ISTITUTO DI DIRITTO, POLITICA E SVILUPPO

Sant'Anna
Scuola Universitaria Superiore Pisa

FOCUS ENVIRONMENT

DIRPOLIS Working Papers

WP No. 1/2023

STEFANO PORFIDO

REDRESSING ENVIRONMENTAL HARM? A 'CORPORATE SOVEREIGNTY' PROBLEM

The *FE* DIRPOLIS WP series can be found at

www.cir.santannapisa.it/working-papers

REDRESSING ENVIRONMENTAL HARM? A 'CORPORATE SOVEREIGNTY' PROBLEM

Stefano Porfido*

ABSTRACT

The transition towards a low-carbon economy is an epoch-defining goal, as the several Green Deals globally adopted testify. However, this transition develops following traditional patterns of business that are intrinsically environmentally harmful as they still rest upon profit-oriented strategies of commodifying natural resources.

This contribution, that constitutes a PhD thesis' draft chapter, discusses the unsustainability of private corporates' property a-like structures of power over natural resources. To discuss so, this paper uses the anthropological notion of 'corporate sovereignty' over natural resources to shed light on the entangled power relations between the State and the corporations. It highlights that such power finds its legitimisation in the economic-driven 'convergence of interests' between the corporate and the State, consistently with forms of economic governmentality. The liberal understandings of corporate social responsibility (CSR) discourses, based on profit as the defining corporates' end, translate on the social and legal ground such convergence.

The paper concludes by stressing the need for a cultural change to occur to back the transition towards a novel model of sustainable business, or to use other words, of 'business within the Heart's limits'.

KEY WORDS: Corporate environmental harm; sustainability, property; corporate sovereignty; economic governmentality; corporate social responsibility.

* PhD in Law candidate, Sant'Anna School of Advanced Studies, Dirpolis, Stefano.porfido@santannapisa.it. This contribution was written during a research stay at the Graduate Institute of Geneva, Centre for Environmental International Studies (CIES), and published on the repository of the Graduate Institute of Geneva at https://repository.graduateinstitute.ch/record/301467. The usual disclaimers apply.

1 Introduction

Besides the perpetration of illegal activities,[1] corporate routinely-productive processes are intrinsically related to the nasties forms of environmental harm.[2] Cases such as the Bhopal gas leak (India), the Seveso chemical-release (Italy), the Erika tanker sinking (France), the Deepwater Horizon oil spill (United States-Mexico), the Ilva steal-plant air and soil contaminations (Italy), the Mariana mine collapse (Brazil) and the Shell oil ravage of Niger Delta (Niger) are just some of the most egregious examples of disruptive processes of degradation of natural resources rooted in corporate profitable activities, with evident impact also on human beings.[3] In this respect, green criminologists refer to systemic forms of environmental harm as the environmental destruction that is built into the fabric of everyday, ordinary life, through ideological strategies of sterilisation of the public perception of the harm, i.e. of greenwashing, and of its consequent social acceptance as being of little relevance to State's interventions.[4] Therefore, White urges to frame environmental harm within "the overarching context of a distinct global political economy" driving the 'treadmill of production' and resulting cycles of consumption and disposal.[5]

Such corporate-derivative environmental harm poses a problem in terms of business vis-à-vis sustainability, here generically regarded as a future that secures social foundations for humanity

[1] A number of Reports certificate the effects of corporate criminal activities in terms of environmental degradation of natural resources. See in this regard Europol (2022) 'Environmental Crime in the Age of Climate Change - Threat assessment 2022', Publications Office of the European Union, Luxembourg, at https://www.europol.europa.eu/media-press/newsroom/news/what-we-know-about-dirty-business-of-environmental-crime-in-age-of-climate-change (accessed, 11/02/2023); European Environmental Bureau (2020) 'Crime and punishment' Belgium Editor Responsible: Jeremy Wates Brussels, at https://eeb.org/wp-content/uploads/2020/03/Crime-and-punishment-March-2020.pdf (accessed 11/02/2023). On the connection between corporate environmental crime and capitalism, see Angus Nurse, *Cleaning Up Greenwash: Corporate Environmental Crime and the Crisis of Capitalism* (Rowman & Littlefield 2022).

[2] 'Environmental harm' is here used broadly as to encompass a broad range of systemic forms of environmental degradation rooted in the everyday-life systems of production and consumption, both licit and illicit. These includes degradation and despoliation of ecosystems due to several factors such as pollution, thoughtless and excessive use of resources, dumping of toxic materials, damaging atmospheric emissions, etc; injury, death and illnesses caused to human and non-human biota; loss of biodiversity and habitats.

[3] On corporate liability for environmental harm, See Perry-Kessaris, A. (2010) 'Chapter 17: Corporate Liability for Environmental Harm', Research Handbook on International Environmental Law. Cheltenham, UK: Edward Elgar Publishing. Retrieved Feb 11, 2023, 361.

[4] E.g. Rob White, *Crimes Against Nature: Environmental Criminology and Ecological Justice* (Routledge 2013), 148.

[5] Rob White 'Eco-Global Criminology and the Political Economy of Environmental Harm', in N. South & A. Brisman (eds) *Routledge International Handbook of Green Criminology* (Routledge 2012), 243. On environmental harm and the treadmill of production see Paul B Stretesky, Michael A Long and Michael J Lynch, *The Treadmill of Crime: Political Economy and Green Criminology* (Routledge 2013).

now and for the next generations within planet boundaries.[6] Integrating sustainability in corporate governance models is not just a desirable, 'ethical' and reputational-convenient option. As Beate Sjåfjell emphasises, this is the sole option for business to thrive in the future.[7] Regardless of whether business cares about sustainability or not, "(un)sustainability will sooner or later, in one way of another, affect most businesses".[8] The challenge for business to cope with its destructive natural effects is thus an existential one.[9] Unsurprisingly so, the global political agenda, and particularly the one of the European Union's Commission,[10] is focused on triggering legal reforms in the corporate governance sector as to meet our epoch-making convergence of social, environmental and financial crises.[11]

With these considerations as backdrop, this work intends to look into the conditions preventing the 'redress' of forms of corporate environmental harm, hereby understood in broad and systemic terms. 'Redress', as understood in this work, does not equate to 'remedial' options, of whatsoever nature, including legal regimes of corporate liabilities, pecuniary compensatory injunctions, victims' restitution orders and cleaning up/land decontamination schemes. Rather, this work refers to a below-the-surface and systemic, one could say 'institutionalised', response. 'Redress' primary significance is to 'set upright again', with 'restore, amend, remedy' as secondary meaning.[12]

---

[6] Melissa Leach, Kate Raworth and Johan Rockström, 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity' (2013), ISSC and UNESCO (2013), World Social Science Report 2013, Changing Global Environments, OECD Publishing and UNESCO Publishing, Paris, 84, at https://unesdoc.unesco.org/ark:/48223/pf0000246073 (accessed, 11/02/2023).

[7] Sjåfjell, Beate and Johnston, Andrew and Anker-Sørensen, Linn and Millon, David K., 'Shareholder Primacy: The Main Barrier to Sustainable Companies' (2015). Company Law and Sustainability: Legal Barriers and Opportunities, Beate Sjåfjell and Benjamin J. Richardson (eds), Cambridge University Press, 2015, University of Oslo Faculty of Law Research Paper No. 2015-37, 79 at https://ssrn.com/abstract=2664544 (accessed, 11/02/2023)

[8] Sjåfjell, Beate, 'Reforming EU Company Law to Secure the Future of European Business' (2021). University of Oslo Faculty of Law Research Paper No. 2021-05, Preprint of article in European Company and Financial Law Review, 2/2021., Nordic & European Company Law Working Paper No. 21-13 191, 202, at https://ssrn.com/abstract=3797685 (accessed, 11/02/2023).

[9] See joint statement of 76 academic signatories, 'Corporate Governance for Sustainability Statement', posted by Andrew Johnston, *The Harvard Law School Forum on Corporate Governance*, 7 January 2020, at https://corpgov.law.harvard.edu/2020/01/07/corporate-governance-for-sustainability-statement/

[10] On the legal initiatives in the governance sector flourished following the adoption of the EU Commission, *The European Green Deal*, Brussels, 11.12.2019, COM(2019) 640 final, and their capability to provoke a shift in the way of doing business, see later on in this contribution's section IV.

[11] See Guilherme Pratti. 'Bad Moon Rising: the Green Deals in the Globalization Era' (2021) 1 Rivista Quadrimestrale di Diritto Dell'ambiente 196, at https://www.rqda.eu/en/guilherme-pratti-s-m-bad-moon-rising-the-green-deals-in-the-globalization-era/ (accessed 11/02/2023) who frames global 'Green Deals' and specifically the EU Green Deal within the philosophical categories of *techniques* and *technologies* to the end of assessing the role of Law in the substitution of the current technologies for the ones that are still to come facing the global ecological crisis.

[12] According to 'The Concise Oxford Dictionary of English Etymology', ed by T. F. Hoad (1996 Oxford University Press: Oxford, New York), 394.

Now, to ‘set upright again’ is not simply ‘putting a wrong right’. It unveils a more intricate and back-ward connotation. Its original etymology, that traces back to the 14th century, comes from the old French word ‘redrecier’, ‘redresier’, that is to "reform, restore, rebuild" (modern French redresser).[13] ‘Redrecier’ is made of the conjunction of two words/meanings, from re- i.e. ‘again’[14] plus ‘drecier’, i.e. ‘to straighten, arrange’.[15]

Therefore, ‘redress’ in this work means ‘returning to something right’. When referred to systemic forms of environmental harm, specifically to those inherently intertwined with business cycles of production and consumption, redress poses a systemic challenge, more complex than making deteriorated natural matrices right again, that is returning to a state of ‘environmental integrity’.[16] It rather poses a back-ward dilemma, i.e. whether it is possible to return to a previous model of business, alternative to the current neoliberal-oriented ones,[17] that was environmentally ‘straight’, ‘right’, in other words sustainable-consistent. And the answer to such a question is, evidently, a negative one. Historically indeed, and at least in Western societies, there has never been a conventional model of doing business characterised by the integration of the preservation of the environmental dimension within its institutionalised goals.

This is, however, not the end of the journey, but rather its actual beginning. For a new model of doing business to be conceived, it is of the utmost importance to understand the number of social, economic, and political, and lastly legal, factors that have determined the historical development of such a one-string model of doing business, at least with regards to its harmful consequences on nature, and which make discourses on ‘redress’ ill-grounded. Therefore, by adopting a descriptive lens, this contribution delves into the entangled power relations between the State and the corporations and their legitimising conditions with the aim of highlighting the structural features of business. The anthropological notion of ‘corporate sovereignty’, as later discussed, provides a lens to this end. The aim is to contribute to the studies on (strong) sustainable models of business by providing a more aware picture of the structural challenges at stake for these models to be achieved.

This work covers a fraction of a broader research that I am currently carrying out on restorative justice for corporate environmental crimes, with the aim of imposing on corporate

[13] See the etymological analysis of redress provided by the Online Etymology Dictionary, at redress | Etymology, origin and meaning of redress by etymonline (accessed, 11/02/2023).
[14] Ibid., from old French *re-* and directly from Latin *re-* an inseparable prefix meaning "again; back; anew, against."
[15] Ibid, from Latin *directus* "direct, straight," past participle of *dirigere* "set straight".
[16] On the notion of ‘environmental integrity’, and its Western roots, see William (Bill) Adams and Martin Mulligan, *Decolonizing Nature: Strategies for Conservation in a Post-Colonial Era* (Routledge 2012).
[17] See James McCarthy and Scott Prudham, ‘Neoliberal Nature and the Nature of Neoliberalism’ (2004) 35 Geoforum 275.

wrongdoer positive duties of care towards the entangled harmed human and natural dimensions. The following discussion is divided as follows. Section I briefly describes the underlying problem, i.e. the (un)sustainable nature of property law. Section II delves into the mechanisms of power justifying corporations' property rights over natural resources, and their condition of legitimacy. These mechanisms are embedded into the notion of 'corporate sovereignty'. Section III draws from the historical analysis carried out by Joshua Barkan on the evolution of corporation as a private property entity in the United States' legal system during the 19th century. This aims at framing corporate sovereignty within a broader social and cultural discourse on economic governmentality. Section IV emphasises how the previous considerations translate into the legal ground, in the form of the corporate shareholders' primacy. It also points out that the Corporate Social Responsibility (CSR) reflects such primacy. It finally provides a glimpse into some European Union's recent legal novelties in the CSR field emerged following the EU Green Deal. This gives room for further research directions on whether such legal novelties could contribute to a shift of paradigm towards a sustainable model of doing business, at least at the EU level. This work's conclusions provide a cursory reference to some distinguished voices supporting the needed cultural change, for the evolution of property law to occur. This being the basic condition to enable business sustainable transformation.

