental concerns to their governance so as to promote enhanced profits in the long-term. French companies have developed their practices before French law did. Yet, even though French law enacted norms in response to this movement, it is also attempting to deepen the environmental governance of companies by enforcing monitoring mechanisms and is in the long run aiming at implementing sanctions. It has tried to implement a substantial sanction in its Duty of Vigilance law, but the provision was struck down by the French Constitutional Court because of the overall vagueness of the law. Imposing such sanctions would have been contrary to the concept of Rule of Law. In other words, in France, environmental CSR norms act as a complementary regime to the will of companies. Furthermore, in China and the USA, where environmental CSR can be analyzed as more limited compared to the one implemented in France, environmental concerns are not systematically taken into consideration in the corporation's governance, meaning the will of companies is not sufficient so as to create a widespread environmental CSR practice and is in general limited to larger companies and polluting industries. That is why, China has in its 13th Five-Year Plan decided to ensure the enforcement of environmental corporate governance at the national and corporate level[385].

[385] See Chapter on Chinese law.

II. The Confusion of Environmental CSR Norms with other Norms

There is often a confusion between environmental law and environmental CSR law. It is argued that the two areas are not separate from one another. It surely cannot be denied that these two fields are linked because of the core of the subject, which is in both, the protection of the environment. Still, environmental CSR also has another subject which is to improve corporate governance and thus enhance profits.

Yet, this confusion is also understandable since in the American legal context, environmental CSR only exists through other networks and mainly environmental law. Consumer law and Securities regulations are the two other main networks used to create environmental CSR at the expense of companies. Coming back to environmental law, environmental CSR has been enforced through this means to ensure the largest polluters that are incorporated in the United States would report on their environmental impact. A similar conclusion can be inferred from the Chinese regime. In fact, most of the companies whose behaviors are being regulated by the SASAC have a highly polluting activity. Taking the example of the two CSR reports, they both belong to either the National Nuclear company or SOEs leading the exploitation of oil and petrol. Textile industries were also highlighted as successful reporting duties in China[386].

Nevertheless, environmental CSR, despite existing through other legal norms in other countries, aims at adding a new burden to companies, which is taking environmental concerns into account throughout all of their daily operations and publishing reports so that the scale of their concern can be determined. The field is also trying to create accountability of companies but was only met with failure or half-successes. Being a new field of corporate law, the States all appear to be struggling to create its legal framework.

[386] Wang JiangYu, *An Overview of China's Corporate Law Regime*, CityU - Centre for Chinese & Comparative Law, p.5 (Aug. 13, 2008): "To Build a Responsible Supply Chain by Putting CSR Management into Practice – Annual Conference on CSR for China Textile and Apparel Industry and Its Annual CSR Report Release", 12 December 2006, *at* http://www.csc9000.org.cn (last visited 2 August 2007).

III. The greenwashing critic of environmental CSR

In Europe and China mainly, the concept of circular economy is rising in importance. Circular economy aims at rethinking all of the production and consumption schemes of one State. Companies must necessarily play a part in the implementation of that concept. That is why it is often considered as greenwashing. In fact, in the numerous laws, regulations and political pressures it appears that environmental norms should only be considered by companies, but there is no obligation to succeed in the protection of the environment, except for extremely polluting industries and companies that are in all three under a particular legal classification (ICPE, see the regulations delivered by the EPA in the USA and the SEPA in China). That is to say that the States are only trying to create a green image of their economy without actually creating true duties at the companies depends.

Nevertheless, the States are trying to incorporate a new reality of corporate law in the 21st century. The efforts are not perfect as mentioned because of the lack of enforcement mechanisms and the reliance of China on political pressures for its creation, meaning if it changes its mind, it can reverse overnight its policies. Still, they have the merits to exist, and States are attempting to improve its legal framework. France initiated its attempts in 2001 to renew and improve its commitment in 2008 and 2009. New regulations were also initiated in 2017 and 2019, before the EU took action in a very active way, especially in the years 2022 and 2023. Yet, as declared by Winston Churchill, "success is not final, failure is not fatal: it is the courage to continue that counts."

Eventually, another critic of greenwashing seems more relevant because companies may use the CSR reports as greenwashing tools[387]. Environmental CSR can be extremely beneficial to companies as it can enhance profits and allow them to retain consumers. These companies may then use the reports to convey false information over their true environmental considerations and impact which could represent a threat to consumers and the other stakeholders such as investors. In the United States, the FTC is trying to protect consumers against such behaviors and France has also created an article in the consumer Code protecting them in a similar way. Companies can then be held liable for the greenwashing they may engage

[387] Claudio Ventura, *Corporate social responsibility and the risk of greenwashing*, Smart Green Post (Jan. 11, 2021).

in. Yet, the EU is one of the few institutions that have decided to associate and protect companies' other stakeholders with the CSRD. It was trying to revalorize the role of both investors and shareholders by providing them with more information on the company's green policy. The US and Chain also have similar regulations through the securities regulations.

