

Brazilian Corporate Sustainability Regulation in the Green Transition: Missing the Forest for the Trees

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ABSTRACT: The article describes and analyses new regulatory and governance rules regarding corporate sustainability regulation in Brazil, including the new provisions by the capital markets, the financial authorities, and private frameworks. This is done through the theoretical lens of a critical approach to socio-ecological transformation, shedding light on the broader context in which the institutional innovations take place: the political project of relying on finance to guide the transformation and the current transformations (i.e., the dismantling) of the traditional apparatus for environmental protection. In so doing, the contributions are twofold: on an empirical level, the article presents an overview of new rules regarding corporate governance and climate change in Brazil, serving as a useful source for comparison with other jurisdictions and a critical analysis of trends and differences in Northern and Southern Countries. On the theoretical level, we argue in favour of the need for a holistic approach that considers the broader regulatory context including the political agenda boosting the reforms in internal corporate governance and the circumstances of external environmental regulation. As such, we stress the interplay between extra-corporate and intra corporate governance tools in fostering corporate sustainability.

I. Introduction

In the last decade, the ecological crisis has been politicized with calls to promote a green transition towards a more sustainable economy. In the wake of the economic crisis caused by the COVID-19 pandemic, there has been a resurgence in the idea of a green recovery along with calls to reset capitalism and reinvent the corporation. In response, several institutional transformations have been taking place around the world aimed at addressing corporate responsibility with regard to the ecological crisis and, specifically, climate change.

Many of these innovations instrumentalize corporate law and governance to incorporate social and environmental aims, in what has been described as “sustainable corporate governance regulation”¹. These innovations have been analysed by a growing body of literature on sustainability related studies of corporate law and corporate governance,² that has helped “to illuminate how corporate law and governance affect the pursuit of corporate sustainability in a number of perspectives”³. In so doing,

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1 D. Monciardini, “Conflicts and Coalitions: The Drivers of European Corporate Sustainability Reforms,” in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, ed. Beate Sjäffjell and Christopher M. Bruner (Cambridge University Press, 2020), 611 (citing the objectives of ensuring ecosystems stability resilience and the promotion of human rights).

2 B. Sjäffjell and C. M. Bruner, “Corporations and Sustainability,” in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, ed. Beate Sjäffjell and Christopher M. Bruner (Cambridge University Press, 2020), 3 (introducing the book with 50 contributions ranging from conceptual discussions to several country-specific case studies).

3 C. M. Bruner and B. Sjäffjell, “Corporate Law, Corporate Governance and the Pursuit of Sustainability,” in *The Cambridge*

many contributors to the field have argued against the division of labor between an essentially privately focused corporate governance and a socially concerned external regulation.⁴ As argued, business and corporate law mechanisms should also be included in the legislative toolbox to promote sustainability, helping to alter the dynamics of decision-making within the corporation.⁵ Moreover, in the environmental arena, this would be crucial to overcome the limits of the “traditional paradigm of environmental law”⁶.

With the aim to contribute to the field, the purpose of this article is to describe and analyse the current changes taking place in the landscape of sustainable corporate governance regulation in Brazil, where new regulatory measures and governance rules were enacted by public authorities and private actors. Considering the central role played by the country in an envisioned green future, Brazil presents an interesting case study with which to analyse the scope of corporate regulation in the fight against climate change in the Global South. This task raises difficult challenges given the Global South’s place within the periphery of the capitalist world-ecology,⁷ as well as

its reliance on neoextractivism as a development strategy in the recent past.⁸

We expect to offer two main contributions. On an empirical level, the article presents an overview of recent rules regarding corporate governance and climate change in Brazil, serving as a useful source for comparison with other jurisdictions. On the theoretical level, we consider these innovations through an approach that considers the broader regulatory context including the green finance agenda boosting the reforms in internal corporate governance and the circumstances of external environmental regulation in Brazil. As such we stress the interplay between intra-corporate and extra-corporate governance tools in fostering corporate sustainability. We argue that a critical approach to the “transformation debate”⁹ entails a holistic perspective that considers the broader regulatory context to avoid missing the forest for the trees. As such, we aim to shed light on the relationships between corporate regulation, environmental regulation, and private power¹⁰ – an approach that has been neglected so far.¹¹

Handbook of Corporate Law, Corporate Governance and Sustainability, ed. Beate Sjøfjell and Christopher M. Bruner (Cambridge University Press, 2020), 713 (offering a panorama view of state-of-the-art developments and general trends).

- 4 See, for instance, B. Sjøfjell, “The Role of Business Law in the Jigsaw Puzzle of Sustainability,” in *Reframing the Game: The Transition to a New Sustainable Economy*, ed. Mike Townsend and Katrin Muff (Routledge, 2015), 42–56; C. Bruner, “Corporate Governance Reform and the Sustainability Imperative,” *The Yale Law Journal* 131 (2022): 1217–77; I. H.-Y. Chiu, “An Institutional Theory of Corporate Regulation,” *Northwestern Journal of International Law & Business* 39, no. 2 (2019): 85–170; A. Johnston and B. Sjøfjell, “The EU’s Approach to Environmentally Sustainable Business: Can Disclosure Overcome the Failings of Shareholder Primacy?,” in *Research Handbook on EU Environmental Law*, ed. Marjan Peeters and Mariolina Eliantonio (Edward Elgar, 2020), 396–410.
- 5 Different proposals can be found at B. Sjøfjell and B. J. Richardson, eds., *Company Law and Sustainability – Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015) (referring to a paradigm change from “shareholder primacy”; the setting of criteria for non-financial reports; and the transformation of directors’ duties).
- 6 S. E. Light, “The Law of the Corporation as Environmental Law,” *Stanford Law Review* 71 (2019): 147–148 (highlighting problems of cumulative harm, like climate change). See also C. Bruner, “Corporate Governance Reform and the Sustainability Imperative,” (referecing the piece by Light).
- 7 According to Jason Moore, the capitalism world-system is simultaneously a capitalist world-ecology, which is constituted by arrangements of power and economy, but also of socio-ecological relations. According to this theoretical framework, the peripheries of capitalism are special sites for the reorganizations of socio-ecological relations that each new cycle of

capital accumulation entails (cf. *Capitalism in the web of life* (London: Verso, 2015)).

- 8 Neoextractivist strategies focus on economic growth through the appropriation of natural resources (like ‘classic’ extractivism), but are defended on new conceptual bases in their adoption by many progressive governments in South America, with a much more active role of the State. Nonetheless, within those strategies, there is still a subordinated integration to the global economy. On the continuities and discontinuities, see E. Gudynas, ‘Estado compensador y nuevos extractivismos’ (2012) 237 *Nueva Sociedad* 128–146). On the Brazilian experience, see R. Balakrishnan and F. Toscani, ‘How the commodity boom helped tackle poverty and inequality in Latin America’ (21 June 2018) IMF Blog, available at <https://blogs.imf.org/2018/06/21/how-the-commodity-boom-helped-tackle-poverty-and-inequality-in-latin-america/> and L. Carvalho, *Valsa brasileira: do boom ao caos econômico* (São Paulo: Todavia, 2018).
- 9 For an overview of the debate on “socio-ecological transformations” (often a synonym for transition), see: U. Brand and M. Wissen, ‘Socio-ecological transformation’, in D. Richardson (ed.), *International Encyclopedia of Geography: People, the Earth, Environment, and Technology* (Hoboken, NJ: Wiley-Blackwell and Association of American Geographers, 2017) (analysing different uses of the terms both in the policy as well as in the academic domain).
- 10 J. Britton-Purdy et al. ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’ (2020) 129 *The Yale Law Journal* 1784–1835 (arguing for the need to recentre power in legal theory).
- 11 On the lack of consideration of power dimensions in discussions related to stakeholder capitalism and ESG investing, see R. Forohaar, ‘The failures of stakeholder capitalism’ (2 May 2022) *Financial Times*, available at <https://www.ft.com/content/f7f76d7c-2d01-4129-b87d-fcc9815e3a77>.