SECTION I

OUTLINE OF THE BACKGROUND PROBLEM

2 The Sustainable Development principle. From sustainability law to Sustainable law.

> 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[18]

The phrasing 'sustainable development' (SD)[19] enshrines an oxymoronic combination of two conflicting notions, namely sustainability and development. Whilst the former notion refers to

[18] Brundtland Report 'Our Common Future' U.N. World Commission on Environment and Development (WCED), 1987:43.

[19] Probably coined by Barbara Ward, founder of the International Institute for Environment and Development. See David Satterthwaite, 'Barbara Ward and the Origins of Sustainable Development' (*International Institute for Environment and Development*) <https://www.iied.org/11500iied> accessed 9 March 2023.

the ecological idea of conservation of natural resources, the latter points towards their exploitation for economic purposes.[20] Nevertheless, in spite of (or maybe because of) this oxymoronic nature, SD met popular recognition, particularly thanks to the works of Lester R. Brown Building a sustainable society (1981), Normal Meyer's Gaia: an atlas of planet management (1984) and the International Union for the Conservation of Nature's World Conservation Strategy (1980).

The World Commission on Environmental and Development (WCED), also known as the Brundtland Commission, adopted SD in its final report Our common future, in 1987. Since then, and despite critical views,[21] SD has achieved a world-wide consensus and firmly entered in both the juridical and extra-juridical discourse.[22]

The Brundtland's definition is based on two basic notions, that of 'intragenerational equity' (between rich and poor) and 'intergenerational equity' (between present and future generations).[23] Furthermore, it breaks down the notion of 'sustainable development' into three fundamental components, namely the environment, the economy and society (what later became the famous triple bottom line). Whilst acknowledging the tension between economic growth and environmental protection, the Brundtland's definition embeds the need to pursue the harmonisation and integration of these different areas. In a nutshell, a single policy area, rather than three distinct and conflicting ones.

Notwithstanding differences in declining it, SD commonly embodies the reassuring message that in order to be sustainable, development has to improve economic efficiency, protect, and restore ecological systems and enhance the well-being of all peoples, in the present as well as in the future. In pursuing so, SD expands the idea of distributive justice in space and time. There is no just world without equity (among people and among generations), i.e. "without fair distribution of existing resources among people living today and not future regard for the needs of people living

[20] For an historical analysis of the notion of sustainable development, see Jacobus A Du Pisani, 'Sustainable Development – Historical Roots of the Concept' (2006) 3 Environmental Sciences 83.

[21] See Louis J Kotzé and Sam Adelman, 'Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope' [2022] Law and Critique <https://doi.org/10.1007/s10978-022-09323-4> accessed 10 March 2023; David Mollica and Tom Campbell, 'Don Worster (1993), 'The Shaky Ground of Sustainable Development', in Don Worster (ed.) *The Wealth of Nature* (New York: Oxford University Press 1993) 142. These critiques, differences notwithstanding, all point towards the fact that the Brundtland definition does not challenge the economic growth imperative.

[22] Scholarship on this principle is massive. For a review of SD in international law see Jorge E Viñuales 'Sustainable Development in International Law' (2018) L. Rajamani, J. Peel (eds.) *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2nd edn. 2019). In the Italian scholarship, see Carlo Focarelli, 'La sostenibilità nel diritto internazionale: spunti dalla prassi più recente' (2022) 3 Rivista di Diritti Comparati, 339.

[23] Dinah Shelton, Alexandre Kiss, *International Environmental Law: 3rd Edition* (Brill Nijhoff 2021) 112, 216.

tomorrow".[24] As such, its ethical-moral underpinning is often linked with the 'responsibility principle' as elaborated by Hans Jonas.[25]

2.1 Two competing ways of conceiving SD: between weak and strong sustainability

SD has been interpreted in various ways. However, one can distinguish between two main declinations of it, namely a 'weak' and a 'strong' one.[26] Recalling Bosselmann's metaphorical phrasing, the 'weak' understanding could be understood in terms of "interlocking circles", whereas the area of sustainable development is where social, economic, and ecological interests overlap. The underlying idea here is that of the compromise which allows for trade-off in one sector for the improvement in another. The 'strong' notion, instead, is associated with the image of a "nested egg", whereas ecology is conceived as the overarching system, society part of it and the economy as part of both systems.[27] Hence, it presents a different idea, namely a within which one. Precisely, economic and social development can unfold outside the idea of compromise, but necessarily within ecological limits.

In the background, there are two competing and radically different ways of conceiving the 'environment'. The 'weak' notion reflects a (traditionally Western) anthropocentric perspective, that maintains the environment to be 'the other' i.e. the physical surroundings of humans, a system on its own. Whilst the 'strong', a non-anthropocentric one according to which the environment is 'everything', i.e. the biosphere as a whole including the human sphere.[28] It follows that the strong model embraces a broader understanding of distributive justice, or, if one prefers, of 'ecological justice', that includes non-human biota in the scope of concern. Interspecies equity stands alongside

[24] In this sense, and for the quotation, see Klaus Bosselmann, 'Strong and Weak Sustainable Development: Making Differences in the Design of Law' (2006) 13 South African Journal of Environmental Law and Policy 39.
[25] Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (University of Chicago Press 1985). A in-depth analysis on this broad theme goes beyond the scope of this work. In this sense, see Focarelli, 'La sostenibilità nel diritto internazionale, cit., 346 *ff*; Vyacheslav Mantatov and Larisa Mantatova, 'Philosophical Underpinnings of Environmental Ethics: Theory of Responsibility by Hans Jonas' (2015) 214 Procedia - Social and Behavioral Sciences 1055; Martin Maier, 'Ethics and sustainability' Jesuit European Social Centre, at https://jesc.eu/ethics-and-sustainability/ (last access 26/02/2023).
[26] Bosselmann, 'Strong and Weak Sustainable Development', cit., passim; Eric Neumayer, *Weak Versus Strong Sustainability: Exploring the Limits of Two Opposing Paradigms* (Edward Elgar 2013).
[27] For the quotations and the relative models, see Klaus Bosselmann, 'Sustainable Development Law', *Routledge Handbook of International Environmental Law* (2nd edn, Routledge 2020) 81, 91.
[28] Bosselmann, 'Strong and Weak Sustainable Development', cit., 43.

intergenerational and intragenerational founding components of SD and marks the main feature of strong sustainability.[29]

For the purposes of this work, an aspect should be emphasised. Differently from the 'weak' model, strong sustainability challenges the whole economic paradigm, determining its external boundaries. In other words, the weak understanding seeks to shape economic growth by dictating the goal of internalising and minimising environmental externalities (environmental harm) on the base of a trade-off between entangled, yet autonomous systems. On the other hand, strong sustainability challenges economic growth by setting an upper limit, that of the Earth's ecological carrying capacity. It is not about 'either economic well-being' or 'environmental protection'. Both are possible and concomitant, whether the ecological limits of Earth are respected by all.[30] As such, one could dare saying that strong sustainability translates a very simple and intuitive concept, namely that 'you cannot do more than what you can afford to do'. For instance, you cannot push your body beyond its physical limits, you cannot spend more than what you gain, and clearly you cannot consume more natural resources than those provided by the planet.

2.2 From sustainability law to Sustainable law?

When these 'strong' and 'weak' notions translate in the legal realm, two different strands of law could be distinguished. On one side, the law implementing the 'weak' notion of SD. This is, as of now, the one prevailing, as it has been embedded in most of the current legal instruments at the international level.[31] This is the case, for instance, of the UN Rio Declaration on Environment and

[29] Ibid. See also Brenda Almond, 'Rights and Justice in the Environment Debate', *Just Environments* (Routledge 1995). For conceptual linkages between justice and sustainability, see Klaus Bosselmann, 'Ecological Justice and Law, in Benjamin J Richardson and Stepan Wood, *Environmental Law for Sustainability: A Reader* (Bloomsbury Academic 2006) 129; Id *The Principle of Sustainability* (2nd edn, Routledge 2016), specifically at 27 *ff*.

[30] Prue Taylor and David Grinlinton (eds), 'Chapter 1. Property Rights and Sustainability: Toward A New Vision of Property' (Brill | Nijhoff 2011) 1, 12-13; Neumayer, *Weak Versus Strong Sustainability*, cit.

[31] For an overview, see Bugge, Hans Christian (2008). 1987-2007: "Our common future" revisited. In Bugge, Hans Christian & Voigt, Christina (Ed.), *Sustainable development in international and national law.* Europa Law Publishing.

Development's principle 3 and 4,[32] of several International Court of Justice's pronouncements[33] and, more recently, the UN 'Transforming our world: the 2030 Agenda for Sustainable Development' and its Sustainable Development Goals and Targets (SDGs).[34] In light of its widespread recognition, Philippe Sand deems that SD is a recognised principle of international law.[35]

These legal instruments could be labelled as 'sustainability law', in the sense that it is a law that adopts, promotes, and enforces the idea of 'balance', of 'compromise' between entangled, yet different systems embedded within the weak notion of sustainability. As such, it does not challenge the status quo and the idea of infinite linear growth. Arguable lines of incoherence and contradictions among this law's objectives are symptomatic of such narrow notion of SD.[36]

Then, one could think of a different model of law, that could be referred to as 'Sustainable law', concerned with the strong notion of sustainability, whereas the capital 'S' aims at emphasising precisely such connection. Sustainability law is, accordingly, that law that recognises and addresses the needs and interests of human beings by imposing a limit on social, cultural and economic activities. These limits are the Earth's physical ones. As such, 'Sustainable law' is a law that challenges the 'business as usual', the linear conception of economic growth and that makes the structural changes in the relevant legal dogmatic categories for ingraining such limits in them.

---

[32] A/CONF.151/26 (Vol. I). Principle 3 states that "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". Principle 4 states that "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". For an analysis on the Rio Declaration see The Rio Declaration on Environment and Development: A Commentary Edited by Jorge E. Viñuales (Oxford University Press) <https://opil.ouplaw.com/display/10.1093/law/9780199686773.001.0001/law-9780199686773> accessed 26 February 2023.

[33] For instance, ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226, §29; "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."; ICJ, GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7, §140 : "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades"; ICJ, Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, §§75-76 "The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States"; "In the Gabc˘ikovo-Nagymaros case, the Court, after recalling that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".

[34] Resolution adopted by the General Assembly on 25 September 2015 [(A/70/L.1)].

[35] Philippe Sands, *Principles of International Environmental Law* (2nd edn, Cambridge University Press 2003), 254.

[36] See for instance, Jason Hickel, 'The Contradiction of the Sustainable Development Goals: Growth versus Ecology on a Finite Planet' (2019) 27 Sustainable Development 873 highlighting a contradiction between SDGs 6, 12-15 on environmental sustainability and the no. 8 concerning economic growth.

This model of law, as of now, does not exist. One could find this law, for instance, in the words of Joseph Guth when he states that "Our law must enforce a limit to the scale of environmental damage that we are collectively permitted to inflict upon the Hearth. This would represent a transformation in the law's understanding of the public welfare, and a dramatic evolution in the structure of property law".[37] Yet, in positive law terms, and beside perhaps the New Zealand's 'Resource Management Act' (RMA) of 1991,[38] one could hardly find a model of law that meets a strong idea of sustainability. In short, Sustainable law is (mainly) a prescriptive model of law, not a descriptive one. It says how law ought to be, not how law is.

Traditional Western notions of property law are inconsistent with Sustainable law. Particularly, this is the case when referring to corporate's power over natural resources and, more broadly, to the very corporate structure. Challenging the current form of corporate business, thus, requires challenging these notions. More details are provided below.

[37] Joseph H Guth, 'Law for the Ecological Age' (2008) 9 Vermont Journal of Environmental Law 431, 511.