Thus, limited tools to fight against greenwashing exist although they do not appear sufficient. That is why, civil society has also assumed a greater role when it is possible, especially in the determination of greenwashing efforts by finding companies committed to such behaviors and Naming and Shaming them[388].

Despite the critics it appears that these three countries will meet at some point, especially China and France that have taken the same pledge to create an entire environmental CSR legal framework. The US also has more in common with these two countries, despite the significantly different approach that was taken.

Section 3 – The common Characteristics Shared Between China, France, and the United States

Traces of environmental CSR can be found in each of these legal systems to some extent, probably because its merits were at least acknowledged to some extent. Thus, the current legal frameworks must necessarily share some common characteristics.

First, all of these legal systems relied at some point on voluntary actions from companies and their shareholders. In fact, it is especially true in the US and France because of the correlation between the political and legal system and the norms, which was explained in the first section. Still, China also relied on their will to some extent since the "norms" were first strong political pressures from the CPC. Then, companies could still follow their own ideas without any legal consequences. Soft law tools and international instruments were also extremely helpful since they provided a basis for the creation of these frameworks and gave an impulse since they can be traced to the 20th century (e.g., GRI Standards that were created in 1997 before any law addressed the issue of environmental CSR). The three States also value information more than

[388] *Ibid*.; Helena Horton, *Greenwashing UK fashion firms to be named and shamed by watchdog*, The Guardian (Mar. 11, 2022), https://www.theguardian.com/fashion/2022/mar/11/greenwashing-uk-fashion-firms-to-be-named-and-shamed-by-watchdog.

liability, most likely to ensure the understanding of the extent of the duty by companies and to enshrine this new way of management in their DNA. They might also lack the proper venues and means to hold these companies accountable, especially in terms of fact finding. Coming to the perception of environmental CSR norms, they are perceived as both a philanthropic and strategic instrument that companies should mobilize in their own interest and in the interest of the society in general. It has a mutually beneficial purpose recognized by all three States. The legal transformations are also operating a change in the structure of companies especially with regard to the still limited but growing influence of shareholders and investors. However, directors remain in all three countries the favored network for the implementation of environmental CSR obligations at the level of the company, even in the US where no direct norms exist. Still, directors' fiduciary duties are one of the most useful indirect vectors of environmental CSR.

Still, the United States appears quite isolated in the construction of the environmental CSR legal framework. It uses pre-existing norms in various sectors such as environmental law, securities regulations, and consumer laws while France and China have enacted direct provisions on environmental CSR. They are both defined by a strong State intervention. Furthermore, French and Chinese law meet on another point, which is their interest for the activity of their domestic firms abroad through the Law on the duty of Vigilance and the additional burdens on Chinese Foreign investing companies. China is more focused on the strategic component of this concern as it will legitimize its BRI. But such concern is also aimed at remedying the behaviors of companies that tend to delocalize their production and activities in a foreign nation, with complete disregard for their environmental and Human rights' impacts. The legal framework is not fully efficient since no enforcement mechanism is in fact working and the duty is limited to disclosure of information. Yet, the fact-finding supporting the determination of the honesty of these disclosures might be significantly harder because of the foreign location.

French and American law also have in common since they both created a similar model of companies in which, which they have assumed the public benefit, which can involve concerns for the environment, as one of their purposes. They are also both attempting to prevent the adverse effect of environmental CSR, which is greenwashing by companies, and protect consumers. Both States also valorize the role of the civil society with the use of NGOs' works or the reliance on NGOs, consumers or even employees for the enforcement of environmental

CSR. Thus these two States take full advantage of all stakeholders, whether they are inherent to the company organization or external to it. In China, only companies' stakeholders can be involved because of the authoritarian regime that prevents the flourishing of NGOs and citizens' actions.

The PRC also has a similar legal framework of environmental CSR regulations, compared to the American one. It has indeed enacted specific regulations but through the existing networks which are environmental law and securities regulations. Furthermore, the local level has taken action with for example the CSR duties created by the Shenzhen Stock Exchange, while in the United States, the States are trying to legislate on the matter and assuming a greater role in environmental CSR. It has failed until now. Still, as highlighted previously the situation might be reversed soon if the political will has survived these systematic failures.

The EU is one of the unique characteristics that can be found under French law. It is the only legal system influenced by regional norms. In fact, the EU has always followed the movement of French and other European laws until 2017. Yet, a recent movement is noticeable in which the EU is moving faster than most States and has triggered evolution towards greater environmental CSR throughout the EU, allowing a greater harmony as well.