After this brief introduction, Section 2 describes the main regulatory and governance innovations affecting corporate sustainability in Brazil enacted by securities and financial authorities, as well as self-regulatory measures adopted by the stock exchange and private actors. In Section 3, the article offers a critical analysis of such rules in context, including an assessment of the political strategy of relying on finance as a source of pressure on corporate climate responsibility and the parallel process of dismantling the traditional Brazilian environmental legal apparatus. With the bigger picture in sight, Section 4 presents the final remarks.

II. Transforming Corporate Governance in Brazil?

In considering the innovations described below, it should be kept in mind that corporate law in Brazil contains a unique provision stating that the controlling shareholders must use their power to fulfil the company's purpose and social function, and that they hold duties and responsibilities towards the other shareholders, the company's employees, and the community in which the company operates (art. 116, sole paragraph, Companies Act¹²). Directors and officers are also expected to comply with a similar duty, as they must act in the interest of the company, respecting public interest requirements and the entity's social function (art. 154, Companies Act).¹³

A. Public companies and investment funds

In 2021, the Brazilian Securities and Exchange Commission (CVM)¹⁴ introduced changes to the form (known as "Reference Form") that publicly traded companies must disclose and keep updated (Resolution 59/2021, effective from 2 January 2023).¹⁵ The main goal of the reform was to decrease the cost of compliance, to fall in line with

other jurisdictions, but also included rules to standardize the disclosure of environmental, social and governance ("ESG") issues, "attending to the growing demand of investors" and "aligning the Brazilian regulation to the progress the issue has made in developed markets"¹⁶. The movement can be seen as a reflex¹⁷ to the debates being held at the Laboratory of Financial Innovation (LAB), a multistakeholder forum that unites representatives from the public and private sectors to promote sustainable finance (i.e., to boost private investment in projects with positive social and/or environmental impact) in Brazil.¹⁸

Currently, the regulation requires companies to disclose information regarding socio-environmental issues in the Reference Form. Socio-environmental risks are included in the list of risk factors and, in cases where the company foresees such a risk, the existence of risk management policies must be declared, accompanied by the objectives and strategies of such policies as well as the adequacy of the operational structure and internal controls to assure compliance. Since 2016, companies have also been required to declare whether they disclose social and environmental information, what methodologies they have adopted, whether they are undergoing an external audit, and where such information can be found online.¹⁹

The adoption of Resolution 59/2021 presents a step forward: the current socio-environmental risk factor mentioned above will be divided into social, environmental and climate issues, the latter including physical and transitional risks.

Furthermore, companies must now disclose additional information, as per an extensive list of environmental, social and corporate governance factors²⁰, such as (a)

¹² Federal Law n. 6.404/1976.

¹³ Although litigation on the basis of a failure to comply with such corporate duties to the public interest are rare to find, they are certainly a legal basis for arguing for a broader perspective on the spectrum of interests (including environmental ones) to be taken into consideration by the corporate management.

¹⁴ The acronyms referring to Brazilian institutions are in Portuguese.

¹⁵ A public consultation preceded the changes, receiving many contributions from relevant actors. All the documents, including an English version of the Public Consultation Notice, are available at http://conteudo.cvm.gov.br/audiencias_publicas/ap_sdm/2020/sdm0920.html.

¹⁶ Public Consultation Notice SDM n. 09/20, p. 2.

¹⁷ The suggestions made by LAB's ESG risk management and transparency working group influenced CVM's reform proposal, as explicitly stated in the Public Consultation Notice (p. 2).

¹⁸ The founders of LAB are the Brazilian Association of Development (ABDE), the Interamerican Development Bank (BID) and the CVM, in partnership with Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH. Currently, members include the other regulators, private and public banks, development banks, business, NGOs, law firms and representatives from academia. See: <http://labinovacaoofinanceira.com/lab>.

¹⁹ At the time, this was done through influence from the Brazilian Stock Exchange, B3, and its "Report or Explain for Sustainability" voluntary initiative. From 2011 the initiative required listed companies to annually report if and where they disclosed information on environmental, social and governance issues.

²⁰ The first 4 items parallel item 7.8. on the current Reference Form that refers to socio-environmental policies (as mentioned above).

whether ESG information is disclosed in an annual report or other document; (b) the adopted methodology; (c) whether it is externally audited, and, if so, the identification of the entity is required; (d) where it can be found online; (e) whether a materiality matrix and ESG key performance indicators are considered, and which ones; (f) whether the Sustainable Development Goals (SDGs) are considered and the materiality of them to the company; (g) whether the guidelines of the Taskforce on Climate-related Financial Disclosures (TCFD) or those of other entities are considered; and (h) whether the company inventories its emissions, indicating the scope and where further information can be found. Companies may choose not to disclose the listed points, but they are required to explain such a decision.

The new Reference Form must also include information on (a) whether there are business opportunities related to ESG issues in the business plan; (b) the role of management bodies in the assessment, management, and supervision of climate risks and opportunities; (c) whether there are channels to address ESG and compliance issues with the board; and (d) the main performance indicators taken into consideration for defining the compensation of officers, directors, and committee members, and whether they include any ESG issues.²¹

Overall, the position held by the regulator was to endorse the importance of disclosure, but also to highlight the need to go at a slow pace, in order to accompany the standardization initiatives, so as to not contribute to a deeper fragmentation of the field.²² According to the president of CVM, the aim is only to improve transparency and not to act in an interventionist fashion.²³

Along with the innovations introduced by CVM, two other initiatives from capital markets are worth mentioning. First, the launch of a new methodology²⁴ for the Cor-

porate Sustainability Index (ISE) by B3, the Brazilian Stock Exchange.²⁵ Most significantly, the new format introduces subdivisions according to economic sectors,²⁶ and two stages are added to the selection process in order to gather information on climate issues and reputation from independent entities as a complement to the self-declared information²⁷. Regarding climate issues, performance will be measured according to the Carbon Disclosure Project (CDP). To be ISE eligible, a company will need to earn a grade of C or above in the CDP.²⁸ Moreover, the scoring process will result in a publicly available ranking.²⁹ All of these innovations are part of an attempt to boost the credibility of the ISE, with the ranking of the company no longer being determined by its market value, but by its ESG performance.

Second, in response to the rapid growth of ESG products in Brazil,³⁰ the Brazilian Financial and Capital Markets Association³¹ (ANBIMA) has enacted self-regulatory

available at https://iseb3-site.s3.amazonaws.com/Visao_geral_do_novo_questionario_ISE_B3-12_ago2021-ok.pdf.

²⁵ It should be stressed that ISE, launched in 2005, was one of the earliest innovators in the market. Moreover, B3 is an important player in the context of corporate sustainability: it was the first stock exchange to sign the Global Pact, and one of the first five to join the Sustainable Stock Exchange (SSE) initiative. It was also the first, from an emergent market, to join the Principles of Responsible Investment (PRI). Nowadays, besides ISE, it also hosts the Carbon Efficient Index (ICO2) (an index that weights the reason between the GEE and companies' liquidity) and other measures on the topic.

²⁶ Previously, the survey was the same for each and every company. The innovation grants a more accurate analysis of material risks for each sector, and will be updated in the following years (B3, Novo questionário ISE B3, p. 2).

²⁷ As in the previous methodology, companies are required to present documents that prove their survey responses (B3, Novo questionário ISE B3).

²⁸ B3, Metodologia do índice de sustentabilidade empresarial (ISE B3) (July 2021), available at https://iseb3-site.s3.amazonaws.com/ISE-Metodologia-pt-br_vf.pdf.