[38] This act constitutes an environmental and planning legislation that was the first in the world to internalise the concept of sustainability as a defined and enforceable core obligation within a comprehensive integrated resource management structure. Section 5(2) therein states that "sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment."
Despite its tendency towards an idea of ecological upper limit, case-law has interpreted it by adopting the 'balancing' logic (i.e. weak SD). In this sense, see Klaus Bosselmann, 'Property Rights and Sustainability: Can They Be Reconciled', in David Grinlinton and Prue Taylor (eds), Property Rights and Sustainability, cit. 23, 39-42.
On the New Zealand RMA, see DE Fisher "The Resource Management Legislation of 1991: a Juridical Analysis of Its Objectives" in Resource Management (Brooker and Friend Ltd, Wellington, 1991) Vol. 1A, at 1–30, 13; Gordon Smith, 'The resource management act 1991 "a biophysical bottom line" vs "a more liberal regime": a dichotomy?' a https://www8.austlii.edu.au/nz/journals/OtaLawRw/1993/3.pdf

3 Corporate property rights over natural resources: a problem of strong sustainability.

Under international law, the State has sovereignty over natural resources.[39] This means that, besides the problem of conceiving people as the real owners of natural resources,[40] from a legal point of view the natural resources located in a State's territory belong to the State. The State could, and indeed does, legitimately transfer its 'ownership' over natural resources,[41] to private entities, such as corporations.[42] Focusing on this latter cluster of subjects, i.e. the corporations, such transfer could be via private law mechanisms, such as private-international-law techniques and contracts.[43] When this occurs, the corporation is legitimately entitled to enjoy rights to property, i.e. property rights, over natural resources (water, soil, timber, air, etc), and more broadly, over nature.[44]

[39] As stated by the U.N. General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources", at https://digitallibrary.un.org/record/57681?ln=en. Relevant is also Island of Palmas Case (or Miangas), United States v Netherlands, Arbitral Award, (1928) II RIAA 829. In this case, the arbitrator, Max Huber, observed that "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State." See also the ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Judgment of 9 April 1949, ICJ Reports 1949, 4, p. 22 (on territorial sovereignty and the State's duties of diligence over these territories) "It is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".
See Ian Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects) (Volume 162)', *Collected Courses of the Hague Academy of International Law* (Brill 1979) 245-318, at <https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789028605305_02> accessed 4 March 2023.

[40] On this, see Jorge E Viñuales, 'The Resource Curse - A Legal Perspective' *Global Governance*, (2011) 17/ 2, The Governance of Extractive Resources 197.

[41] Here 'ownership' is generically meant as a component of sovereignty. In this sense, Viñuales, 'The Resource Curse' last. cit. 198. However, see Federica Violi, 'The Practice of Land Grabbing and Its Compatibility with the Exercise of Territorial Sovereignty' in F Romanin Jacur (ed), *Natural Resources Grabbing: an International Law Perspective* (Brill/Martinus Nijhoff 2016) 15, particularly 27 for a critique on '*territoire – object*' theory that conceives the State's power over territories in terms of ownership. She points out that such theory dates back to a patrimonial conception of the State which is typical of absolute monarchies and based on a relation of altered power.

[42] On the connection between property, State's sovereignty and climate change see Neil Walker, 'Sovereignty, Property and Climate Change' (2022) 19 *Edinburgh School of Law Research Paper.*

[43] See Federica Violi, 'Contracting in Land and Natural Resources: A Tale of Exclusion' (2021) 17 International Journal of Law in Context 145. For a call for refining international law tools to protect local land rights in the face of commercial concessions, see Lorenzo Cotula, 'Land, Property and Sovereignty in International Law' (*International Institute for Environment and Development*) <https://www.iied.org/g04309> accessed 4 March 2023.

[44] Eric T Freyfogle, 'Taking Property Seriously' in David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability*, cit., 44 emphasises that there is a significant difference between private rights in nature and in other things, such as patents, arts, real estate, mobile devices etc. The difference is that people do not create nature, this being relatively finite, and essential for human welfare.

Property is a social institution that exists as a product of law and State power.[45] As such, it could be translated into many different legal forms, since there is neither a core content that is recognised at all times and in all places, nor a core moral justification to its existence. Therefore, the way in which property is organised in a given legal order reflects normative conceptions of the world or in most cases, sedimented layers of such conceptions.[46] In Western culture, civil law conceptions of property based on Roman top-down "sum of attributes"[47] interplay and overlap with bottom-up common law conceptions of property as "bundle of rights", i.e. as a variety of rights, prerogatives and duties. Besides Western culture, indigenous societies have developed remarkably sophisticated property arrangements, demonstrating polyhedric conceptualisations of property that go beyond, for instance, the allodial-fee simple dichotomy developed in the Anglo-Saxon tradition.[48]

Providing a full account of meanings and conceptions of property would fall beyond the scope of this work.[49] For its purposes, I refer to private property as a system of power that consists of a complex of jural relationships between the owner and other individuals in reference to 'things'.[50] In the context of natural resources and lands, 'others' include the regulatory State, other landowners (individual neighbours and the larger community of landowners), the landless (wider public and future generations) and nature (other species and life forms).[51] In this sense, private property's

[45] Ibidem, 47. In this respect, Freyfogle quotes Richard Schlatter, *Private Property: The History of an Idea* (Allen & Unwin 1951), 245-50.
[46] Jorge E Viñuales, *The Organisation of the Anthropocene: In Our Hands?* (Brill 2018), 23.
[47] That is the sum of three pre-defined conceptual attributes, namely usus, fructus and abusus. See Y. Emerich, 'Regard civiliste sur le droit des biens de la common law: pour une conception transsystemique de la propriete' (2008) 38 *Revue générale de droit* 339, at 346–349.
[48] Freyfogle, 'Taking Property Seriously', cit., 46. For conceptions of communal property of some indigenous peoples, see Viñuales, *The Organisation of the Anthropocene,* cit., 22-23, also for relevant case-law in this respect. See for instance See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, ICtHR Series C No. 79, Judgment (31 August 2001), specifically §149.
For a survey in this matter, see The United Nation Permanent forum on Indigenous Issues – 'Indigenous peoples' collective rights to lands, territories and resources' at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Peoples-Collective-Rights-to-Lands-Territories-Resources.pdf.
For insights into indigenous conceptions of property in the Amazon region, see Jason Bremner and Flora Lu, 'Common Property among Indigenous Peoples of the Ecuadorian Amazon' (2006) 4 Conservation and Society 499.
[49] See John Edward Cribbet, 'Concepts in Transition: The Search for a New Definition of Property' (1986) 1986 University of Illinois Law Review 1.
[50] Kevin J Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press 2009), 95, describe property is power relationship.
[51] Prue Taylor and David Grinlinton 'Property Rights and Sustainability: Towards a New Vision of Property', David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability*, cit. 10.

essence is always the right to exclude others.[52] Particularly, the exclusive rights of possession, use, and disposition, over natural resources.[53]

3.1 Assessing unsustainability through the disentanglements of property law from nature.

The current Western idea of common good is grounded on a traditional idea of property which is functional to economic linear growth and does not know ecological limits. In other words, the classical conceptions of property as developed in both civil and common law traditions do not consider potential harm to nature and its related relational realm, for present as well as for future generations.[54] As pointed out by Prue Taylor and David Grinlinton, a fundamental aspect of traditional property law is that it contains no inherent or internal means of restricting cumulative damage to a level that is ecologically sustainable.[55] Similarly, Ugo Mattei and Andrea Pradi highlighted that "both historically, and to this day, there is little awareness of an inherent duty to avoid environmental degradation as a qualification on property ownership".[56]

As Timothy O'Riordan points out, from the industrial revolution to present, property law has become one of the main engines enabling an unrestrained economic growth pursued through the free use and enjoyment of natural resources. As such, property has contributed to shape a Western idea of common good entangled with said idea of growth and exploitation of nature.[57] In O'Riordan's words, "Throughout the industrial revolution and well into the [20th century], western nations were intent on creating wealth and exploiting environmental resources, whether they be clean air or water, undisturbed scenery, forests, or minerals. A belief in utilitarianism was matched by a love of private property, for private property conferred not only social status, but certain safeguards against environmental abuse. So, during the past hundred years, jurists and legislators have tended to favour use over preservation, private property rights over common property rights, and the generation of wealth and productivity over amenity, largely because society as a whole wanted it that way".[58]

---

[52] Morris Cohen, 'Property and Sovereignty' (1927) 13 Cornell Law Review 8, 12.
[53] Neil Walker, 'Sovereignty, Property and Climate Change', cit. 8.
[54] Viñuales, *The Organisation of the Anthropocene*, cit., 24.
[55] Prue Taylor and David Grinlinton 'Property Rights and Sustainability: Towards a New Vision of Property', David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability*, cit., passim.
[56] Ugo Mattei and Andrea Pradi, 'Doctrinal Issues in Property' (2007) Davide Scott Clark (ed) *Encyclopedia of Law & Society: American and Global Perspectives* (Thousand Oaks, CA, Sage Publications) 1198-1208, 1201. See also Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers 2015).
[57] See Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.
[58] Timothy O'Riordan, *Environmentalism* (Pion 1976), 265.

The novel theorisations of property elaborated by Samuel Pufendorf (1632 -1694) and, above all, by John Locke (1632 -1704), played a role in this sense. Coherently with the Enlightenment's shift towards greater individualism and a more instrumental view of nature as 'natural resources', they contributed to the establishment of a notion of property declined as a 'legal entitlement' and detached from any collective morality (what Bosselmann calls 'the non-enlightened dark part).[59]

Pufendorf and Locke could hardly conceive natural exploitation as currently understood in terms of 'harm'. They cannot be blamed for all the sustainability-related crises contemporary societies face. However, (also) through their theorisations, 'property' has paved the way for creating legal incentives to ecological harm. Walter Lippman, writing in 1955, envisioned said connection stating that "Absolute private property inevitably proceeds intolerable evils. Absolute owners did grave damage to their neighbours and to their descendants: they ruined the fertility of the land, they exploited destructively the minerals under the surface, they burned and cut forests, they destroyed the wildlife, they polluted streams, they cornered supplies and formed monopolies, they held land and resources out of use, they exploited the feeble bargaining power of wage earners".[60]

Property law is thus essentially un-sustainable (in sustainability's strong sense). In this respect, Viñuales claims that the conceptualisation of property law as impermeable to duties towards nature or to future generations represents the paradigmatic, yet not unique, example of the broader limit of law in ingraining nature into its legal categories.[61] These considerations constitute the backdrop to discuss the relation between corporation's power over nature and the State.

SECTION II

CORPORATE SOVEREIGNTY

4 Corporate power over natural resources: between property and sovereignty

In light of the foregoing, one can point out that corporations are entitled to establish an exclusive (and potentially environmentally harmful) propriety alike relation of power over natural resources because of State's transfer of its sovereignty over them. This suggests that the

[59] Klaus Bosselmann, 'Property Rights and Sustainability: Can They Be Reconciled?' David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability*, cit. 31.
[60] Walter Lippmann, *The Public Philosophy* (Transaction Publishers 1989), 109.
[61] Viñuales, *The Organisation of the Anthropocene*, cit., 24.

underpinnings of 'business as usual', that is of corporate's environmentally destructive profit-oriented activities, do not fall primarily within corporate law, but rather in these power dynamics between States and corporates. In other words, why does the State transfer its power to corporates, although this could turn, and indeed turns, into environmental destructive practises? These questions bring into play some reflections on the relation between State's sovereignty and property.

This relation is a complex one, object of a proliferation of studies.[62]

Eyal Benvenisti puts emphasis on the tension between these two notions. He takes the stance that "the State is not more than the aggregate of individuals who define theirs and others' property rights through the State's political process". He thus claims that the underlying tension between property and sovereignty reflects the tension existing between economic markets and the political markets: "owners and others compete simultaneously at both levels to define, protect, or improve the value of property".[63]

Neil Walker embraces a quite different approach when describing the deep relation existing between sovereignty, property, and environmental harm. Differently from Benvenisti, he rather emphasises that sovereignty and property are connected by what he labels as "elective affinity",[64] to capture a deep intertwinement of (certain) conceptions of property and sovereignty that has favoured the kind of political economy[65] ultimately generative of harmful climate change. Particularly, according to the development paradigm, States have facilitated a process of commodification of natural resources through the privatisation of the earth itself and placed such process under the control of private profit-driven corporations. [66]

Although providing different perspectives, these studies point towards the intertwined relation between State's sovereignty and the corporates' sovereign rights, here meant as an extension

[62] See e.g. Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1886-1981* (Oxford University Press 2020); Caroline Humphrey, 'Sovereignty', (2007) Nugent D, Vincent J (eds) *A Companion to the Anthropology of Politics* (John Wiley & Sons, Ltd 2007) 418; Peter Muchlinski, 'Sovereignty and Private Corporate Power: The Case of Multinational Enterprises' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013). See infra for further bibliography.