Chapter 2 – Towards the Uncertain Future for Environmental Corporate Social Responsibility

As mentioned previously, the USA is at a crossroads following the 2023 U.S. Supreme Court decision[389]. The EU on another hand represents a promising future of environmental CSR because of the European Parliament and European Council's Resolution on a future European due diligence directive[390]. As its name emphasizes, the directive will aim at neutralizing any environmental and human rights adverse consequences of companies', and their subsidiaries that relate to some extent to the EU[391], operations. As a reminder, companies may be implemented within the EU but exploiting resources or producing goods and services through direct and indirect partners located in third countries. Yet, so far, most companies disregarded the environmental, and human rights, adverse impacts these partners had on Third Countries' territories and benefited greatly from this relationship. The EU is now seeking to bring these practices to an end.

The article 2 of this proposal also details the scope of companies that shall be under the control of this directive to be. Two types of companies are targeted. First, there are the companies that were incorporated in one of the Member States. The scope covers either companies that had more than 500 employees and had a net worldwide turnover of more than EUR 150 million in the last financial year or companies below that threshold if they meet three criteria: They must have had more than 250 employees and a net worldwide turnover of more than EUR 40 million in the last financial (…), provided that at least 50% of this net turnover was generated in one or more of the following sectors, namely textile, leather and related products manufacture etc.[392].

Second, companies not incorporated in one of the EU member States may fall under the scope of this proposal, consecrating an extra-territorial effect to this directive. Either of these two

[389] *Chevron Corp. v. San Mateo Cnty*., 2023 U.S. LEXIS 1719 (2023).

[390] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, COM(2022) 71 final, 2022/0051 (COD) (Feb. 23, 2022).

[391] *Ibid*. Art. 1.

[392] *Ibid*., Art. 2(1)(b).

conditions must be met: a net turnover of more than 150 million euros generated within the EU in the last financial year or a turnover amounting to 40 millions euros, but no more than 150 million euros, provided that at least 50% of this turnover was generated in at least one of the sectors previously targeted in the article 2(1)(b). As a consequence, companies like Apple might fall under the scope of such a directive and would have to respect it if it wishes to maintain access to the EU market free from any sanctions, since it has a net turnover of 86.4 billion euros in Europe[393]. An estimate was published and deduced that more than 13,000 European companies and 4,000 Third Countries companies would fall under this scope[394].

The proposed duties are very diverse. The very first one regards the need for companies to integrate due diligence into their policies, thus the company's approach on due diligence, the code of conduct duly established, a description of the process used to implement the due diligence[395]. The article 6 also requires companies to identify any potential and actual adverse impacts of the company's operations and of those conducted by their subsidiaries, with a different regime if the company was below the threshold because of the sector it is located in. Only severe and potentially severe impacts must be identified. This is the correlate of the duty to prevent any potential adverse impacts. The measures to be taken to support this goal are extremely precise. Companies must provide a prevention action plan with reasonable and clearly defined timelines and indicators to measure improvements. Furthermore, companies would now be required to seek contractual guarantee from their supply chain partners. Even with indirect partners, companies should seek such a contract if the adverse effect occurred[396]. Eventually, if the adverse effect occurred, companies must bring an end to it or minimize it if it cannot be ended. Ending the adverse effect must imply the neutralization of it through every necessary means, which include the payment of damages, implement plans that are aiming toward that objective and seek contractual assurance from the direct partner[397].

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393 David Curry, *Apple Statistics 2023*, Business of Apps (May 2, 2023), https://www.businessofapps.com/data/apple-statistics/.

394 Fabien Ganivet et al. (DLA PIPER), Proposition de Directive européenne sur le devoir de vigilance des entreprises en matière de durabilité, Les Échos (Jul. 28, 2022), https://www.lesechos.fr/partenaires/dla-piper/proposition-de-directive-europeenne-sur-le-devoir-de-vigilance-des-entreprises-en-matiere-de-durabilite-1779326.

395 *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence*, Art. 5.

396 *Ibid*., Art. 7.

397 *Ibid*., Art. 8.

At articles 9, 10 and 11, the EU is also trying to ensure proper ways to enforce this duty exist, so that the directive would not be an empty shell stating an intent without the means to bring actual compliance with it.

First, the article 9 provides a detailed complaint procedure ensuring all interested parties can bring a claim. These interested parties are any direct victims or persons that reasonably believe they might be impacted by the violation, "trade unions and other workers' representatives representing individuals working in the value chain concerned, civil society organizations active in the areas related to the value chain concerned[398]." The procedure is free to be determined by each member States, although they must ensure some rights of the claimants. Companies must also periodically assess the environmental impact of their operations and those of their subsidiaries[399]. To ensure the effectiveness, each year companies will have to publish a statement that could be joined to the report first established by the Directive 2013/34/EU[400]. As required by Article 13, the Commission will have to provide guidelines so that companies can have an idea of the shape this statement should have. State support or guidance should also be provided[401]. Additionally, National supervisory authorities should be created in each member States in accordance with their national laws, to monitor and supervise compliance of companies[402]. They will be part of the European Network of supervisory Authorities, aiming at enhancing cooperation and mutual assistance between National Supervisory Authorities[403]. Indeed, they shall all have adequate powers to carry out its supervisory mission, which includes the power to investigate at its own initiative, in compliance with the National law of where it is located[404]. The article also provides that if a violation arises out of the investigation, the authority should leave a reasonable time to the company to bring the situation in compliance with its duties if possible, in addition to potential administrative sanctions and civil liability as described in the articles 20 and 22. It also has the following powers:

[398] *Ibid*., Art. 9.
[399] *Ibid.*, Art. 10.
[400] *Ibid*., Art. 11.
[401] *Ibid*., Art 14.
[402] *Ibid*., Art. 17.
[403] Ibid., Art. 21.
[404] *Ibid*., Art. 18.

(a) to order the cessation of infringements of the national provisions adopted pursuant to this Directive, abstention from any repetition of the relevant conduct and, where appropriate, remedial action proportionate to the infringement and necessary to bring it to an end;
(b) to impose pecuniary sanctions in accordance with Article 20;
(c) to adopt interim measures to avoid the risk of severe and irreparable harm.

The enforcement mechanism is not purely theoretical thanks to these two last provisions, especially when any person can raise a concern based on objective reasons that a company is failing to comply[405]. However, it clearly specifies that sanctions must be effective, proportionate and dissuasive, framing the State's sanctions[406]. Pursuant to the article 20 paragraph 2, the company's attempt to remedy the situation, its cooperation and any investment it has made must also be taken into account for the determination of the sanction. Noteworthy the article 22 explicitly requires member States to ensure the company can be liable for damages based on the general civil liability, which requires criteria to be mobilized. They are the following: a failure to comply with an obligation by a company which has caused a damage, namely "an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimized through the appropriate measures".

Other observations are important to be made, since article 15 provides a specific provision dedicated to one of the environmental CSR aspects which is Climate Change. In fact companies "shall adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement". Thus, companies should identify the risk that climate change is and the impact their operations have on climate change. This is the first time an environmental CSR component was directly and exclusively addressed in an article of a European norm. Furthermore, the EU aimed at ensuring directors should be responsible for the implementation and monitoring of the respect of these provisions[407], emphasizing the importance directors have in environmental law, since they are the favored network of environmental CSR in the three countries examined. However, a new organ ought to be created,

[405] *Ibid*., Art. 19.
[406] *Ibid.*, Art. 20.
[407] *Ibid*., Art 25-6.

which is the authorized representative, whose role will be to ensure proper communication between its company and the National supervisory authority[408].

Although the obligations remain quite general, the consideration for environmental norms in companies' daily decisions and organizations would be deeply rooted in European legal systems, including the French one. This proposal also has the merits to create refined supervisory and enforcement mechanisms, with potentially deterrent measures, making environmental CSR a full area of corporate law. The EU and consequently France are then at a crossroad in the summer 2023.

[408] *Ibid*., Art. 16.

Conclusion

It was often said from environmental CSR that political will and leverage lacked for it to exist as a full and independent discipline. In fact, the entire CSR movement lacks preciseness and is in general short of enforcement mechanisms, but it also relies on companies' social awareness of environmental and social issues. It is then efficient in its own way. It is also slowly and safely building a path for CSR to become part of the American, Chinese and French corporate law landscape.

Environmental CSR should then be considered as an entire discipline of corporate law. A special emphasis should be given to the EU that has been anticipating a potential *Brussels Effect*[409]. As demonstrated, the EU has indeed taken a very active duty to primate environmental CSR and enacted numerous binding provisions to support its development in every EU member States, following the path paved by some other EU countries as France and the Netherlands. It now has the ambition to spread this discipline across the world and have the potential to shape the corporate law international environment. Data privacy was a successful field of influence because of its extraterritorial reach, since foreign companies operating within the EU were bound to respect it[410]. Thus, multinational companies use EU standards for the conduct of their business[411]. The last proposal is especially supporting this aim because of its wide extra-territorial application. Foreign companies might fall under this duty if they wish to be free from any of the listed sanctions. Thus, even if the legal systems do not follow in foreign countries such as the United States, environmental CSR will de facto be implemented, especially when foreign companies will seek to compete in the same conditions as EU companies that are legally bound by these duties.

In fact, the EU, France and China are not the only States demonstrating a strong political intent to create an environmental CSR legal framework, that was partly realized through relevant laws or regulations. Taking a concrete example, in South Korea, a public sector

[409] Anu Bradford, *The Brussels Effect: How the European Union Rules the World*, Columbia Law School, Oxford University Press (Mar. 2020).
[410] *Ibid.;* See also Oskar J. Gstrein & Andrej J. Zwitter, *Extraterritorial application of the GDPR: promoting European values or power?*, Internet Policy Review, V. 10, Issue No. 3 (Sept. 30, 2021).
[411] *Ibid.*

organization was created to promote sustainable development of companies' activities and to ensure they promote environmental CSR, among other environmental objectives[412]. It has then published in 2021 a sustainability report which is directly addressing the issue of environmental CSR. Similarly, in 2017 a study was published on Indian environmental CSR demonstrated that it existed and constituted a rising discipline of corporate law[413].