²⁹ See B3, 'B3's sustainability index will disclose companies' ESG ranking positions' (20 July 2021), available at https://www.b3.com.br/en_us/news/ise-b3-has-just-been-revised-to-facilitate-investitors-analysis.htm.

³⁰ According to ANBIMA, there was a 50% growth in funds that self-declared 'sustainable', and an almost 300% growth in assets under management between 2016 and 2021 (GUIA ASG II – Aspectos ASG para gestores e para fundos de investimento, p. 20, available at https://www.anbima.com.br/data/files/93/F5/05/BE/FEFDE71056DEBDE76B2BA2A8/Guia_ASG_II.pdf).

³¹ Since 2009, it represents more than 300 capital markets institutions including banks, asset managers, brokers, security dealers, and investment advisers (ANBIMA, 'Who are we', available at https://www.anbima.com.br/en_us/institucional/a-anbima/quem-somos.htm). The association is a relevant

²¹ There are other interesting innovations that are beyond the scope of this article regarding disclosure on diversity and pay gaps.

²² Official report summarizing the suggestions, p. 29, available at https://conteudo.cvm.gov.br/audiencias_publicas/ap_sdm/2020/sdm0920.html.

²³ A. L. de Carvalho, 'CVM não será intervencionista quanto às novas regras para ESG, diz presidente', Valor Investe, 21 December 2021, available at <https://valorinveste.globo.com/mercados/noticia/2021/12/22/cvm-nao-sera-intervencionista-quanto-as-novas-regras-para-esg-diz-presidente.ghtml>.

²⁴ See B3, Metodologia ISE B3, available at <http://iseb3.com.br/metodologia#conteudo-principal>. It is worth noting the main references taken into account in the reviewing process of the methodology, such as the Sustainability Accounting Standards Board (SASB), the Global Reporting Initiative (GRI) and the B Lab, as explicitly mentioned in B3, Novo questionário ISEB3 – Visão geral para o lançamento 2021 (12 August 2021), p. 1,

rules on sustainable investment funds.³² The criteria are applicable to stock and fixed income funds,³³ with a promise that they will soon be expanded to other classes.³⁴

The rules differentiate between a “sustainable investment fund”³⁵ and funds that “integrate ESG concerns”. The former must be identified by the suffix IS (the acronym for sustainable investment in Portuguese), include a brief description of its sustainable investment goals in its charter, demonstrate the alignment of its portfolio and that the investments do not harm the stated goals.³⁶ The latter may include information in its marketing materials,³⁷ as long as it complies with certain requirements, among which is the duty to publicly disclose the adopted methodology, including at least the investment selection criteria.³⁸ In an attempt to avoid ambiguity, the self-regulatory measures forbid investment funds from adopting other terms, such as ESG, SDG and/or green, among others, without compliance with the new rules.

This new private framework also contains provisions regarding the managers of the funds, who are required to assert their compromise on sustainable investment or ESG concerns in a publicly available document. Addition-

ally, the manager must have a functional organizational and decision-making structure compatible with the responsibilities assigned to the management of a sustainable investment fund.

B. Financial Institutions

Besides corporate regulation and governance applicable to public companies, an important case can be observed in the financial system. Brazil is seen as a relevant first-mover in the attempt to align financial systems with environmental policy goals.³⁹ Since 2008, the Brazilian financial authorities have been implementing regulatory measures concerning socio-environmental topics.⁴⁰ Initially, new regulations dealt with specific credit lines, such as those related to activities in the Amazon biome (Resolution 3,545/2008). In 2011, the Brazilian Central Bank (BCB) adopted Circular 3,547, requiring financial institutions to demonstrate how they incorporated socio-environmental risks in their assessment processes. Three years later, Resolution 4,327/2014 listed guidelines that should be observed by financial institutions to implement their socio-environmental responsibility policies (PRSA). In 2017, Resolution 4,557 added provisions regarding risk and capital management structure, including a mandate to consider socio-environmental risks.

An important driver for these developments is the so-called “indirect polluter” provision in Environmental Law⁴¹, insofar as it impacts the boundaries of lender liability.⁴² According to the literature, lender liability is a useful tool in promoting the role of financial institutions in sustainable development.⁴³

locus for self-regulation in the sector through its “Regulation and Best Practice Codes”.

³² As stated, the purpose was “to secure, through self-regulation, a healthy and strong growth of those products” (ANBIMA, ‘ANBIMA define critérios para identificar fundos sustentáveis’, (01 October 2021), available at https://www.anbima.com.br/pt_br/noticias/anbima-define-criterios-para-identificar-fundos-sustentaveis.htm).

³³ Detailed in the document “Regras e Procedimentos para Identificação de Fundos de Investimento Sustentável (IS)” (n. 14, 03 January 2022), available at https://www.anbima.com.br/data/files/E8/50/C4/BF/1519D710E79BD7D76B2BA2A8/Regras_procedimentos_Fundos%20IS_03.01.22.pdf.

³⁴ ANBIMA, GUIA ASG II, p. 4.

³⁵ As indicated by ANBIMA, the IS funds are equivalent to the Deep Green category (art. 9) of the European Sustainable Finance Disclosure Regulation (GUIA ASG II, p. 46).

³⁶ As stated in the guidelines, there are no prescriptive requirements, such as minimum composition percentages or indication of accepted methodologies. ANBIMA understands that “diverse portfolio and management combinations can produce similar results in the achievement of a sustainable investment goal” (GUIA ASG II, p. 46).

³⁷ The advertising materials shall include the following warning: “this fund integrates ESG concerns in its management, according to the ANBIMA Portfolio Management Code” (art. 14, “Regras e Procedimentos para Identificação de Fundos de Investimento Sustentável (IS)”). ANBIMA’s expectation is that the ESG integration will be mainstreamed among all investment funds, and thus differentiation will not be necessary (GUIA ASG II, p. 58).

³⁸ In both types of funds, the adoption of a reference index does not exempt the fund from complying with the rules.

³⁹ United Nations Environment Program (UNEP), The financial system we need: Aligning the financial system with sustainable development (October 2015), available at <https://wedocs.unep.org/handle/20.500.11822/9862>.

⁴⁰ Centre for Sustainability Studies Getulio Vargas Foundation (GVces), The Brazilian Financial System and the Green Economy, (São Paulo: Febraban, 2014), p. 34–35 (offering a table with the main provisions).

⁴¹ Article 3, IV, Federal Law n. 9.638.

⁴² Centre for Sustainability Studies Getulio Vargas Foundation (GVces), The Brazilian Financial System and the Green Economy, (São Paulo: Febraban, 2014), p. 34 (mentioning court decisions and affirming that “[u]ndoubtedly, such elements become internalization mechanisms for environmental externalities, as well as relevant elements in the analysis of socio-environmental risks present in the operation of financial institutions in Brazil”).

⁴³ R. Sampaio et al. ‘Lender’s and investor’s environmental liability: how much is too much?’ UNEP Inquiry Working paper, available at: <https://wedocs.unep.org/handle/>

Since these advances, the agenda for a sustainable financial system has gained traction globally. For instance, the establishment of the Network for Greening the Financial System (NGFS) in 2017 gathered central banks and financial authorities all over the world in a cooperative framework to exchange experiences, recommendations and best practices on green finance.⁴⁴ Then, in 2020, the Bank for International Settlements introduced the “green swan” concept, highlighting the risks posed by climate change and the associated natural disasters to financial stability.⁴⁵

These movements were also reflected in Brazil. In March 2020, the BCB joined the NGFS, and, later the same year, signed a Memorandum of Understanding with the Climate Bonds Initiative to work on a green taxonomy.⁴⁶ Following these connections, BCB launched its Sustainability Agenda, which is understood to fall within the scope of its financial stability mandate⁴⁷.