[63] These quotations are from Eyal Benvenisti, 'Sovereignty and the Politics of Property' (2017) 18 Theoretical Inquiries in Law 448, 448-449.

[64] Neil Walker, 'Sovereignty, Property and Climate Change', cit. 8. He refers to Max Weber's connection between Protestantism and the rise of capitalism.

[65] Here meant as economic governmentalities. On this topic, see later section III.

[66] In stating so, Walker 'Sovereignty, Property and Climate Change', cit. 19, quotes Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001).

of private rights or "rights to pollute",[67] over nature. How this relation unfolds poses a variety of issues.

Several studies frame the relation between traditional State sovereignty and the rising corporate power within the profound neoliberal transformation of the State and decline it in adversarial terms[68]. In this fashion, for instance, emphasis is put onto the rising of transnational corporations as paradigmatic examples of capitalist projects of corporates dominance whose rising power, together with lack of accountability, goes hand in hand with processes of fragmentation, erosion and disassembling of State authority.[69]

Scholars have highlighted the connection between said processes of fragmentation and corporates' (environmental) disruptive practises, such as extraction activities and land grabbing. For instance, Saulesh Yessenova refers to 'extractive enclaves' to indicate the failure of the State to tackle and prevent the lawlessness aspects of international oil contracts.[70] Federica Violi conducted extensive research on large-scale land-related investments in natural resources, particularly on practises of land grabbing, and their compatibility with the exercise of territorial sovereignty. The author claims that such contracts generate a series of interrelated consequences, namely: they enable a significant transfer of control over extensive areas of the host State's territory to private entities; they shield the investment operation from the territorial authority of host countries; and they result into the creation of 'legal enclaves'.[71] The term 'enclave' is used by Violi, similarly to Yessenova, to refer to an entanglement of multiple and overlapping different spatial, temporal and normative levels that are subtracted from the host State's control and left to the discretion of private investors.[72]

[67] To use Viñuales's words in *The Organisation of the Anthropocene*, cit., 24.
[68] As referred to by David Harvey, *The New Imperialism* (OUP Oxford 2005).
[69] See, for instance, Rita Abrahamsen and Michael C Williams, *Security Beyond the State: Private Security in International Politics* (Cambridge University Press 2011); James Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (Duke University Press 2006); Milan Babic, Jan Fichtner and Eelke M Heemskerk, 'States versus Corporations: Rethinking the Power of Business in International Politics' (2017) 52 The International Spectator 20; Aihwa Ong, 'Graduated Sovereignty in South-East Asia' (2000) 17 Theory, Culture & Society 55. On a more general ground, and beyond the role of corporates themselves, the changing structure and the functioning of the world community recognize in one way or another that fragmentation and segmentation is accompanied by the inevitable interaction among the legal orders operating in the world community: for all, see Eyal Benvenisti, The Law of Global Governance (The Hague: Hague Academy of International Law, 2014).
[70] Saulesh Yessenova, 'The Tengiz Oil Enclave: Labor, Business, and The State' (2012) 35 PoLAR: Political and Legal Anthropology Review 94.
[71] Federica Violi, 'Contracting in Land and Natural Resources: A Tale of Exclusion' (2021) 17 International Journal of Law in Context 145, 146.
[72] Ibid. See also Alessandra Arcuri and Federica Violi, 'Reconfiguring Territoriality in International Economic Law' in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law* (TMC Asser Press 2017).

As a consequence, said enclaves disintegrate the local social and legal regimes to facilitate the trade of commodified natural resources at the transnational level via global supply chains.[73] The adversarial relation between said enclaves of legalities and State's sovereignty is stark. Indeed, these spaces exist and operate transnationally, yet they are completely disarticulated nationally[74] to the point of creating a "structural hole in the tissue of sovereign territory".[75]

Other scholars have emphasized that corporates have a long history of governing over territories, populations and resources, often throughout colonial alike rules.[76] Experiences in this sense have been documented, for instance, in Nigeria,[77] Angola,[78] Mozambique,[79] and in South Africa.[80] Such corporate's governing power is also related to the phenomenon of corporate towns, such as the Dutch city of Eindhoven, which growth is linked to the foundation of Philips Electronics in the late 19th century,[81] and those developed in the Copperbelt mineral region in Zambia.[82] In other cases, the relation State-corporation evolved in the sense of strengthening, rather than undermining State's authority. Nigeria, for instance, represents a model of authoritarian 'Development State', which ruling party grounds its political legitimisation on the achievement of purely economic goals.[83] Nigeria has thus chartered transnational corporations to carry out development projects functionally to these goals. Similarly, in Mozambique the government has

[73] As noted by Lorenzo Cotula, '(Dis)Integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties' (2020) 23 Journal of International Economic Law 431.
[74] See Federica Violi, 'The Practice of Land Grabbing and Its Compatibility with the Exercise of Territorial Sovereignty' cit.
[75] Saskia Sassen, 'Land Grabs Today: Feeding the Disassembling of National Territory' (2013) 10 Globalizations 25, 28.
[76] See for instance, Lustig, *Veiled Power: International Law and the Private Corporation',* cit.; Philip J Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford University Press 2012).
[77] On the colonial roots of oil exploration in Nigeria, see Phia Steyn, 'Oil Exploration in Colonial Nigeria, c. 1903–58' (2009) 37 The Journal of Imperial and Commonwealth History 249.
[78] Cristina Udelsmann Rodrigues and Deborah Fahy Bryceson, 'Precarity in Angolan Diamond Mining Towns, 1920–2014: Tracing Agency of the State, Mining Companies and Urban Households' (2018) 56 The Journal of Modern African Studies 113.
[79] Eric Allina, *Slavery by Any Other Name: African Life under Company Rule in Colonial Mozambique* (University of Virginia Press 2012).
[80] Jade Davenport, *Digging Deep: A History of Mining in South Africa* (Jonathan Ball Publishers 2013).
[81] JL Schippers, 'Eindhoven Voor Altijd Lichtstad' (Eindhoven, città della luce per sempre) (2012) 192 SP-167 EP-180 Gronico.
[82] James Ferguson, *Expectations of Modernity: Myths and Meanings of Urban Life on the Zambian Copperbelt* (1999).
[83] See Gebresenbet Fana, 'Securitization of development in Ethiopia: the discourse and politics of developmentalism' (2015) 4:1, Review of African Political Economy, 64. Regarding the development model pursued by Ethiopia, see also Christopher Clapham, 'The Ethiopian developmental state' (2018) 39:6, Third World Quarterly, 1151. In these cases, it would perhaps more appropriate referring to a corporate-ruling elites' relation.

prompted massive foreign development investments enabling energy and extractive mega-projects and the allocation of large concession areas to transnational companies, such as the Brazilian 'Vale'.[84]

This brief overview reveals that the entangled relations between corporate private power and the State's sovereignty unfold in a number of multifaceted declinations. It would be reductive to refer to such relations in merely adversarial terms, despite this aspect being an evident and challenging one for modern States. Building on such complexity, anthropologists Tessa Diphoorn and Nikkie Wiegink concluded that "corporate power can thus simultaneously strengthen and weaken the legitimate authority of the State".[85] Such complexity is reflected in the anthropological notion of 'corporate sovereignty', as illustrated in the following paragraphs.

5 Corporate sovereignty from an anthropological perspective: a definition.

'Corporate sovereignty' is a notion coined in anthropological studies by Bruce Kapferer to describe the nature of transnational corporates' power spread across areas and populations as autonomous from the one of the State.[86] Whilst recognising that corporates share certain similarities with the State, what Trouillot calls state-effects,[87] Kapferer draws from Agamben's notion of sovereignty as a power reflecting "an externality which assert itself unconstrained against another externality"[88] to elucidate a notion of "wild" sovereignty that deviates from State's sovereign power. He notes that "State continues to be territorially based (…) and confronted with the problematic of popular legitimacy".[89] Corporates, on the other side, have the character of war machines,[90] that is

[84] Joshua Kirshner and Marcus Power, 'Mining and Extractive Urbanism: Post development in a Mozambican Boomtown' (2015) 61 Geoforum 67.
[85] Tessa Diphoorn and Nikkie Wiegink, 'Corporate Sovereignty: Negotiating Permissive Power for Profit in Southern Africa' (2022) 22 Anthropological Theory 422.
[86] Bruce Kapferer, 'Introduction: Old Permutations, New Formations? War, State, and Global Transgression' (2004) 48 Social Analysis: The International Journal of Social and Cultural Practice 64.
[87] Michel-Rolph Trouillot, 'The Anthropology of the State in the Age of Globalization: Close Encounters of the Deceptive Kind' (2001) 42 Current Anthropology 125.
[88] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998).
[89] Kapferer, 'Introduction: Old Permutations, New Formations?', cit., at 69 claims that said legitimacy is problematic to be achieved in dominant metropolitan regions. It is thus resolved "at the ideological level: for example, in a fetishism of democracy and individual rights coupled with an intensification of technologies of control and surveillance – indeed ultimately an anti-democratic move".
[90] Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press 1987).

they are rhizomic, lack such legitimacy and are structured in a number of nodal points, operating almost autonomously and following interwoven intersections and spread "as to yield a politics and structure of responsibility that is often more opaque than it is transparent".[91]

Kapferer thus intends the notion of corporate sovereignty as unfettered corporate power. Suzana Sawyer also declines the notion of corporate sovereignty as power. She investigates it within the analysis of a lawsuit brought in Ecuador by "subaltern-subjects" against ChevronTexaco, the second-largest oil company in the United States, a case that, in her words, "offers a heuristic for examining regimes of power embroiled in a struggle to define the shape and content of corporate sovereignty and embeddedness, impunity and accountability".[92] Differently from Kapferer, Sawyer depicts the relation between corporate and State in more complex terms, highlighting that "legal and ethical regimes bring entities into being and establish their worth by endowing them with specific rights and obligations".[93] Joshua Barkan offers an even more elaborated and comprehensive understanding of the interplay between corporate and State sovereignty. Barkan places corporate power squarely within structures of state-led order making, emphasising that State political sovereignty and corporate private sovereignty are actually bound together through a "principle of legally sanctioned immunity from law".[94]

In this work, by 'corporate sovereignty' I refer to the work of Tessa Diphoorn and Nikkie Wiegink. These authors define 'corporate sovereignty' as:

> "A performative claim to power undertaken by (individuals aligned to) corporate entities with profit-making objectives within a state-sanctioned permissive space".[95]

This definition conceives corporate sovereignty as a profit-based exercise of power that receives legitimisation by the legal purview of the State and of which the State somehow benefits. It reflects the outcome of the authors' ethnographic fieldwork analysis concerning transnational

[91] Kapferer, 'Introduction: Old Permutations, New Formations?', cit., 69.
[92] Suzana Sawyer, 'Disabling Corporate Sovereignty in a Transnational Lawsuit' (2006) 29 Political and Legal Anthropology Review 23, 24.
[93] Ibid. She argues that the present corporate form derivates its juridical and philosophical basis from the so-called "natural entity theory," aiming at defining corporates as "natural" person endowed with particular constitutional rights. The case study she uses offers the opportunity to study how this theory is used to veil corporate's responsibility. In her words, "As the lawsuit against ChevronTexaco illustrates, the vision of the corporation as a natural person or entity that once legitimized the fabulous explosion of capitalist activity resonates strongly with both the company's arguments for plausible deniability and the plaintiffs' arguments for calling transnational corporate activity into question".
[94] Joshua Barkan, *Corporate Sovereignty: Law and Government Under Capitalism* (University of Minnesota Press 2013), 4. I will later in this contribution return on Barkan's work when discussing the evolution of corporate's structure.
[95]Diphoorn, Wiegink, 'Corporate Sovereignty, cit., 2.

corporations' interactions with local communities in Mozambique and South Africa, through which they zoomed into the everyday dynamics of corporate exercise of power. In doing so, they shed light on the continuous negotiations among various actors that shape the nature, scope and scale of corporate power, in order to distinguish it from other claims of power.

By adopting this definition, this research frames the transfer of sovereignty rights over natural resources from the State to individual private entities, i.e. the corporations, within complex processes of everyday negotiations beyond a mere adversarial perspective. That is, beyond power as violence.[96] Said definition revolves around two main parameters, namely the "performative claim to power" and the "state-sanctioned permissive space". Linked with this latter parameter, a third one, i.e. the "profit-making objectives", also plays a crucial role in understanding 'corporate sovereignty' as later discussed. Each of these criteria are discussed one-by-one after a brief insight into Diphoorn and Wiegink's anthropological work.