[412] *Korea Environment Corporation*, K-eco (last accessed Aug. 5, 2023), https://www.keco.or.kr/en/lay1/S295T304C311/contents.do.
[413] Amee Ishwarbhai Dave, *Voluntary vs. Mandatory CSR*, International Jounral for Innovative Research in Multidisciplinary Field, Vol. 3, Issue No. 4 (Apr. 2017).

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ANNEXES

Table No.1: The evolution of CO_2 emitted by the Countries in the world.

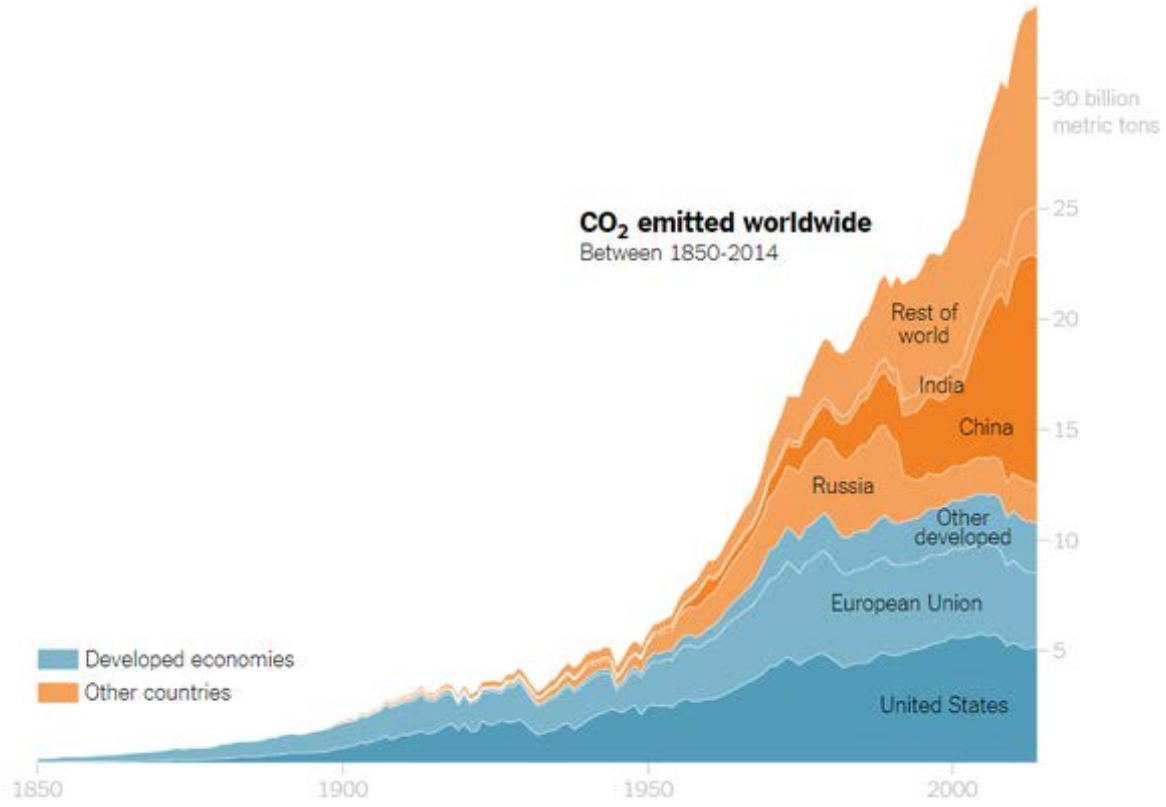

Table No.2: List of duties of companies depending on their social form – Law Grenelle II.

Matters	Sections	List of Duties	Public companies	General Corporations
Environmental Information	General Environmental Policies	The organization of the company to take into account environmental issues and, where applicable, the environmental assessment or certification procedures	Yes	Yes
		Employee training and information actions carried out in terms of environmental protection	Yes	Yes
		The means devoted to the prevention of environmental risks and pollution	Yes	Yes
		The amount of provisions and guarantees for environmental risks, provided that this information is not likely to cause serious harm to the company in an ongoing dispute	Yes	No
	Pollution and waste management	Measures to prevent, reduce or repair discharges into the air, water and soil that seriously affect the environment	Yes	Yes
		Waste prevention, recycling and disposal measures	Yes	Yes
		Taking into account noise pollution and any other form of pollution specific to an activity	Yes	Yes
	Sustainable Use of Resources	Water consumption and water supply according to local constraints	Yes	Yes
		The consumption of raw materials and the measures taken to improve efficiency in their use	Yes	Yes
		Energy consumption, measures taken to improve energy efficiency and the use of renewable energies	Yes	Yes
		Land use	Yes	No
	Climate Change	Greenhouse gas emissions	Yes	Yes
		Adapting to the consequences of climate change	Yes	No
	Protection of biodiversity	Measures taken to preserve or develop biodiversity	Yes	Yes
	Territorial, economic and social impact of the company's activity	On employment and regional development	Yes	Yes
		On neighboring or local populations	Yes	Yes