Further steps were taken after conducting public consultations⁴⁸, with the adoption of new regulatory measures which (i) strengthen management for social, environmental, and climate risks (CMN Resolutions n. 4,943 and n. 4,944)⁴⁹; (ii) set standards for the disclosure of such

risks (BCB Resolution n. 139 and Normative Instruction n. 153)⁵⁰; (iii) launch the new Social, Environmental, and Climate Responsibility Policy (CMN Resolution n. 4,945); and (iv) specify criteria for rural credit (BCB Resolution n. 140)⁵¹.

Given the scope of the present article, it is worth highlighting the changes introduced by Resolution n. 4,945, with the new Social, Environmental, and Climate Responsibility Policy (PRSA) replacing the PRSA. In line with the aforementioned CVM rules, there is a shift from the broad notion of socio-environmental risk⁵² to more detailed principles and guidelines for social⁵³, environmental,⁵⁴ and climate⁵⁵ issues.

Overall, the new Resolution specifies and elaborates on themes that had not received much attention before. For instance, whereas the 2014 Resolution only pointed to the need for financial institutions to appoint an officer to be responsible for the fulfilment of PRSA, the new Resolution goes beyond this, by stating the duty to name such an officer before the Brazilian Central Bank and to expressly list its attributions, which shall be mentioned in the charters of the financial institution. They include the duty to

20.500.11822/7521 (presenting Brazil as a case study and noting the particularity of its lender liability regime).

⁴⁴ The network started off with only eight members, and now registers more than 105 members across five continents. See: <https://www.ngfs.net/en/about-us/governance/origin-and-purpose>.

⁴⁵ P. Bolton et al., *The green swan: central banking and financial stability in the age of climate change* (BIS, January 2020), available at <https://www.bis.org/publ/othp31.pdf>. As it is stated, the concept is inspired by the “black swan”, used after the 2007 financial crisis to refer to unexpected, deeply impacting events.

⁴⁶ L. Mello, ‘Climate Bonds & Banco Central do Brasil sign agreement to develop sustainable finance agenda: new partnerships to share technical knowledge on climate & financial sector’, 14 September 2020, available at <https://www.climatebonds.net/2020/09/climate-bonds-banco-central-do-brasil-sign-agreement-develop-sustainable-finance-agenda-new>.

⁴⁷ BCB, ‘Opening speech for the launch of the Sustainability Dimension of the Agenda BC#’, (08 September 2020), available at https://www.bcb.gov.br/content/about/presentationtexts/Agenda_BC_Sustainability_%20Opening_Speech_DepGovernor_Fernanda_Nechio_September_2020.pdf.

⁴⁸ From April to June 2021, Public consultations n. 85 (<https://www3.bcb.gov.br/audpub/DetailharAudienciaPage?1>) and 86 (<https://www3.bcb.gov.br/audpub/DetailharAudienciaPage?2>) were conducted.

⁴⁹ If financial institutions were previously only expected to take socio-environmental risks into consideration, the new provisions set forth detailed norms on social, environmental and climate risks, stating, for instance, that they shall implement mechanisms to identify and monitor climate risks incurred by its counterparts. These risks are monitored by a Risk Com-

mittee that shall conduct its activities in coordination with the Social, Environmental and Climate Responsibility Committee (Resolution n. 4,557/2017).

⁵⁰ The standards have been described as “TCFD on steroids”, because in addition to the disclosure of climate risks in the model proposed by the Taskforce on Climate Related Financial Disclosures, they add the social and environmental dimensions (see N. Viri, ‘Com novas resoluções, BC traz ESG para regulação bancária; entenda’ (15 September 2021) available at <https://www.capitalreset.com/com-novas-resolucoes-bc-traz-esg-para-a-regulacao-bancaria-entenda-%EF%BB%BF/>).

⁵¹ A detailed analysis of the rural credit criteria is beyond the scope of this work. However, it is relevant to note that there are relevant implications and perils to land governance that should not be underestimated. See *Política por Inteiro*, ‘Banco Central quer bancos “mais verdes”, com gestão de riscos climáticos, sociais e ambientais’ (2021), available at <https://www.politicaporinteiro.org/2021/09/16/banco-central-quer-bancos-mais-verdes-com-gestao-de-riscos-climaticos-sociais-e-ambientais/>.

⁵² Previously defined as “the possibility of incurring in losses from socio-environmental damages” (art. 4º, Resolution n. 4.327/2014).

⁵³ “The respect, protection, and promotion of fundamental rights and guarantees, and of common interest” (art. 3º, § 1º, I).

⁵⁴ “The conservation and repair of the environment, including its recovery when feasible” (art. 3º, § 1º, III).

⁵⁵ “The institution’s positive contribution a) in the transition to a low carbon economy, in which greenhouse gas emissions are reduced or compensated and the natural capture mechanisms are preserved; and b) in the reduction of impacts caused by frequent and severe weather events or longstanding environmental changes that may be associated with changes in climate patterns” (art. 3º, § 1º, IV).

assist the board in the decision-making process regarding the implementation of the PRSAC; to implement actions related to the PRSAC; to monitor implemented actions and improve them, whenever necessary; and to disclose relevant information regarding the PRSAC.

Additionally, Resolution 4,945/2021 is innovative⁵⁶ in its assertion of the board of directors' duties to approve and review⁵⁷ the PRSAC, with the assistance of the appointed officer and of the Social, Environmental and Climate Responsibility Committee; to safeguard compliance with the PRSAC; to safeguard the overall compatibility and integration of the PRSAC with the broader policies adopted by the institution, including credit, human resources, risk, and capital management policies; to safeguard the timely correction of deficiencies with the PRSAC; to rule on the organization and attributions of the Social, Environmental and Climate Responsibility Committee; to safeguard that compensation programs do not stimulate behaviours contradictory to the PRSAC; and, finally, to promote the internal dissemination of the PRSAC and its implementing actions.⁵⁸

The resolution also drives progress by stipulating that the previously optional Socio-Environmental Responsibility Committee is now mandatory for some financial institutions⁵⁹. It is within the current Social, Environmental and Climate Responsibility Committee's duties to propose recommendations to the board regarding the establishment and revision of the PRSAC, as well as to evaluate the level of adherence of the implemented action to the PRSAC, suggesting improvements whenever needed.

Given that economic activity must distance itself from business as usual in order to fight the ecological crisis, the new provisions presented above are welcome regulatory tools in the attempt to redefine the corporation and

contribute to the green transition.⁶⁰ However, as we argue below, in assessing the efficacy of these tools, one must consider not only their own characteristics but the broader institutional context in which they are implemented.⁶¹ In what follows, we briefly describe such context in Brazil, shedding light into the agenda driving the incorporation of environmental concerns in corporate governance, as well as the current circumstances of external environmental regulation. In doing so, we argue for the centrality of the interplay between internal and external corporate regulation.

III. Corporate Sustainability in Context: A Critical Approach

The rise of the new discourse on the need to transition to a low carbon economy aims to capture the collective discontent with incremental improvements⁶² – which “may lull us into a dangerous complacency”⁶³. Within the transformation discourse, for instance, a broader spectrum of initiatives⁶⁴ is promoted, with different regulatory tools required to implement them and deal with environmental change.⁶⁵ Altogether this “transformation debate” can be

⁵⁶ Resolution 4,327/2014 did not list the board's duties, only broadly stating the need for approval of PRSA and to secure the adequate integration to the other policies within the institution.

⁵⁷ The revision shall be done every three years or whenever there is a relevant event, including significant corporate reorganizations (art. 7º, § 1º). Under Resolution 4,327/2014, the PRSA needed to be assessed every five years (art. 2º, § 5º).

⁵⁸ The Resolution assigns these new competences to the board of directors in its capacity as a body of the corporation, which means that the directors shall vote on such topics during board meetings. From the failure to comply with the Resolution may follow the individual responsibility of the directors.