5.1 Between 'communities of dependency' and 'communities of security'. Corporate negotiations in Mozambique and South Africa

Nikkie Wiegink operated in Mozambique's region of Tete, specifically in two villages, Cateme and Mualadzi, built between 2009 and 2014 by two coal mining multinational companies, the Brazilian 'Vale' as for Cateme, also known as 'Vale's village' and the Australian 'Rio Tinto' as for Mualadzi.[97] These villages were built following displacement policies were undertaken to make space for coal mines and they currently house over 10,000 inhabitants.

Wiegink highlights the concomitance of two different and concurring modalities of company's power exercise. Alongside more traditional uses of force in exercising control over territory and population in the surrounding of the mine,[98] companies mainly relied on soft forms of

[96] Beyond does not mean 'without'. Violence is present. Yet, the overall evaluation frames violence in a more complex picture.

[97] Nikkie Wiegink, 'Imagining Booms and Busts: Conflicting Temporalities and the Extraction - "Development" Nexus in Mozambique' (2018) 5 The Extractive Industries and Society 245; Id 'Learning Lessons and Curbing Criticism: Legitimizing Involuntary Resettlement and Extractive Projects in Mozambique' (2020) 81 Political Geography 102192.

[98] E.g. by fencing-off areas and patrolling via private security personnel operating in co-optation with State's security forces. These latter have been reported having dispersed protests against coal mining companies by using excessive force and randomly arresting people. See Human Rights Watch 'What is a House Without Food? Mozambique's Coal Mining Boom and Resettlements (2013) New York: Human Rights Watch at https://www.hrw.org/report/2013/05/23/what-house-without-food/mozambiques-coal-mining-boom-and-resettlements

power over the local populations. Soft forms of power are mean to establish and maintain so-called 'social license to operate'.[99]

This occurs in two ways. To begin with, by establishing and maintaining ongoing channels for dialogue between corporate staff and members of the local community. 'Good neighbourhood' practices and above all 'social risk' related reasons demand so. As a Vale's officer declared to Wiegink, "I have to know these people [living close to the mine] and somehow be part of their daily life. They could protest one day, and if I do not have these relationships, I would not know who to approach".[100]

Secondly, and above all, by creating a situation of community dependency on the corporate. Both Vale and Rio Tinto proactively engaged with local communities providing them, at least temporarily, with services and infrastructure that are typically associated with the State, these including water, electricity, housing and schools, health facilities, roads, markets, etc. In addition, companies shared 'know-how' focused on adjusting agricultural practices to semi-arid soils, often more arid than those left behind due to resettlements. In doing so, mining companies create 'communities of dependency' for them to exercise some kind of control.[101]

Noteworthy are the state-companies mechanisms enabling such forms of control over territories and people. Mining projects are regulated by concessions given by government, in this case the Mozambican one. Luning and Pijpers refer to it as 'subterranean sovereignty', to indicate the negotiations between mining companies and authority to gain access to lands and sub-soil.[102] In this case, the Mozambican government negotiated through its domestic elite, the Frelimo Party that dominates the country's political and economic life.[103] Negotiation processes are not transparent, and the author foreshadows the possibility of obscure negotiations and corruption.[104]

In any event, said negotiations result into a legal frame defining the (broad) perimeters of corporate's powers. In addition to corporate actors, stakeholders taking part to these negotiations include international donors and international institutions, such as the World Bank.[105]

---

[99] Diphoorn and Wiegink, 'Corporate Sovereignty, cit., 9.
[100] Ibid, 9 'Conversation 7 June 2017'.
[101] Ibid, 10.
[102] Sabine Luning and Robert J Pijpers, 'Governing Access to Gold in Ghana: In-Depth Geopolitics on Mining Concessions' (2017) 87 Africa 758, 760 (subterranean in the double sense of 'shady negotiation' and concerning under-soil exploitation).
[103] Madeleine Fairbairn, 'Indirect Dispossession: Domestic Power Imbalances and Foreign Access to Land in Mozambique' (2013) 44 Development and Change 335, 343.
[104] Diphoorn and Wiegink, 'Corporate Sovereignty, cit., 11.
[105] Wiegink, 'Learning Lessons and Curbing Criticism', cit.

Obligations, on the side of the corporation, are, in short, to be in compliance with traditional corporate social responsibility (CSR)[106] tools and undertakings. Particular emphasis is on transparency and audit regimes to demonstrate efficiency in the governing of extractive resources.[107]

In return, benefits, often related to demonstrated capability to higher extraction rates, include benevolent fiscal regimes and, above all, 'being accountable-immune' in case of failure in fulfilling their undertakings towards local communities. For instance, Rio Tinto faced no consequences when it unexpectedly stopped its operations in the area under its control, leaving behind the local communities depending on it without further means. The residents of Mualadzi felt abandoned and during interviews with Wiegink they expressed their concerns about "when will they take care of us".[108] This demonstrating that nature of corporate engagement towards communities is merely ephemeral and based on the corporate's situational needs.

In synthesis, corporate's negotiations at both the local and governmental level, should be framed within complex strategies to secure production, infrastructure and reputation, functional to build the social perception of a 'good company' taking care of the population and being profitable for the state (or the governing elite). Both hard power and above all soft powers, including the relevance given to CSR narratives of compliance, are functional to these threefold ends.[109]

Diphoorn's work in South-Africa related to the private security agency sector reached similar conclusions, despite context-based differences.[110] Context is precisely that of a State that has massively outsourced law enforcement operations, above all in urban contexts, to private security sector. This sector was valued at nearly 2% of the country's total GDP in 2011, thereby constituting one of the largest private security sectors in the world.[111] The process of outsourcing state's functions to private actors slowly started during the 1970s when private security sector slowly shifted from operating only for industrial sites to (also) urban realities. The adoption of new national laws,

[106] On CSR, see later on in this work.
[107] See Schubert, 'Wilful Entanglements: Extractive Industries and the Co-Production of Sovereignty in Mozambique', cit., 552-553.
[108] By 'they', the residents referred to both the company and the local government agencies. See Diphoorn and Wiegink, 'Corporate Sovereignty, cit., 10.
[109] When malpractices and abuses come to surface (see for instance Human Rights Watch 'What is a House Without Food?, cit.), corporations are attentive in responding showing their social commitment and compliance with the law. See Diphoorn and Wiegink, 'Corporate Sovereignty, cit., 11.
[110] See Tessa G Diphoorn, *Twilight Policing: Private Security and Violence in Urban South Africa* (Univ of California Press 2015); Id, 'The 'Bravo Mike Syndrome': Private Security Culture and Racial Profiling in South Africa' (2015) 27 Policing and Society 525.
[111] Rita Abrahamsen and Michael C Williams, *Security Beyond the State: Private Security in International Politics* (Cambridge University Press 2010).

from the 1980s, underpinned this shift, formally authorising private companies to exercise functions and tasks that had previously fallen under the remit of the public enforcement agencies.[112]

This legal framework demonstrates a state-private company relationship that starkly distinguishes such private actors from vigilantes and gangs in South-Africa, despite their common reliance on violence. Said relation emerges in the form of 'an alliance' between public officials and private employees, concretised in formal and informal cooperation and in active shared social networks. Public officials often allowed, tolerated, and even encouraged private agents carrying out formally deemed illegal activities, the so called 'dirty work'.[113]

State and private sector companies are mutually benefitting. The former actor outsources security activities to private entities that it could not otherwise carry out on its own due to personnel and economic shortage. The latter actors receive formal recognition to operate within the boundaries of law (the State sanctioned permissive space), and to use State a-like powers. In short, companies pursue private profit all the while strengthening State's sovereignty.

Consistently with the aforementioned double level of negotiation, i.e. local and governmental, private security actors also invest in creating bounds with local communities. Following specific marketing strategies, private security companies offer their 'security' services to communities, often for free.

In the words of one of these companies' marketing manager, interviewed by Diphoorn, "as a company you need to differentiate yourself through your service, (…)" so we invest in communities and "we provide free security training, provide free monitoring to schools, all of that. It costs us a hell of a lot of money, but it pays off (…) people think: they really care for the community and I want to be their client".[114]

Therefore, and despite these companies being more prone to exercising power as violence compared to the two coal mining companies operating in Mozambique discussed earlier, at the local level they also employ a great deal of soft power. As in the Mozambique case, private security companies in South-Africa are also attentive to build good relations locally, by participating in community activities, and assisting citizens who are not formally paying clients. In short, they create "communities of security". This is done not only to enlarge the plethora of potential clients, but also to demonstrate their positive social role in alleviating the State from fulfilling its typical law

[112] See for instance, the National Key Points Act 102 of 1980, the Security Officers Act of 1987, and above all the Private Security Industry Regulation Act No. 56 of 2001. See Diphoorn and Wiegink, 'Corporate Sovereignty, cit., 14.
[113] Diphoorn and Wiegink, 'Corporate Sovereignty, cit., 14-15.

[114] Ibid, 15.

enforcement duties, and thus to justify their enormous power. At the same time, the State too gains advantages, in terms of indirect revenues (taxation, GDP) and in terms of strengthening its sovereignty over territory.

The aforementioned definition of 'corporate sovereignty' here adopted reflects such complex interplays.

5.2 Corporate sovereignty as power

By referring to the "performative claim to power" tenet, Diphoorn and Wiegink acknowledge that corporate sovereignty is first of all a form of power. In doing so, they frame their understanding in line with Kapferer and, more broadly, with the anthropological studies developed during the 2000s.[115] Said studies aimed at reconceptualising the notion of sovereignty as to enshrine non-state actors' use of violence in the making of new social orders. Accordingly, they propose a de facto notion of sovereignty, based on the ability to kill and punish, as opposed to the traditional de jure sovereignty founded in rules and legality. The elaboration of a de facto sovereignty allows to frame in conceptual terms the competition between State and non-state actors in pursuing their own self-affirmation as sources of powers, claimed through public performances and reciprocal assertions and infringements of other power claims. It follows, as properly highlighted by Diphoorn and Wiegink, that said de facto sovereignty is not directly linked to the control of a territory, but it rather unfolds as control over the body.[116] Violence could be the foundational feature of such power enabling those exercising it a form of control over persons' "conditions of existence"[117] and the "authority to decide on inclusion and exclusion from communities". In short, said notion of sovereignty "entails the capacity to determine who will live and how".[118]

However, Diphoorn and Wiegink's understanding of corporate sovereignty is a more nuanced one. They recognise violence as a constitutive element of it, consistently with the aforementioned studies. But, at the same time and in contrast with Kapferer's conceptualisation, they decline such powers also as the exercise of "soft forms of power linked to agendas of human

[115] E.g., Caroline Nordstrom (2000) Shadows and sovereigns. Theory Culture and Society 17(4): 35–54. Donald S Moore, *Suffering for Territory: Race, Place, and Power in Zimbabwe* (Duke University Press 2005); Diane E Davis 'Irregular Armed Forces, Shifting Patterns of Commitment, and Fragmented Sovereignty in the Developing World' (2010) 39 Theory and Society 397–413. See Diphoorn, Wiegink, 'Corporate Sovereignty, cit., 4 for further references.

[116] Diphoorn, Wiegink, 'Corporate Sovereignty, cit., 4. Their reference is to Agamben, *Homo Sacer: Sovereign Power and Bare Life*, cit.

[117] Jean Comaroff and John Comaroff, *Law and Disorder in the Postcolony* (University of Chicago Press 2006), 35.

[118] Diphoorn, Wiegink, 'Corporate Sovereignty', cit., 5.

progress".[119] Dichotomies based upon both punitive and security aspects, exploitation practises and development-oriented efforts, emerge from their on-field analyses as forging a power that is ultimately a complex one and that enables corporate entities to generate communities of dependency and of security, both through traditional practises of de jure territorial control and implementation of de facto security strategies.

Therefore, according to Diphoorn and Wiegink, corporate private power, i.e. sovereign power, could not be understood as detached by State power. Following Barkan, and at the same time claiming to go beyond him, the authors affirm the legally ambiguous nature of corporate power, for it simultaneously occurs as part of and separated from State's authority. And said dynamic course of interactions is the outcome of continuous negotiations through formal and informal means.[120] This process of negotiation occurs in what they call the "state-sanctioned permissive space". This second criterion is thus crucial to differentiate corporate's claim to power from those of other entities, as well as to grasp the inherent complexity underpinning state-corporate relations. The following paragraph dwells into this criterion.