Information relating to societal commitments in favor of sustainable development	Relations maintained with people or organizations interested in the company's activity, in particular integration associations, educational establishments, environmental defense associations, consumer associations and local populations	The conditions for dialogue with these people or organizations	Yes	Yes
		Partnership or sponsorship actions	Yes	Yes
	Subcontracting and suppliers	Taking social and environmental issues into account in the purchasing policy	Yes	Yes
		The importance of subcontracting and consideration in relations with suppliers and subcontractors of their social and environmental responsibility	Yes	No
	Fair practices	Actions taken to prevent corruption	Yes	No
		Measures taken to promote consumer health and safety	Yes	No

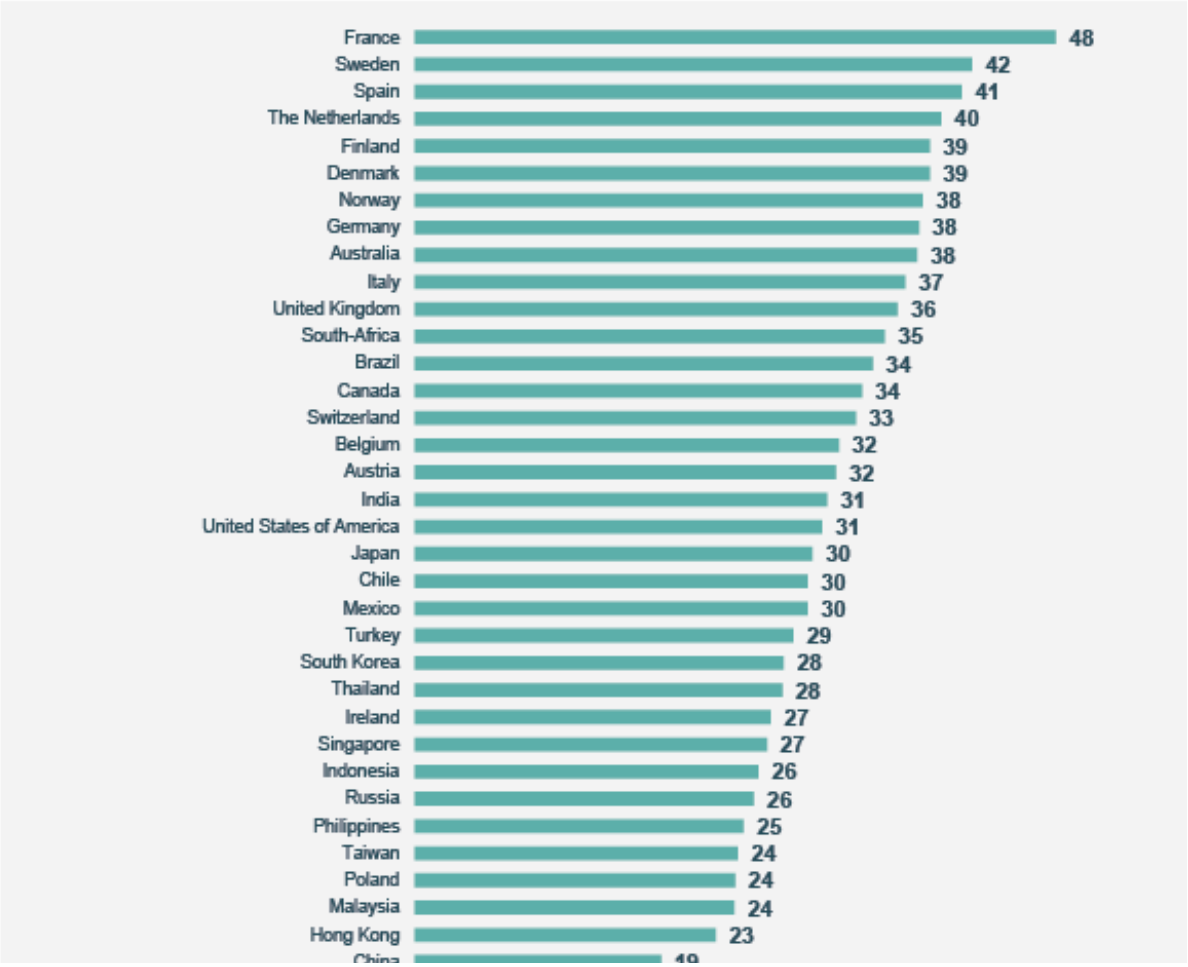
France 48
Sweden 42
Spain 41
The Netherlands 40
Finland 39
Denmark 39
Norway 38
Germany 38
Australia 38
Italy 37
United Kingdom 36
South-Africa 35
Brazil 34
Canada 34
Switzerland 33
Belgium 32
Austria 32
India 31
United States of America 31
Japan 30
Chile 30
Mexico 30
Turkey 29
South Korea 28
Thailand 28
Ireland 27
Singapore 27
Indonesia 26
Russia 26
Philippines 25
Taiwan 24
Poland 24
Malaysia 24
Hong Kong 23