⁵⁹ At present, organizations in segments 1 and 2 are required to establish a Social, Environmental and Climate Responsibility Committee, while those in segments 3, 4 and 5 may choose not to do so (art. 6º, Resolution 4,945/2021). Without a Committee, the board of officers shall perform its duties (art. 6º, § 5º).

⁶⁰ B. Sjäfjell, 'Redefining the corporation for a sustainable new economy' (2018) 45 *Journal of Law and Society* 29–45 at 36 (stating that such a redefinition is “an essential piece of the jigsaw puzzle of sustainability”).

⁶¹ On the need to consider “the social and political structures in which institutions are embedded”, see K. Pistor, 'Contesting property rights: towards an integrated theory of institutional and system change' (2011) 22 *Global Jurist*, article 6.

⁶² C. Görg et al., 'Challenges for socio-ecological transformations: contributions from social and political ecology' (2017) 9 *Sustainability*, doi:10.3390/su9071045.

⁶³ B. Sjäfjell and B. Richardson, 'The future of company law and sustainability', in B. Sjäfjell and B. Richardson (eds.), *Company Law and Sustainability: Legal barriers and opportunities* (Cambridge: Cambridge University Press, 2015) p. 312–340 at 313.

⁶⁴ J. Köhler et al., 'An agenda for sustainability transitions research: state of the art and future directions' (2019) 31 *Environmental Innovation and Societal Transitions* 1–32 (describing the broadening of societal domains that have been the object of transitioning efforts).

⁶⁵ L. J. Kotzé and R. E. Kim, 'Earth system law: the juridical dimensions of earth system governance' (2019) 1 *Earth System Governance*, <https://doi.org/10.1016/j.esg.2019.100003> (embracing the “transformation” discourse and arguing for a new legal phenomenon “more than environmental law” that acknowledges the implications of trade law, economic law, social security law and many other legal domains in the socio-ecological crisis).

seen as constituting “a new political-epistemic terrain”⁶⁶, in which different visions and interests about a sustainable future are confronting each other and the outcomes are being disputed.

It is in this realm, and its emphasis on a low carbon transition, that the institutional innovations described above have made headway – bringing a specific emphasis to the climate agenda within corporate governance.⁶⁷ In this light, this Section argues that the adoption of a critical perspective⁶⁸ on the socio-ecological transformation discourse is useful in order to assess the innovations in context, taking into consideration both the political agendas that are promoting them and the broader social landscape in which they are being implemented.

A. The market-based green finance agenda and its premises

It is first necessary to have in mind the broader political agenda in which the capital markets and financial system as a whole have a prominent role in dealing with the environmental crisis. As mentioned above, the described institutional innovations can be viewed as part of broader efforts to diffuse the regulatory approach of market-based green finance⁶⁹ – although it cannot be reduced to it, as

many motivations and interests function as drivers of the institutional reforms.⁷⁰

With the goal of “making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development” defined in the Paris Agreement (art. 2, 1 (c)), there has been a burgeoning of market instruments and institutional arrangements aimed at “greening” finance and allegedly pressuring the productive sector. This approach marked a turning point in climate policy, with the use of blended finance and a deeper shift to private sector governance,⁷¹ and has turned central banks,⁷² private investors,⁷³ financial institutions, and financial regulators into key actors in the fight against climate change.

In this context, there is a double effort to provide key information to investors and to incorporate such information in the allocation process of financial actors.⁷⁴ The adoption of mandatory non-financial reporting is a common regulatory technique in corporate sustainability regulation and an illustrative example of the regulatory paradigm of shaping markets “from within”.⁷⁵ In this regulatory paradigm, as stated by Kampourakis, the law is in charge of facilitating “the permeability of private institutional structures to the pressures of the market and civil society”⁷⁶. It is thus expected that market processes, civil

⁶⁶ U. Brand, “Transformation” as a new critical orthodoxy – The strategic use of the term “transformation” does not prevent multiple crises’ (2016) 25 GAIA 23–27 at 23.

⁶⁷ In the case of CVM, the ‘special treatment’ of climate issues was justified by the urgency of climate change, as well as by the fact that report standards and metrics are more advanced (V Adachi, ‘CVM passa a exigir informações ESG de companhias listadas’ (23 December 2021), available at <https://www.capitalreset.com/cvm-passa-a-exigir-informacoes-esg-de-companhias-listadas/>).

⁶⁸ See U. Brand, C. Görg and M. Wissen, ‘Overcoming neoliberal globalization: socio-ecological transformation from a Polanyian perspective and beyond’ (2020) 17 Globalizations 161–176. On the problems with the hegemonic use of ‘transformation’, see: I. Blühdorn et al. ‘Transformation research and academic responsibility. The social theory gap in narratives of radical change’, Report, Institut für Gesellschaftswandel und Nachhaltigkeit (March 2018) (pointing to the lack of analysis on social barriers to such radical transformations); J. Blythe et al., ‘The dark side of transformation: latent risks in contemporary sustainability discourse’ (2018) 50 Antipode 1206–1223 (referring to a “transformative turn” in sustainability science).

⁶⁹ For a summary, see S. Steuer and T. H. Tröger, ‘The role of disclosure in green finance’ (2022) 8 Journal of Financial Regulation 1–50 at 5 (stating that “[t]he overarching objective of these approaches is to unleash market forces and induce market discipline to propel the transition to a net-zero carbon-emission economy”).

⁷⁰ On the coalitions of actors that acted as driver of corporate sustainability reforms in the European Union, see D. Monciardini, Conflicts and coalitions: the drivers of European corporate sustainability reforms, in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, 2020) 611–625. On disclosure regulation see, further, A. M. Lipton, “Not Everything Is about Investors,” *Yale Journal on Regulation* 37 (2020): 499–572.

⁷¹ Bracking and Leffel, ‘Climate finance governance’, 6.

⁷² Bolton et al., *The green swan*, p. 47 (describing central banks as “coordinating agents in the age of climate uncertainty”).

⁷³ S. K. Park, ‘Investors as regulators: green bonds and the governance challenges of the sustainable finance revolution’ (2018) 54 *Stanford Journal of International Law* 1–47.

⁷⁴ UNEP, *The financial system we need*, p. 14 (pointing out that non-financial reporting is needed as “input to financial decisions that take social and environmental factors more fully into account”, implying a division of labour within this regulatory arrangement).

⁷⁵ I. Kampourakis, ‘The postmodern legal ordering of the economy’ (2021) 28 *Indiana Journal of Global Legal Studies* 101–152 at 133 (pointing to a transformation in the notion of “bindingness”, where enforcement is concerned with “the first-order obligation of non-financial transparency rather than the second-order obligation of sustainable corporate activity”). On the justification of such a perspective, see O. Perez, ‘Responsive regulation and second-order reflexivity: on the limits of regulatory intervention’ (2011) 44 *UBC Law Review* 743–778.

⁷⁶ ‘The postmodern legal ordering of the economy’, 109 (pointing to a mutation in the function of law).

expectations, and reputational sanctions will trigger the envisioned changes in corporate conduct.⁷⁷ In the case of the climate agenda, this may be summarized in the fostering of a “corporate climate responsibility” that congregates the different sources of external pressure towards a low carbon transition.⁷⁸

The institutionalisation of this type of arrangement is not done in a vacuum. Pre-existing social inequalities regarding the capacity to put pressure on companies or other economic actors are thus reflected in these new regulatory mechanisms.⁷⁹ In any case, within the market-based green finance agenda, the financial system is envisioned to be the main source of pressure on corporate actors, triggering changes in the cost of capital and reallocating resources from “dirty” to “green” activities without direct regulatory intervention or taxation.⁸⁰ This helps to explain the stricter regulatory environment within the financial sector in Brazil, while the securities authority (CVM) aimed only to improve transparency and not act in an interventionist fashion.⁸¹

There is no doubt that the financial and capital markets are important players in the quest to design a green transition. There are, however, different institutional arrangements in dispute – with different roles attributed to both private and public financial spheres.⁸² In theory, the market-based green finance approach is based upon premis-

es that may be difficult to verify, considering that for the shifts in the cost of capital to occur, “dirty” assets need to be riskier than ‘green’ assets in the sense that they are likely to perform badly in states of the world in which the representative investor’s marginal utility is high and vice versa.⁸³ Nonetheless, facing these issues in practice can be an even bigger challenge, as the case of Brazil illustrates.