5.3 Qualifying power: the 'permissive space' of corporations

The "state-sanctioned permissive space" draws on the notion of 'permissive space' as introduced by the social anthropologist Sarah-Jane Cooper-Knock who equates the notion of 'permissive space' to 'spaces of impunity' wherein violence becomes permissive through unremitting negotiations with numerous actors.[121]

However, for Diphoorn and Wiegink, what characterises their understanding of 'corporate sovereignty' is not the presence of such a space per se, since "all claims to sovereignty occur in some type of permissive space".[122] It is rather that such a space is sanctioned by the State. It is the State, in other words, that defines the scope of corporate sovereignty, i.e. its power, or, if one prefers so, the corporate's property rights. And, according to the authors, it is still the State that recognises and grants special privileges to the corporate, which power is thus shaped by the State. It is what Barkan calls "the sovereign gift".[123]

---

[119] Ibid.
[120] According to the authors, Barkan, presents a more static understanding of said process.
[121] Sarah-Jane Cooper-Knock, 'Beyond Agamben: Sovereignty, Policing and "Permissive Space" in South Africa, and Beyond' (2018) 22 Theoretical Criminology 22, 36. The authors does so by departing from Agamben's studies on sovereignty.
[122] Diphoorn, Wiegink, 'Corporate Sovereignty', cit., 5.
[123] Barkan, *Corporate Sovereignty*, cit., 19.

This is key in Diphoorn and Wiegink's understanding of sovereignty, and it marks a difference with other notions of it, such as Kapferer's 'wild sovereignty', but also with the idea of 'unrestrained space of impunity' by Cooper-Knock. In Diphoorn and Wiegink's perspective, corporate sovereignty, and its underlying sum of processes of negotiations among multiple actors, occurs under the aegis of the State, which is the determining subject of such negotiations. For them, 'corporate sovereignty' refers to a power highly visible and central to the State, far from being the violent power taking place "in the peripheries of powerful state orders".[124] States, in their reconstruction of 'corporate sovereignty', are not mere 'passive subjects', or 'victims' of an overwhelming corporate power.

More precisely, and without denying the immense power that corporate entities could enjoy and deploy for the attainment of their profit-based objectives, they "debunk the perception that corporate power is inherently unrestricted, unaccountable and unbounded by law".[125] Rather, they emphasise that "States themselves remain powerful entities",[126] or, in their words, they are the "final arbiter" in determining, both in legal and illegal ways,[127] the contours of the permissive space, through formal framework and procedures, such as contracts, lawsuits, concessions and regulations that stipulate how corporate entities can operate.[128]

This clearly emerges, for instance, from the Wiegink's studies in Mozambique. There, extractive companies, such as the multinational Brazilian corporate 'Vale', operate on State approval for the exploration of concessions, subordinated to public and private legal conditions and standards, such as the Environmental Impact Assessment, international foreign direct investment standards, and the National Mining and Land Law.[129] In light of the close collaboration between corporate actors and State's ones in determining the content of such body of regulations, the exercise of corporate property rights could be hardly considered as occurring in a space "monitored neither by international

[124] Kapferer, 'Introduction: Old Permutations, New Formations?', cit., 69.
[125] Diphoorn, Wiegink, 'Corporate Sovereignty', cit., 6. In the same sense, commenting on the Volkswagen 's scandal Carl Rhodes, 'Democratic Business Ethics: Volkswagen's Emissions Scandal and the Disruption of Corporate Sovereignty' (2016) 37 Organization Studies 1501, 1504.
[126] Yarimar Bonilla, 'Unsettling Sovereignty' (2017) 32 Cultural Anthropology 330, 331.
[127] When illegally, from a green criminological perspective one could refer to such 'cooperation' in terms of corporate-state environmental crime. See Angus Nurse, *Cleaning Up Greenwash: Corporate Environmental Crime and the Crisis of Capitalism*, cit.
[128] Diphoorn, Wiegink, 'Corporate Sovereignty', cit., 6 also for quotations.
[129] For a general overview on mining law in Mozambique, see VdA-Ângela Viana and João Afonso Fialho, 'Overview and Outlook: Mining Law in Mozambique' (*Lexology*, 10 November 2020) <https://www.lexology.com/library/detail.aspx?g=aad90e26-a25a-4eb4-bbdb-6aa179eb3b91> accessed 10 March 2023; Couto, Graça e Associados, 'Mozambique's new Mining Law and the Key changes it introduces' at https://www.cga.co.mz/wp-content/uploads/2015/03/CGA-Mozambiques-new-Mining-Law.pdf accessed 10 March 2023;

law nor by the legal norms of any particular State".[130] Rather, as significantly stated by Jon Schubert, it would be more appropriate to speak about a process of co-production of articulated sovereignty.[131]

This notion of 'corporate sovereignty' here discussed stresses that the transfer of power over natural resources from the State to private entities, through the attribution of property rights, is not the outcome of a prevarication of one power over the other. It rather results as the outcome of a negotiation. In highlighting so, it also emphases that said negotiation benefits the State itself which profits from corporate activities.[132] In other words, the State shapes the permissive space in a way functional to the enhancement of the State itself through the configurations of other sovereignties. This aspect opens up space to discuss the justificatory ground for this transfer to occur, that is the corporate's "profit-making objectives".

5.4 Justifying 'corporate sovereignty': the profit-making (unsustainable) objectives.

'Corporate sovereignty' thus indicates a private power that does not stem from violence, but rather from negotiation processes with the State. Such negotiations' justification lies in the corporate's capabilities to achieve "profit-making objectives". The "profit-making objectives" criterion is not a qualifying one per se. Many non-corporate actors are concerned with profit-oriented opportunities, including criminal organisations,[133] shadow networks,[134] fighters in context of civil wars,[135] etc.

However, when discussed for corporate actors, it is the foundational element of both the corporates' claim to power and their permissive space. As Diphoorn and Wiegink emphasize,

---

[130] As instead argued by Sawyer, 'Disabling Corporate Sovereignty in a Transnational Lawsuit' cit., 38.

[131] Jon Schubert, 'Wilful Entanglements: Extractive Industries and the Co-Production of Sovereignty in Mozambique' (2020) 21/4 Ethnography 537.

[132] This could also be in illicit ways. See Lars Buur and Jason Sumich, '"No Smoke Without Fire": Citizenship and Securing Economic Enclaves in Mozambique' (2019) 50(6) Development and Change 1579.

[133] See for instance the U.N. Office for Disarmament Affairs on the illegal arm trade at https://www.un.org/disarmament/convarms/att/. On this, see also Europol activities at https://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/illicit-firearms-trafficking.

[134] See for instance the Europol's Report on the international networks of illicit finance, 'Shadow Money - the International Networks of Illicit Finance' (*Europol*) <https://www.europol.europa.eu/publications-events/publications/shadow-money-international-networks-of-illicit-finance> accessed 15 March 2023, on the international networks of illicit finance.

[135] It is the case, for instance, of art crimes. In the Syrian context, see Christine A Weirich, 'Antiquities in a Time of Conflict: A Crime Script Analysis of Antiquities Trafficking during the Syrian Civil War and Implications for Conflict Antiquities' (2021) 10 Crime Science 13. More generally, on art crimes in war context, see Erik Nemeth, 'The Artifacts of Wartime Art Crime: Evidence for a Model of the Evolving Clout of Cultural Property in Foreign Affairs'.

economic wealth plays a crucial role for the exercise sovereignty and this "situate the profit-making objective here as centralized legitimising feature of corporate sovereignty" (emph. added).[136]

The connection between 'economic wealth' and private 'profit making objectives' is declined, in the authors' theorisation, in terms of a 'convergence of (economic) interests', namely those of the corporate in the pursuit of private profits, and those of the State in achieving capitalist projections of growth, development, and productivity. In other words, the State authorises the corporate's activity insofar as such activity meets the economic interests of the conceding State itself.

The authors claim that in many parts of the world it is possible to identify such a symbiotic entanglement of interests, where States and corporate actors mutually benefit from corporate efforts and this is, they argue, "largely due to this profit-making dimension that shapes the legally grounded permissive space of corporate sovereignty".[137] This convergence is evident, they claim, "in our empirical cases: (…) in South-Africa, the enormous private security industry is crucial to the country's gross domestic product". Also in Mozambique, their ethnographic work revealed that the government linked economic development with further extractive activities (carried out by private corporates).

As such, what Barkan calls a "gift' is nothing but the outcome of such convergence of private-public economic interests on the ground of which the State grants sovereign-alike powers to the corporate over natural resources. It follows that the corporation is in constant need of demonstrating its capability to achieve profit-making objectives under said 'convergence of interests' which legitimises the 'state-sanctioned' permissive space. This need could thus be labelled in terms of an 'existential need of justification'.

In this sense, the notion of corporate sovereignty does not fit within limited and static understandings of rule of law as merely equated with strong legal and judicial State institutions serving a traditional notion of property and contract protection.[138] Rather, as Violi claims, the State plays a pivotal role in granting investors the "power to make the law, dictating legal norms that overrule domestic law and rewrite public choice and can demand compliance thereof through a strong system of enforcement".[139] In short, she argues, "we can observe a reconfiguration of the role of the

[136] Diphoorn, Wiegink, 'Corporate Sovereignty', cit., 6.
[137] Ibid.
[138] See Martin Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12 Annual Review of Law and Social Science 199.
[139] Federica Violi, 'The Function of the Triad "Territory", "Jurisdiction", and "Control" in Due Diligence Obligations' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) 75, 91. She argues so in the frame of a normative reflection on whether multinational enterprises' control over the territory in force of investment State contracts could be conceptualised as triggering due diligence obligations.

State as facilitator of (extensive) private power".[140] One can argue that such notion of private property, as discussed in the introductory chapter, is unsustainable insofar as functionally structured for capitalist accumulation outside natural and social concerns.

In a nutshell, the notion of 'corporate sovereignty' ultimately reveals the proactive role of the State in protecting and promoting a traditional understanding of property. And that the justification for transferring sovereign-alike powers to corporates, in the form of property rights, is grounded on the corporate's capability to fulfil its 'existential need of justification' by making profit. Corporate sovereignty, as here understood, is thus unsustainable (under the strong declination of sustainability) since it does not pay any concern to environmental limits. It rather promotes a linear understanding of growth. The next section explores the social and cultural reasons underpinning such justificatory ground.

SECTION III

THE ELEPHANT IN THE ROOM: ECONOMIC GOVERNMENTALITY

6 The cultural background: economic models of governmentality

As discussed in greater details later on in this section, the economic declination of the aforementioned 'convergence of interests', that justifies the notion of 'corporate sovereignty' over natural resources, reflects a profound cultural and social move from the idea of corporation as being a public instrument for organising the productive relations of society to being a private one. The themes underpinning such idea are those concerning the interplay between discourses on governmentality, political economy and corporations and they pertain to the rise of economic liberalism, also named 'the government by economy' or 'the economic government' in Western societies.[141]

Notably, the relation between economy and governmentality has been investigated by Michel Foucault.[142] For the author, a central tenet in the rising importance of economic discourse

[140] Violi, 'Contracting in Land and Natural Resources', cit., 148.
[141] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78* (London: Palgrave MacMillan, 2007) 95.
[142] In *Security, Territory, Population*, cit. and in *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79* [*Naissance de la biopolitique: cours au Collège de France, 1978–1979* (Paris: Gallimard/Seuil, 2004)]. See also Mitchell Dean, *The signature of power: Sovereignty, governmentality and biopolitics* (Sage Publications 2013).

in governmentality must be attributed to the security mechanisms, i.e. to those policies put in place to counter scarcity.[143] In Foucault's work, political economy is the intellectual instrument through which security mechanisms are put in place. In a similar interpretation, sociologist Mitchell Dean emphasised that the connection between 'economy' and governmentality revolves around scarcity that is a natural mechanism capable to shape social orders around the market. In his words, economy constitutes a mode of power to tackle scarcity being it concerned with "the incessant struggle to bring more lands into cultivation, and to increase the productivity if its labour, so that it can defeat the natural and irreducible ontological scarcity it faces due to the laws of population (…) the discovery of the ontological reality of scarcity means that the administration of life must take into account the means of production of the subsistence of that life".[144]

Building on these premises, according to Foucault economy becomes the archetype of the security apparatus and consequently the lens through which the organisation and distribution of powers in post-Enlightened Western society[145] is shaped or, to use other words, the intellectual instrument of the transformation of governmental reason.[146] More precisely, Foucault claims that political economy rooted in (economic) liberalism became the science of managing populations, thereby requiring an expansion of governmentality to all aspects that are linked to economic processes.[147] In a nutshell, throughout the observation of the eighteenth-century laissez-faire liberalism and its related political economic forms, namely the German ordo liberalism of the 1930-50s and the post war American neoliberalism,[148] Foucault argues that economics becomes

[143] In *Security, Territory, Population*, cit. 60 Foucault refers to the work of the liberal economist Lous-Paul Abeille, who explains in his *Lettre d'un négociant sur la nature du commerce des grains* (1763) that scarcity is a natural mechanism and thus it is by working within the reality that scarcity can be limited or even eliminated.