Table No.4: Notation of E.U. countries on CSR performances: focus on the environmental indicator.

This table presents descriptive statistics of the CSR score and of each dimension of CSR scores for the 1071 firm-year sample observations between 2003 and 2010. It provides number of observations (Obs.), percentage (%), mean, first quartile (Q1), median, third quartile (Q3), and standard deviation (SD) of the CSR score by country. HR is human resources rating, ENV is environment rating, BB is business behavior rating, CG is corporate governance rating, CIN is community involvement rating, HRTS is human rights rating.

			Overall CSR score					HR	ENV	BB	CG	CIN	HRTS
Country	Obs.	%	Mean	Q1	Median	Q3	SD	Mean	Mean	Mean	Mean	Mean	Mean
Austria	24	2.24	1.66	1.33	1.75	2.00	0.47	1.70	1.54	1.5	1.87	1.33	2
Belgium	49	4.57	1.62	1.16	1.50	2.00	0.59	1.79	1.63	1.61	1.38	1.69	1.59
Denmark	8	0.74	1.29	1.00	1.16	1.58	0.35	1.62	1.25	1	1.25	1.25	1.37
Finland	75	7.00	1.93	1.33	1.83	2.50	0.70	2.17	1.98	1.81	2.06	1.69	1.88
France	353	32.95	2.35	1.83	2.50	2.83	0.66	2.77	2.43	2.30	1.70	2.45	2.44
Germany	214	19.98	2.03	1.33	2.16	2.66	0.69	2.18	2.07	2.02	1.64	1.96	2.12
Greece	20	1.86	1.47	0.66	1.16	2.16	0.99	1.45	2	1.2	.85	1.65	1.7
Ireland	36	3.36	1.26	0.50	1.16	1.33	0.89	1.19	1.16	1.11	1.63	1.22	1.25
Italy	62	5.78	1.83	1.16	1.66	2.50	0.73	2.01	1.69	1.90	1.38	2.14	1.85
Luxembourg	17	1.58	1.88	1.33	1.83	2.16	0.56	2.05	1.94	2.05	1.41	1.94	1.88
Portugal	18	1.68	1.75	1.50	2.00	2.00	0.60	2.05	1.94	1.77	1.27	1.77	1.72
Spain	82	7.65	1.84	1.16	1.83	2.50	0.73	1.92	1.91	1.76	1.51	2.02	1.91
The Netherlands	113	10.55	2.32	1.83	2.33	2.83	0.65	2.20	2.28	2.41	2.46	2.38	2.31
Total	**1071**	**100.0**	**2.05**	**1.50**	**2.16**	**2.66**	**0.74**	**2.26**	**2.10**	**2.02**	**1.72**	**2.09**	**2.11**

Table No.5: List of duties of companies depending on their social form – Directive 2013/34/EU.

Matters	Sections	List of Duties	
Environmental Information	General Environmental Policies	The organization of the company to take into account environmental issues and, where applicable, the environmental assessment or certification procedures	
		The means devoted to the prevention of environmental risks and pollution	
		The amount of provisions and guarantees for environmental risks, provided that this information is not likely to cause serious harm to the company in an ongoing dispute	
	Pollution *[MODIFIED]*	Measures to prevent, reduce or repair discharges into the air, water and soil that seriously affect the environment	
		Waste prevention, recycling and disposal measures [MOVED & MODIFIED]	
		Taking into account all forms of pollution specific to an activity, in particular noise and light pollution *[MODIFIED]*	
	Circular Economy *[NEW]*	Waste Prevention and Management *[MOVED & MODIFIED]*	Measures for the prevention, recycling, reuse, other forms of recovery and disposal of waste *[NEW]*
			Actions to combat food waste *[NEW]*
		Sustainable Use of Resources *[MOVED]*	Water consumption and water supply according to local constraints
			The consumption of raw materials and the measures taken to improve efficiency in their use
			Energy consumption, measures taken to improve energy efficiency and the use of renewable energies
			Land use
	Climate Change	The significant sources of greenhouse gas emissions generated as a result of the company's activity, in particular through the use of the goods and services it produces; "- the reduction targets set voluntarily in the medium and	