Regarding financial institutions, while there is undeniable progress in the corporate regulation of financial actors in Brazil, it comes as part of a package that aims mainly to strengthen the sector’s prudential regulation, which may – at best – create an indirect stimulus for a reallocation of capital towards greener investments.⁸⁴ A deeper analysis of the broad landscape of green financial regulation in Brazil is beyond the scope of this article. Nonetheless, it should be kept in mind that prudential tools currently exceed promotional tools to foster the green economy.⁸⁵ The instrument of mapping and disclosing climate-related financial risks “constructs climate change as a threat to the financial system, but does not see private finance as a key driver of the climate crisis”⁸⁶, and therefore falls short of the required pressure to transform the economy. Indeed, climate risks are defined as the possibility of losses “to the institution”⁸⁷.

In the case of climate-related and other non-financial disclosures, CVM’s new rules are considered insufficient to provide investors with trustworthy information.⁸⁸

⁷⁷ Kampourakis, ‘The postmodern legal ordering of the economy’, 136.

⁷⁸ R. H. Weber and A. Hösl, ‘Corporate Climate Responsibility – The rise of a new governance issue’ (2021) *sui generis* 83–92 (pointing out climate litigation and institutional investors as sources of external pressure).

⁷⁹ Kampourakis, ‘The postmodern legal ordering of the economy’, 109 (on the different capacities to shape normative outcomes) and 144 (stating that “the reliance on ‘the Social’ reifies the asymmetries of social and market power into concrete legal arrangements”). This is in line with the diagnosis made by Bracking and Leffell regarding climate finance governance, that although it has increasingly become dispersed among agents, power has not been shared, but concentrated with financial actors (‘Climate finance governance’, 11–12).

⁸⁰ Steuer and Tröger, ‘The role of disclosure in green finance’.

⁸¹ See note 17, above.

⁸² See D. Gabor, ‘The Wall Street Consensus’ (2021) 52 *Development and Change* 429–459 (cautioning against a narrowing of the political space for countries in the Global South, with the promotion of a development paradigm that sees the state as an enabler of private finance solutions to climate change). On the growing relevance of the new paradigm in the green recovery calls in the wake of the COVID-19 pandemic, see Y. Dafermos, D. Gabor and J. Michell, ‘The Wall Street Consensus in pandemic times: what does it mean for climate-aligned development?’ (2021) *Canadian Journal of Development Studies*, <https://doi.org/10.1080/02255189.2020.1865137>.

⁸³ Steuer and Tröger, ‘The role of disclosure in green finance’, 22 (referring to “highly demanding preconditions” for the functioning of the market-based green finance agenda).

⁸⁴ M. Schapiro, ‘Variedades da atuação financeira do Estado na crise climática: evidências do caso brasileiro’ in I. Miola et al. (eds.) *Finanças verdes no Brasil: perspectivas multidisciplinares sobre o financiamento da transição verde* (São Paulo: Blucher, 2022), pp. 267–294.

⁸⁵ Schapiro states that “the conservation or the defense of the financial system from climate risks seem to be in a more accelerated and assertive rhythm than the transformative role of finance.” (translated from ‘Variedades da atuação financeira do Estado na crise climática’, 288).

⁸⁶ Dafermos, Gabor and Michell, ‘The Wall Street Consensus in pandemic times’, 8.

⁸⁷ Art. 38-C, I and II, Resolution 4,943/2021.

⁸⁸ A. L. Grizzi, ‘CVM vai na contramão do mundo e fica para trás em regulação ESG’, *Capital Reset*, 15 December 2021, available at <https://www.capitalreset.com/cvm-vai-na-contramao-do-mundo-e-fica-para-tras-em-regulacao-esg/> (describing them as a “tiny step”). In the same direction, pointing out that without broader regulatory measures “disclosure risks being a vain exercise”, see J. Cornillie et al. ‘Will the EU Sustainable Finance rules deliver?’ *STG Policy Papers*, Issue 2021/13 (June 2021), p. 5, available at https://static1.squarespace.com/static/5f7709cd633d6220bbee2709/t/60e42c24704c791a20f69de2/1625566245871/PB_2021_13_STG.pdf.

Among the outlined shortcomings, it is highlighted the absence of regulation on ESG data providers (including second-party opinion providers, third-party certifications and ESG ratings), and of rules on the fiduciary duties of directors and officers in regard to ESG issues – failing to reflect the encompassing provisions of the above mentioned art. 154 of the Companies Act.

Moreover, by refraining from including prescriptive requirements, the new CVM and ANBIMA rules rely on the expectation that companies and investors will adopt one of the consolidated private normative frameworks. The strength of the private ordering arena stems from its ensemble regulatory structure, characterized by multiple links and cross-sensitivities between the different frameworks.⁸⁹ This is illustrated in the case of B3's ISE, a private mechanism in itself, in which the choice to rely on a consolidated and broadly diffused methodology (CDP) is seen as a means to promote integration and cost reduction to participant companies.⁹⁰ The alignment of ANBIMA's criteria with IOSCO's recommendation to asset managers offers another example.⁹¹

However, despite clear institutional developments in the field of private environmental regulation,⁹² especially in the climate arena,⁹³ a realistic account of their capacity to trigger radical changes towards sustainability recognizes that “private regulation remains constrained by the precepts of modern capitalism and by the broad institutional framework in which both corporations and

private bodies (e.g., CSR institutions) are situated.”⁹⁴ The reliance on private ordering to the extent described above may thus be inconsistent with the semantics of a broad transformation.

In summary, a critical assessment of the current landscape of sustainable corporate governance in Brazil points to a shortfall, even within the premises of a market-based green finance regulatory model. This shortfall becomes even more worrisome when one considers the current context of environmental regulation in Brazil.

B. Sustainable corporate governance amidst the collapse of Brazilian environmental regulation

In Brazil, the current impetus to implement environmental concerns in corporate and financial regulation is taking place concurrently with a direct attack on the traditional apparatus for environmental protection.⁹⁵ While the BCB and CVM – within their autonomous regulatory space⁹⁶ – move forward the reforms described above, the Bolsonaro government (2019–2022) carries on an explicit campaign to disempower actors and institutions in charge of implementing environmental policy, as well as to amend environmental laws and rules that, according to this policy, put a curb on economic development.

This campaign has seen the duties of the Ministry of Environment slashed⁹⁷; the restructuring and demoralization of the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA); and the harassment and dismissal of government employees who failed to fall in line with the government's goals becoming a regular occurrence.⁹⁸ Brazil has also abandoned its leading role in climate negotiations, with its 2020 Nationally Determined

⁸⁹ Perez, ‘Private environmental governance as ensemble regulation’, 548 (conceptualizing the ensemble regulation as “a collection of autonomous regulatory schemes that form a regulatory network, clustering around a common core of basic principles and exhibiting positive externalities”).

⁹⁰ B3, Diretrizes do índice de sustentabilidade empresarial (ISE B3) (July 2021), p. 14, available at https://iseb3-site.s3.amazonaws.com/Diretrizes_ISE_B3.pdf (referring to CDP as a “nationally and internationally well-established methodology”).

⁹¹ ANBIMA, Guia ESG, p. 4.

⁹² O. Perez, ‘International environmental law as a field of multi-polar governance: the case of private transnational governance’ (2013) 10 Santa Clara Journal of International Law 285–296, 286 (highlighting the move from a highly fragmented and uncoordinated into “a much more ordered domain, dominated by several centers of global governance”).