[144] Dean Mitchell, *Governmentality: Power and Rule in Modern Society* (Sage Publications 2010), 115.

[145] *The Birth of Biopolitics*, cit., 268-272.

[146] Grenier, J. & Orléan, A. (2007). Michel Foucault, l'économie politique et le libéralisme. *Annales. Histoire, Sciences Sociales*, 62, 1155-1182 as https://www.cairn.info/revue--2007-5-page-1155.htm.

[147] The notion of population is central in Foucault's reconstruction. He links population to the notion of economic subject, i.e. *homo economicus* who is characterised by the absolute liberty to pursue his/her own interests in *The Birth of Biopolitics*, cit, 276 ff. Foucault asserts that economy is a naturalism, i.e. it belongs to nature, since individuals' autonomous behaviours are themselves part of nature. Behaviours are, for him, everything that relates to nature or natural phenomena, so that *"the population is therefore everything that extends from biological rootedness through the species up to the surface that gives one a hold provided by the public" (Security, Territory, Population,* cit., 38, 105). Hence, according to Foucault political economy, and liberalism more broadly, is a naturalism, making it a model for an expanded governmentality. The corollary of this approach is that the political government conversely restraints by inner limits, namely the liberty of the economic subjects and consequent respect for private property. In *The Birth of Biopolitics*, cit., 29 Foucault very clearly associates political economy with less (political) government.

[148] Grenier & Orléan, Michel Foucault, l'économie politique et le libéralisme, cit., §32 argue that ordo liberalism and neoliberalism "in a certain sense reprise the concept of population but in a more radical way,

governmentality par excellence,[149] so to define governmental intervention as the power to establish the conditions under which a market economy and competition can function.[150]

Besides Foucault's conclusions,[151] there is little debate regarding the fact that in modern Western liberal societies the economy constitutes the form and method of governmentality and the condition of political legitimacy for governments. In this sense, economist Kate Raworth also claims that the Economy has lost sight of its goals, namely contributing to public welfare and supplying abundant income or subsistence to people, to solely serve the imperative of economic expansion.[152]

Among several strands of studies that investigated the implications of economic forms of governmentality for corporations,[153] in 1997 Ellis W. Hawley offered an innovative perspective on these themes by going beyond both traditional US liberal and conservative narratives grounded on a

---

assigning to the public powers the task of making sure society is in a suitable condition to guarantee its autonomy, and ensuring that they no longer have to intervene (or hardly ever so)".

[149] As noted by Grenier & Orléan, Michel Foucault, l'économie politique et le libéralisme, cit., §§25-33, who point out that in Foucault's reading, economics becomes the reference for the construction of the political – since it produces the necessary legitimacy of the State, and liberty between economic partners creates political consensus – but also for the social body, and even for cultural values.

[150] In *The Birth of Biopolitics*, cit., he refers to the limits of governmental intervention by using the expression "frugal government". By this, he referred to restraining government interventionism in order to grant the conditions of existence of the market, i.e. its legal framework but not its economic content and its social consequences. The expression of frugal government is thus consistent with the idea of autonomy of society/population.

[151] Building on the premise that the sovereign is structurally unable to embrace, comprehend and administer the complexity of economic processes within market economies, constituted by millions of interactions, Foucault reaches the radical conclusion that there could not be "sovereign in economics" (*The Birth of Biopolitics*, cit, 282-3*).* In his words, *"Economics is a discipline without totality; economics is discipline that begins to demonstrate not only the pointless, but also the impossibility of a sovereign point of view over the totality of the state that he has to govern"* (*The Birth of Biopolitics*, cit., 282*). In Society Must Be Defended*: *Lectures at the Collège de France, 1975–1976* (New York: Picador, 2003), 27, Foucault leads his critique of sovereignty to the conclusion that "we have to bypass or get around the problem of sovereignty (…) and the obedience of individuals who submit to it, and to reveal the problem of domination and subjugation instead of sovereignty and obedience".

[152] 'Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (Chelsea Green Publishing 2017), 31 ff. She notably coined the metaphor of the 'cuckoo in the nest' to indicate that the GDP infinite growth has hijacked the economic 'nest', that is it has depleted economy from pursuing other social goals, consistently with its etymology as the practise of household management.

[153] Even a cursory account of the topic would be an extenuating enterprise. As a matter of example, from the perspective of a global management consulting firm, see McKinsey Global Institute's Discussion Paper James Manyika, Michael Birshan, et al., 'A new look at how corporations impact the economy and the households' (2021) McKinsey Global Institute at https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/a-new-look-at-how-corporations-impact-the-economy-and-households that focuses on the pathways through which corporate profit flows to householders. For different, and perhaps more critical, views see Ritu Birla, 'Law as Economy/Economy as Governmentality: Convention, Corporation, Currency' in Deana Heath and Stephen Legg (eds), *South Asian Governmentalities: Michel Foucault and the Question of Postcolonial Orderings* (Cambridge University Press 2018) 134; William GA Collier and Mark Whitehead, 'Corporate Governmentality: Building the Empirical and Theoretical Case' (2023) 0 Territory, Politics, Governance 1. For a classic view on private/public regulation see John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar Publishing 2008).

business-government dichotomy, in the sense of the business conquest of the state or viceversa.[154] Focusing on the U.S. modern history, Hawley develops the expression "Corporate Liberalism" which does not refer to a particular prescription for achieving liberal ends, but to all reformist ideologies that accepted the large business corporation as a permanent and desirable feature of national life. He observes it in relation to the emerging notion of the "organizational sector" to indicate a reality of social complexity taking shape between the market and political realities and conflicts and developing its own kind of discipline and rewards.[155] The organizational sector is conceived as a locus of power tending towards a self-sustaining pluralism constituted by power dispersed "among a multiplicity of narrowly organised interests, counter-organization serving as a means of maintaining this dispersal, and coordination being achieved through the necessity for bargaining and compromise".[156] The idea of "Corporate Liberalism" indicates the formation of "corporative structures seeking to discipline such impulses and achieve coordination through enlightened concerts of recognised interest".[157] In other words, that against a "Balkanization" of interests, the corporation fulfils the role of an organising unity of social complexity.

Without further exploring the notion of "Corporate Liberalism", what is noteworthy is highlighting that the underlying idea is that private orders of business-supported public-private partnerships, with both pluralist and corporative features and with enough statist support to permit their emergence and effective operation, is key to address and resolve social complexity problems.[158] In this sense, as noted by Hawley, "Much of the New Deal, after all, did consist of statist action designed to foster the emergence of new private orders that could function as effective members of an organizational community".[159]

The breath and the complexity of such themes fall beyond the scope of the present discussion. However, the emergence of concepts of economic-grounded governmentalities is of central importance for understanding new articulations of the property structure of corporations developing between the eighteenth and the twentieth century.

---

[154] Ellis W. Hawley, The Discovery and Study of a "Corporate Liberalism", in *the Business History Review*, 1978, vol. 52, no. 3, Corporate Liberalism, 309-320.
[155] Ibid, 310. The term "corporate liberalism" was firstly introduced by neo-leftist revisionists such as Martin J. Sklar, in "Woodrow Wilson and the Political Economy of Modern United States Liberalism" *Studies on the left*, I (1960), 17-47, and James Weinstein, in *The Corporate Ideal in the Liberal State*, 1900-1918 (Boston, 1968).
[156] Hawley, The Discovery and Study of a "Corporate Liberalism", cit., 311.
[157] Ibid.
[158] McQuaid, Kim. "Corporate Liberalism in the American Business Community, 1920-1940." *The Business History Review*, vol. 52, no. 3, 1978, pp. 342–68.
[159] Hawley, 'The Discovery and Study of a "Corporate Liberalism"', cit., 318.

7 The relation between corporate sovereignty and (economic) governmentality in the analysis of Joshua Barkan

The above discussed notion of 'corporate sovereignty' entailing a state-sanctioned profit-oriented private power rests on the establishment of economic forms of governmentality. For the purposes of this work, the focus is on the nature of corporates' commitment to the public welfare under a regime of economic governmentality and, more broadly, in the frame of liberal social structures. To this end, I refer to the historical analysis carried out by Joshua Barkan on the evolution of corporations alongside the evolution of forms of government.

In his 'Corporate Sovereignty', Barkan investigates the role that economic liberalism played in the genealogy of the notion of corporate sovereignty as resulting into the (current) form of corporate as a private property entity or, more precisely, as the organisational tool of private property.[160] He does so by focusing on the evolution of the U.S. legal system during the nineteenth-century in order to demonstrate that the Anglo-American corporations (and modern political sovereignty) are founded in and bound together through a principle of legally sanctioned immunity from law, from which a paradox stems. That corporations, which are legal creations, are given such a power that they undermine the sovereignty of States. Hence, he argues that corporate power should be rethought as a mode of political sovereignty. In this sense, he emphasises that the privatisation of the corporation was not only the mere outcome of incipient forms of corporate capitalism. But rather it occurred because of, and, at the same time, it fostered a new cultural understanding of sovereignty and government.[161]

Focus is given to a specific part of his analysis, which concerns the consequences on corporate property determined by the shift from an idea of political government as one dominating economic exchanges to the opposite subordination of the political power to the economic one. Despite Barkan's analysis is time and space limited, the U.S. nineteenth-century experience is paradigmatic of such processes of transformation. Not only because it constituted the premise for the establishment

[160] Barkan, *Corporate Sovereignty,* cit. Note that references to Barkan's work preserves argumentative coherence with the definition of 'corporate sovereignty' here adopted as developed by Diphoorn and Wiegink, who indeed elaborated it consistently with Barkan's work. I acknowledge that Diphoorn and Wiegink claim to go beyond Barkan himself by conceptualising 'corporate sovereignty' in dynamic terms, as a process of negotiation. However, I deem their work more integrative of Barkan's work, than alternative to it. Diphoorn and Wiegink observe, from their on-field experience, actual corporate behaviours in fulfilling the entanglement of interests with the State. Although Barkan does not engage with such negotiations, he does not argue against them.

[161] Barkan, *Corporate Sovereignty,* cit., 42.

of the U.S. regime of corporate capitalism that became foundational for the U.S. economic growth during the twentieth century. But also, because it contributed to shape, on the cultural ground, the liberal interplay between the concepts of government, sovereignty, and rights in both the U.S. and abroad, these notions being then exported worldwide through economic globalisation. Therefore, and outside any claim of comprehensiveness, the reference to Barkan's analysis of the U.S. experience provides an explanatory lens to understand the role of corporate within society.

7.1 Insights into the evolution of corporate's role and structure within the US legal system. From police power …

Barkan analyses the historical evolution of the legal structure of corporates in the US from being institutions of the imperial government during the European colonisation to privately held and separated from the State entities that, by the end of the nineteenth century functioned within a nationally administered liberal capitalist economy. The turning point of said evolution occurred, according to Barkan, between the early and the late eighteenth century. He highlights that during this period, corporations were still characterised by a substantive identification with the public power. However, their configuration at that time was controversial, as it already presented the germs of those inner tensions that ultimately brought at the end of that century to a net divarication between the public and private spheres.

The key to understanding such tensions is, according to Barkan, the peculiar declination of police power developed in the US. In general terms, police power could be conceptualised as "the due regulation of domestic order of the kingdom" based on oeconomy in its classical sense as relating to the government of the oikos or 'household' by the 'householder'.[162] Therefore, policing reflects an idea of government in "a constant preoccupation with the ordering of productive activity",[163] precisely through the direction of the actions of the "whole populations toward both individual and

[162] In the words of Blackstone, police as developed in England refers to the due regulation of domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. See St. George Tucker (ed) *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 5 vols. (Philadelphia: Birch and Small, 1803), 162. On the difference between police and law as alternative modes of governance, see Markus D Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press 2005); Id, 'Policing Morality: Constitutional Law and the Criminalisation of Incest' (2011) 61 The University of Toronto Law Journal 737.