		long term to reduce greenhouse gas emissions and the means implemented to this end; "-measures taken to adapt to the consequences of climate change *[MERGED & MODIFIED]*
	Protection of biodiversity	Measures taken to preserve or develop biodiversity
Societal Information	Societal commitments in favor of sustainable development *[MODIFIED ORGANIZATION]*	The impact of the company's activity in terms of employment and local development
		The impact of the company's activity on neighboring or local populations
		The relationships maintained with the company's stakeholders and the methods of dialogue with them *[MODIFIED]*
		Partnership or sponsorship actions
	Subcontracting and suppliers	Taking social and environmental issues into account in the purchasing policy
		Consideration in relations with suppliers and subcontractors of their social and environmental responsibility *[MODIFIED]*
	Fair practices	Measures taken to promote consumer health and safety

Table No. 6: Primary Energy Consumption Worldwide in 2021, by Country

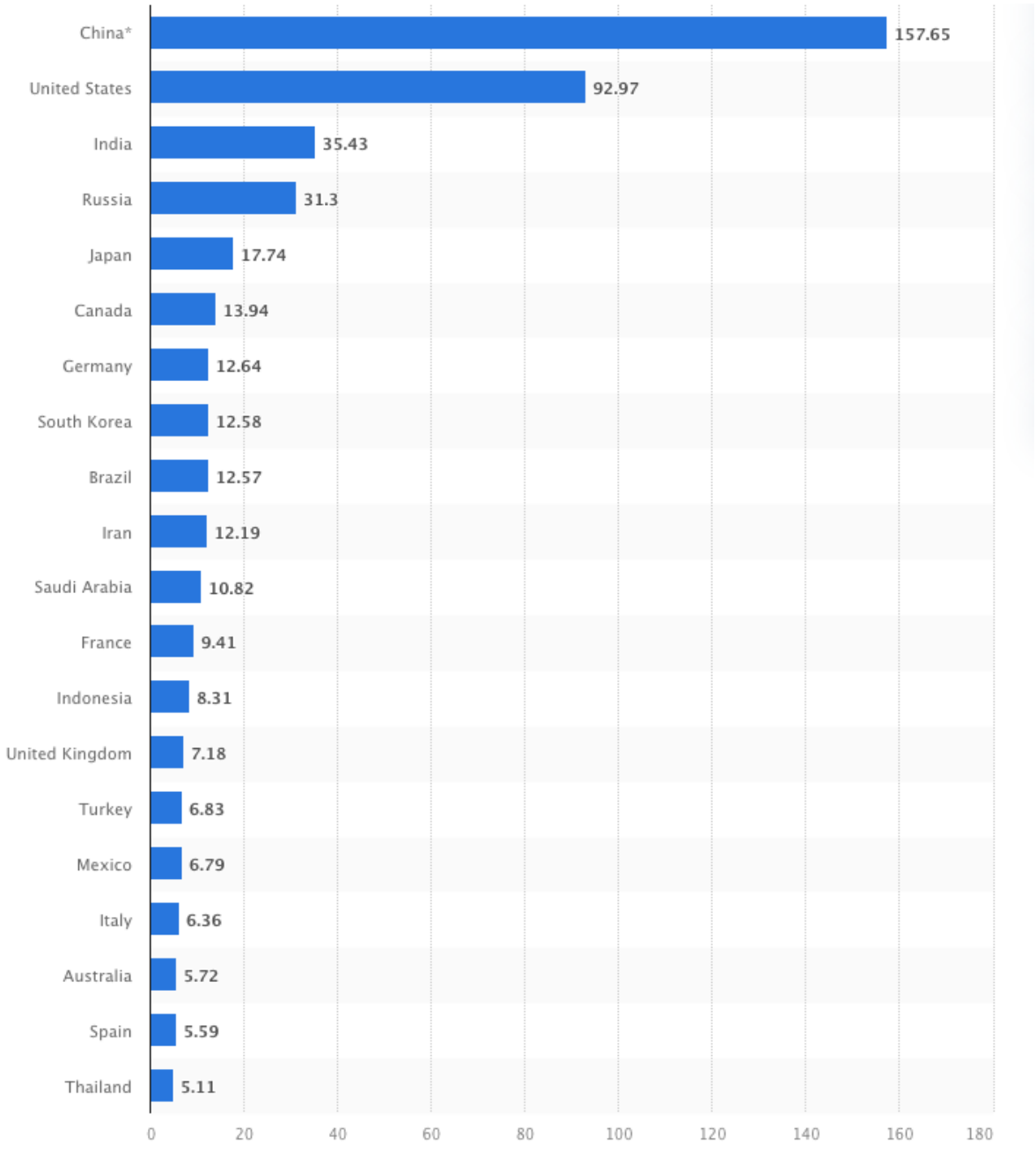

TABLE OF CONTENT