⁹³ K. W. Abbott, ‘The transnational regime complex for climate change’ (2012) 30 Environment and Planning C: Government and Policy 571–590 (highlighting the growing involvement of nonstate actors in climate governance and arguing for orchestration as a means to harness the benefits of decentralization); Bracking and Leffel, ‘Climate finance governance’ (naming this type of governance as “neoliberal” and advocating for a return to “public authored finance and governance”).

⁹⁴ Karassin and Perez, ‘Shifting between public and private’, 129.

⁹⁵ F. Prol et al., ‘Finanzas verdes y hundimiento de la regulación ambiental al servicio de la extrema derecha en Brasil’ (2020) 59 Ecología Política 57–66 (describing the growth of the Brazilian green bonds market in parallel to the dismantling of the environmental protection institutional apparatus).

⁹⁶ Regarding the autonomy of the Brazilian Central Bank even before the legal provision introduced in 2021, see Schapiro, ‘Variedades da atuação financeira do Estado na crise climática’, 280.

⁹⁷ For example, Law n. 13.844/2019 transferred the Brazilian Forestry Service to the Ministry of Agriculture and the National Water Agency to the Ministry of Regional Development.

⁹⁸ The most notable case was the one involving Ricardo Galvão, former president of the National Institute for Space Research (INPE), who was fired for publishing data on the increased deforestation rates in the Amazon Forest (a fact denied by Bolsonaro). See: D. Brant and P. Watanabe, ‘Brazilian scientist fired over deforestation data spat’, Folha de São Paulo, 2 August 2019, available at <https://www1.folha.uol.com.br/internacional/en/>

Contribution (NDC) being considered a step backwards in the country's reduction goals.⁹⁹

The process intensified during the COVID-19 pandemic,¹⁰⁰ with deforestation rates in the Amazon rainforest hitting a record high for the decade in 2021 and the refusal of Brazil to adhere to the Declaration on the Right to the Environment, a decision promptly condemned by civil society organizations.¹⁰¹ Indigenous and other traditional communities are among those most significantly affected by the new policies.

These developments triggered a fierce response from civil society organizations – including challenging the government's actions in the Supreme Court¹⁰² – but much of damage has been done. Even the forced reformulation of the NDC failed to increase the country's climate ambitions.¹⁰³ A complete list of the attacks on the institutional environmental protection apparatus is beyond the scope and limitations of the present article,¹⁰⁴ but this scenar-

io of dismantled socio-environmental regulation and the concurrent rise of the green finance agenda has engendered what Moreno called a “short-circuit of alliances”¹⁰⁵, in which private governance regimes emerge as a viable solution. The government itself, through different actors and policies, stimulates this path, as the case of the “Adopt a Park Program” illustrates.

The Ministry of Environment launched the “Adopt a Park Program” in February 2021, with the stated aim being “to promote the conservation, the recovery, and the improvement of federal conservation units by private, national, and foreign individuals, and legal entities”¹⁰⁶. The Project was justified on the grounds of a lack of resources for environmental policies and, according to former environment minister Ricardo Salles, it would enable businesses to take responsibility, “in an alliance for the conservation of the units”¹⁰⁷. After one year, the project had received eight proposals from companies interested in promoting themselves as responsible businesses.¹⁰⁸ However, the project has been denounced for advancing the privatization of protected areas, including territories of traditional communities, without specifying their right to participate in the adoption process.¹⁰⁹

[brazil/2019/08/brazilian-scientist-fired-over-deforestation-data-spat.shtml](https://www.brazil/2019/08/brazilian-scientist-fired-over-deforestation-data-spat.shtml).

- ⁹⁹ WWF, ‘New Brazilian NDC reduces the country's climate ambition, against the spirit of the Paris Agreement’, (11 December 2020), available at <https://www.wwf.org.br/?77508/New-Brazilian-NDC-reduces-the-country-s-climate-ambition-against-the-spirit-of-the-Paris-Agreement>. In reaction, six young Brazilians proposed a lawsuit against former Environment Minister Ricardo Salles and External Relations Minister Ernesto Araújo (Ação Popular n. 5008035-37.2021.4.03.6100).
- ¹⁰⁰ M. M. Vale et al. ‘The COVID-19 pandemic as an opportunity to weaken environmental protection in Brazil’ (2021) 255 *Biological Conservation*, <https://doi.org/10.1016/j.biocon.2021.108994> (several legislative acts with the purpose of weakening environmental protection in Brazil were identified, along with a 72% reduction in environmental fines, despite the increase in deforestation rates).
- ¹⁰¹ ‘Brazilian civil society repudiates Brazil's non-adherence to the declaration on the right to the environment at the UN Human Rights Council’, available at https://conectas.org/wp-content/uploads/2021/03/Nota-Final-Ambiente-Port-Engl.pdf?_ga=2.63526887.939641753.1647286392-2022378866.1647286392 (offering a panoramic view of the current state of environmental policy in the country).
- ¹⁰² See the following lawsuits: Claim of Non-Compliance with a Fundamental Precept n. 760; Claim of Non-Compliance with a Fundamental Precept n. 735; Claim of Non-Compliance with a Fundamental Precept n. 651; Direct Action of Unconstitutionality by Omission n. 54; Direct Action of Unconstitutionality by Omission n. 59; and Direct Action of Unconstitutionality n. 6808.
- ¹⁰³ See N. Unterstell and N. Martins, ‘NDC: Analysis of the 2022 update submitted by the Government of Brazil’ *Política por Inteiro*, available at https://www.politicaporinteiro.org/wp-content/uploads/2022/04/Brazils-NDC-2022-analysis_V0.pdf.
- ¹⁰⁴ See Actions of the Bolsonaro government to dismantle environmental policies in Brazil (2020), available at: [\[Meio-Ambiente_Governo-Bolsonaro_Inglês_04-set-2020-1.pdf\]\(#\) \(listing the harmful actions taken against environmental policies implemented by Bolsonaro by 2020\); INESC, *Dando nome aos bois* \(May 2021\), available at \[https://www.inesc.org.br/wp-content/uploads/2021/05/Dando-nome-aos-bois_cor_rigido.pdf\]\(https://www.inesc.org.br/wp-content/uploads/2021/05/Dando-nome-aos-bois_cor_rigido.pdf\).](http://www.ascemanacional.org.br/wp-content/uploads/2020/09/Dossie_</p>
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- ¹⁰⁵ C. Moreno, in C. Moreno et al., *O Brasil na retomada verde: integrar para entregar* (Brasília: Grupo Carta de Belém, December 2021), p. 18–19 (identifying in these combined processes a movement of disassembly and reassembly” that resulted in the emergence of a private governance that serves foreign interests).
- ¹⁰⁶ Federal Decree 10.623/2021, article 1.
- ¹⁰⁷ Reproduced at F. T. Ishisaki, ‘Adote um parque: o que aconteceu em um ano?’, *Política por Inteiro*, available at <https://www.politicaporinteiro.org/wp-content/uploads/2022/04/Um-ano-de-Adote-um-Parque.pdf> (identifying that after one year, only one of the proposals was being implemented).
- ¹⁰⁸ The adopting entity has the right to use in its marketing the slogan “a partner company” of a given conservation unit, or of the related biome in which it is located, together with the official logo of the Ministry of Environment and the Chico Mendes Institute (art. 21, III, Federal Decree 10.623/2021).
- ¹⁰⁹ M. Campos, ‘Programa Adote um Parque: privatização das áreas protegidas e territórios tradicionais’, *Terra de Direitos*, FASE, Grupo Carta de Belém, Setembro 2021, available at <https://www.terradedireitos.org.br/uploads/arquivos/af-adote-um-parque.pdf> (pointing to gaps in the Program that put the territories at risk of being appropriated by the adopting entities).

This double strategy¹¹⁰ implemented by the federal government weakens the traditional apparatus for environmental protection while appealing for the responsibility of businesses. So, despite the formal opposition presented by a body within the Ministry of Economy to the new CVM rules,¹¹¹ there is active engagement by the federal government in promoting the private sector's role in environmental governance, the dissent stemming from the level of regulatory intervention that should follow.

In such a context, the duty to disclose environmental and climate information – unaccompanied by stricter compliance criteria – fosters a rush to present oneself as acting responsibly through corporate measures that, due to the absence of a clear definition of environmentally sound practices, might result in both desired and undesired outcomes. This deepens the risks to the environment and affected communities that are already vulnerable due to the process of destruction, as exemplified by companies buying carbon credits associated with public and communal land, thereby promoting the appropriation of common resources.¹¹²

The same logic can be identified in the emergent Brazilian market for corporate green bonds.¹¹³ While actively promoted by government actors,¹¹⁴ the absence of regulation concerning the third parties assessing the green la-

bels – a gap criticized in the new CVM rules¹¹⁵ – gives rise to situations in which an issuer is directly associated with environmental crimes,¹¹⁶ and the social impacts of the activities financed by such bonds are highly controversial.¹¹⁷

There is, therefore, the urgent need to take context into consideration, as the relationship between sustainable corporate governance tools and traditional environmental regulation demonstrates. This connection and its effects must be accounted for before treating light-touch sustainable corporate governance as a harmless “second-best alternative” scenario. This holistic approach is supported by a critical theory of transformation,¹¹⁸ and the broader theory of institutional change.¹¹⁹

IV. Final Remarks

The institutional innovations concerning sustainable corporate governance analysed in this article represent a step forward in the project of using capital markets and financial regulation as tools to tackle climate change. Broader disclosures on so-called non-financial issues can be used by different constituencies to exert pressure on companies towards more responsible and sustainable behaviour,¹²⁰ and the changes to the corporate structure of financial in-

¹¹⁰ Prol et al., ‘Finanzas verdes’, 59 (stressing that this movement subordinates the protection of the environment to economic demands and depoliticizes environmental policies).

¹¹¹ See the manifestation of Secretaria de Advocacia da Concorrência e Competitividade do Ministério da Economia (Seae/ME) in the official report summarizing the suggestions to the public consultation, available at http://conteudo.cvm.gov.br/audiencias_publicas/ap_sdm/2020/sdm0920.html (opposing the interference in market choices).

¹¹² A. B. Anjos, ‘Empresa vende créditos de carbono sobre terras públicas na Ilha do Marajó’ (2 May 2022) Agência Pública, available at <https://apublica.org/2022/05/empresa-vende-creditos-de-carbono-sobre-terras-publicas-na-ilha-do-marajo/> (among the companies that bought the credits were Santander, Deloitte, Barilla and Air France).

¹¹³ On the topic, see I. Miola et al., ‘Títulos verdes: dívida na encruzilhada entre finanças, direito e ecologia’, in I. Miola et al. (eds.) *Finanças verdes no Brasil: perspectivas multidisciplinares sobre o financiamento da transição verde* (São Paulo: Blucher, 2022), pp. 171–204 (summarizing the main concerns with the growing market for green bonds).

¹¹⁴ See, for instance, ‘Climate Bonds Initiative and Brazil Ministry of Agriculture sign Memorandum of Understanding to foster growth in sustainable Agribusiness financing’ (22 November 2019), available at <https://www.climatebonds.net/resources/press-releases/2019/11/climate-bonds-initiative-and-brazil-ministry-agriculture-sign>. On the relationship between green finance and the Brazilian agribusiness sector, see GRAIN, ‘Agribusiness and big finance’s dirty alliance is anything but “green”’ (15 September 2021), available at <https://>

grain.org/en/article/6720-agribusiness-and-big-finance-s-dirty-alliance-is-anything-but-green.

¹¹⁵ See note 79, above.

¹¹⁶ See the issuance of SLC Agrícola, whose Second Party Opinion can be found at https://isecbrasilsiteblob.blob.core.windows.net/ri-files/EMISSÕES/ISEC/CRA/EMISSAO%2020%20SERIE%2001/RESULTANTE_SLC_Relatório%20Final_CRA%20Verde_24112020_v.2.pdf.

¹¹⁷ T. Ferrando et al., ‘Capitalizing on green debt: a world-ecology analysis of green bonds in the Brazilian forestry sector’ (2021) 27 *Journal of World-Systems Research* 410–438 (conducting a case study on the green bond emissions in the Brazilian forestry sector and pointing to the negative environmental and social impacts of funded activities).

¹¹⁸ Brand, ‘“Transformation” as a new critical orthodoxy’. On the need to assess the “explicit” as well as the “implicit environmental politics”, meaning those that play out “on institutional terrains other than those specifically designed for them”, see U. Brand and M. Wissen, *The limits to capitalist nature: theorizing and overcoming the imperial mode of living*, (London/New York: Rowman & Littlefield, 2018); on the “politics of unsustainability”, see Blühdorn et al., ‘Transformation research and academic responsibility’.

¹¹⁹ K. Pistor, ‘Contesting property rights: towards an integrated theory of institutional and system change’ (2011) 22 *Global Jurist*, article 6 (stressing that “institutional reforms without consideration of the social and political structures in which institutions are embedded rarely produce the desired results”).

¹²⁰ On the relevance of non-investor stakeholders, see A. M. Lip-ton, ‘Not everything is about investors: the case for mandatory

stitutions can ensure the necessary governance apparatus to oversight the purpose of mitigating socio, environmental and climate risks - from a prudential perspective.

However, as we argued, these measures must be assessed in context in order to avoid missing the forest for the trees. Both the political agenda that is shaping the reforms, and the state of extra corporate regulation – the focus here being environmental regulation – must be taken into consideration. Regarding the former, the theoretical premises of the regulatory approach of market-based green finance must be acknowledged and discussed. Although it cannot be reduced to one driver, the reforms adopted receive much support from this particular agenda, which influences the type of instruments being promoted. And even within this paradigm, it is uncertain whether the reforms are capable of triggering the capital reallocation movement envisioned.¹²¹

In terms of the state of extra-corporate regulation, the Brazilian case highlights the challenges of the sustainable

corporate agenda within a context of dismantling environmental protection. In such a scenario, the sustainable corporate governance discourse gained traction and occupied the void left by public environmental regulation. However, as pointed, in the absence of an adequate protection to the socioenvironmental agenda, the rush to “act sustainably” may risk putting even more pressure on both the environment and the affected communities – having unintended consequences of their own.

In sum, the article sheds light into the importance of assessing the interplay between extra-corporate and intra-corporate governance tools in fostering corporate sustainability – a valuable perspective in the coming efforts to rebuild the institutional landscape in Brazil in the next few years. On the one side, there is room to go beyond the narrow market-based green finance agenda in internalizing environmental concerns into corporate law, echoing the far-reaching provisions on management and controlling shareholder duties present in the Brazilian Companies Act. On the other, the limits of corporate law instruments themselves must be acknowledged, as they are no substitute for other tools that have traditionally been part of the socioenvironmental apparatus. Strong extra-corporate environmental provisions can, for instance, contribute to the better accountability of environmental and climate risks by financial institutions. We hope this approach contributes to the adoption of institutional arrangements that are more likely to contribute to a cogent, just, and effective green transition.

stakeholder disclosure’ (2020) 37 *Yale Journal on Regulation* 499–572.

¹²¹ On the insufficiency of disclosure measures alone, see UNEP, *The financial system we need*, p. 36 (identifying that such measures may be useful starting points, “but alone will not deliver the quantum changes required”). The document ponders, however, that measures such as priority lending and strengthened environmental liability, which have a greater potential to drive change, need to be carefully considered due to the risk of “unintended consequences”.