[163] Keith Tribe, 'Cameralism and the Science of Government' (1984) 56 The Journal of Modern History 263, 266.

collective health."[164] Barkan's central claim is that in the eighteen century corporation became a vital tool through which State could exercise its police power. Through the chartering of corporations, they "became the very basis for regulating conduct", so to justify the use of corporation-as-police phrasing.[165]

In the early eighteenth century, the U.S. system experienced a partial reconfiguration of such power around private property.[166] The background of such reconfiguration was, according to Barkan, the rising of a capitalist class of property owners. In this respect, William J. Novak pointed out that the traditional salus publica legal maxim, originally equated to State's sovereignty, still stipulated that public interest was superior to private interest.[167] Yet, a new conception of popular sovereignty grounded on individual owners leaded to a private property-oriented declination of 'public interest' as equated to the interest of the property holders who composed the people.[168] Precisely, salus publica started to be read conjunctly with a second legal maxim sic utere tuo ut alienum non laedas, that established a limitation to power not to act in the public interest if this resulted into harm to 'others'. 'Others' and 'harm' were connected to property holders, to "what is yours", i.e. to the people. As such, the sic utere tuo maxim established the protection of property as a guide to when the law could be abrogated.[169]

In the background of such reconfiguration, one could perceive the echoes of political economic discourses, as those of Adam Smith who advocated for a private based system of exchanges as a way to develop welfare within society. In Smith's reasoning, a system of political economy based on private property should have replaced police power in ensuring the public welfare.[170]

In the U.S eighteenth century tradition, police power thus did not only refer to a direct intervention of the State into the economic sphere. It was rather a power dedicated to "promote

---

[164] Barkan, *Corporate Sovereignty,* cit., 28. Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999), 105, provides the image of the traffic cop, who "shapes, structures and guides flows and forces," as opposed to the idea of an absolute sovereign who forces his will directly on his subjects as a way of illustrating the shift from theories of sovereignty to theories of government.

[165] Barkan, *Corporate Sovereignty,* cit., 28 *ff* and 30 for the quotation.

[166] Barkan, *Corporate Sovereignty,* cit., 42 "In the early American republic, however, legal scholars reformulated the concept of police into a more formal police power that state legislatures *used to promote capitalism as a project of national development.* State police powers established the priority of the state over private interests but did so, in many ways, *to promote private property.*"

[167] William J Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Univ. of North Carolina Press 1996), 9.

[168] Barkan, *Corporate Sovereignty,* cit., 50.

[169] Novak, *The People's Welfare,* cit., 42-50.

[170] Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Strahan 1776), 135 *ff*. This order of arguments paved the way for a net distinction between police and political economy, and between government and public welfare.

capitalism as a project of national development".[171] Hence, as emphasised by Barkan, an underlying inherent ambiguity. On the one hand, it prioritised State's power over private interests in ensuring the common good. On the other, and at the same time, it was also meant to protect and promote private property. In a nutshell, police power ultimately intended to serve the common welfare by protecting popular sovereignty, i.e. private propriety.

Said underlying ambiguity infiltrated and characterised in hybrid terms the corporate configuration of the early and mid-eighteen century. This period, still characterised by a substantive identification between public power and corporate, bridges the notion of corporate as part of the institutional structure of colonial government to its privatisation. The aforementioned reconfigurations of popular sovereignty and police power were grafted onto the project "to adapt the corporation to American circumstances".[172] This resulted into an underlying tension between private and public power when granting corporate's powers and privileges for ensuring public welfare.

Barkan highlights this by referring to Chief Justice Marshall ruling in the 1819 U.S Supreme Court case of Darthmouth College v Woodward.[173] In this case, Marshall acknowledged that charters - the traditional legal tools by means of which colonial governments used to create companies and confer to them power and privileges - were contracts and that consequently corporations should be governed under private law. As vested rights, corporate property was protected from government encroachment. However, Marshall also recognised that corporations are closely connected to government and law, since "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law".[174] This is the case because corporations are brought into existence at the behest of the sovereign and serve the aims of governments. Marshall stated that "the objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant". As such, corporation "is not more a state instrument, than a natural person exercising the same power would be".[175]

[171] Barkan, *Corporate Sovereignty*, cit., 42 "State police powers established the priority of the state over private interests but did so, in many ways, *to promote private property".*
[172] Pauline Maier, 'The Revolutionary Origins of the American Corporation' (1993) 50 The William and Mary Quarterly 51, 53.
[173] *Dartmouth College v. Woodward,* 17 U.S. 518 (1819), as reported by Barkan, *Corporate Sovereignty*, cit., 52-3.
[174] Ibid., 636.
[175] Ibid., 636. See also case *Bank of Augusta v. Earle*, 38 U.S. 587 (1839).

Marshall's statement was coherent with the early and mid-nineteenth century prevailing belief that corporate was an extension of the State and thus it operated under its direct control, i.e. the police power, on the ground of the sovereign's ability to direct the totality of social relations.[176] For instance, this belief is clearly stated by David Henshaw, a U.S. Democrat. He affirmed that the "legislature exercises the undisputed right to regulate the business of individuals, and to define their rights to property", for instance by limiting the selling of certain articles without a licence.[177]

However, although Marshall's understanding was underpinned by such underlying belief, the hybrid nature of corporations emerged from his wording. State government issued charters to create companies for the purpose of organising the financial, social, physical, economic, and productive relations of society. Corporate indeed played a pivotal role in settling and colonising the West. So, in addition to traditional functions, such as managing work, public charity, city life, etc., corporates were also deployed in banking, manufacturing, and developing infrastructure, such as the construction of transportation and communication networks including canals, railroads, and telegraph. Therefore, through the very chartering, police power granted groups of private individuals holding corporates with governmental alike powers, for instance the power to confiscate property for building railway. In doing so, the charter turned to be a contract that created vested rights against government encroachment for the advantage of groups of private individuals, distinguishing them from the rest of political community, thereby hampering the very capability of legislature to controlling them.[178]

Therein lies the tension. The police State outsourced the pursuit of public welfare to private holders of corporations by means of charters granting privileges, monopolies, and immunities, i.e. power. However, in doing so, the State limited its own powers to serve the common good. In a nutshell, corporates were at the same time expression of State police power, undertaking complex

[176] See Christopher Tiedeman, *Treatise on the Limitations of Police Power,* 578, quoted by Barkan *Corporate Sovereignty,* cit., 53. Tiedeman states that "it would be exceedingly liberal, and hence wrongful, construction of the constitutional protection against the impairment of the obligations of contracts, to place corporations above and beyond the ordinary police of power of the State".

[177] The quote to Henshaw is from Barkan, *Corporate Sovereignty,* cit., 46. David Henshaw, a Jacksonian Democrat and former banker saw corporations as a problem, one that resulted from the misapplication of the sovereign power to profit individuals instead of the public at large. See David Henshaw, *Remarks upon the Rights and Powers of Corporations, and of the Rights, Powers, and Duties of the Legislature toward Them* (Boston: Beals and Greene, 1837), 9. He then understandably warned from the dangers enshrined in the charter system, since they prevented the legislature power from amending the terms of incorporations. The perception that charters could pose a problem for popular sovereignty was present also in Theodore Sedgwick, *What Is a Monopoly? On Some Considerations upon the Subject of Corporations and Currency* (New York: George Scott, 1835), 8, despite their different perspectives.

[178] Barkan, *Corporate Sovereignty,* cit., 54.

ventures in the name of common welfare, and entities of private property in tense relation with such power.[179]

7.2 ... to administrative power.

The aforementioned tension ceased by the late nineteenth century when a shift occurred from the State's police power to federal administrative laws in corporate regulation, underpinned by the widespread belief of liberal thinkers that the maintenance of legal norms was a better way to serve the public welfare than a direct police-alike intervention of the State. As a result, the close relation between the State and the corporation paved the way to a new conceptualisation of corporations as legal persons distinct from the State on one side and the members of the corporation on the other.[180]

The liberalisation of processes of incorporations through the standardisation of charters and grants into general incorporation laws,[181] the consequent increased accessibility of individuals to the privileges of corporations, new federal administrative regulations addressing corporations on the basis of their effects on prices rather than according to their legal standing, and the consequent spread of administrative agencies at the federal level, were some of the legal novelties that stemmed as a consequence of such shift from the use of the charters as a tool of regulations towards a legal regime in which corporations were recognised new powers in terms of ownership and protections in the form of limited liability. In a nutshell, the new federal State marked the separation of corporations from the public power of the States. Commentators adopted the expression 'a new American State' to describe such turn towards an expanding bureaucratic State setting regulations at the federal level and mainly in terms of anticompetitive behaviours.[182]

Said move toward an administrative State power reveals more than a reconfiguration of the corporations' property structure and privileges to accommodate the rising capitalist class's needs.[183]

---

[179] Ibid.
[180] Barkan, *Corporate Sovereignty*, cit., 55-56.
[181] Morton Horwitz, 'Santa Clara Revisited: The Development of Corporate Theory' (1986) 88 West Virginia Law Review <https://researchrepository.wvu.edu/wvlr/vol88/iss2/5>, 187.
[182] E.g., Stephen Skowronek and Pelatiah Perit Professor of Political and Social Science Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge University Press 1982). See also William J Novak, *The Legal Origins of the Modern American State* (American Bar Foundation 1999). On the evolution towards modern regulatory models of governance see Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 Journal of Public Policy 139.
[183] This aspect is of course a central one. It relates to the conceptualisation of corporate as a legal embodiment of private capitals in the form of autonomous juristic persons holding rights against the State. These rights included standardized limited liability (from the state and from the stakeholders) to promote and protect private investments and the right to create and control subsidiaries companies. On the development of limited liability,

It rather expresses a cultural and social move towards the notions of 'economic governmentality' or 'government by economy' described by Foucault,[184] that is the liberal concepts of governmentality in which the 'Economy', meant as a "level of reality, a field of intervention" bore primarily responsibility for maintaining public welfare.

In brief, it expressed the idea that private individuals could serve the organisation of the productive relations of society[185] better than the State, this ultimately leading towards a narrower conception of public power limited at using law to merely regulate "general forms of intervention" on the private spheres.[186]

8 Where the elephant rests: the corporation's indirect commitment towards economic declination of public welfare.

The elephant in the room is precisely this idea of public welfare declined in economic terms. More precisely, the problem in ensuring 'sustainable', i.e. social model of business, does not rest within the legal structure of the corporate. It is rather external to it and linked with liberal-oriented notions of economic prosperity. The corporate evolution from the status of government's branches to that of private entities with their autonomy and independent powers runs alongside the establishment of such notion.[187]

In terms of consequences of this cultural shift, the corporations achieved the pivotal role in managing the disequilibrium between life and the material conditions needed to support it, becoming the main and potentially the sole actors able to deal with "problems of government and regulation under conditions of scarcity".[188] In short, corporates substituted governments in organising the productive relations of society for increasing an economic understanding of public welfare.[189]

---

see Edwin Merrick Dodd 'The Evolution of Limited Liability in American Industry: Massachusetts' (1948) 61(8) *Harvard Law Review*, 1351–79.

[184] Foucault, *Security, Territory, Population,* cit., 95.

[185] Or as Foucault, *Security, Territory, Population,* cit., 96, framed it, "the complex of men and things."

[186] Barkan, *Corporate Sovereignty,* cit., 43, who quotes Michel Foucault, 'History of Systems of Thought, 1979' (1981) 8 *Philosophy and Social Criticism* 353, 357.

[187] Whether this evolution constituted a mere consequence, or it played an active role in promoting such shift (or both) is a question that falls outside the scope of this work.

[188] Barkan, *Corporate Sovereignty,* cit., 64.

[189] Michel Aglietta, in *A Theory of Capitalist Regulation: The US Experience* (London: Verso, 1979), has suggested that the corporation, by concentrating and consolidating various fragments of capital, was important for the maintenance of the process of valorisation in the early-twentieth-century United States. In this respect, Barkan, Corporate Sovereinty, cit, 184, in note 5, argues that the law had a role in producing corporations with such abilities (or to use Aglietta's language, the law produced the "structural form" that enabled consolidation).

A number of cascading corollaries follow from this major consequence.

In the first place, corporates could justify their privileges and powers, (e.g. the principle of limited liability) by demonstrating the capability of duly serving economic prosperity. From this perspective, the act of granting rights to corporations in order to safeguard and shield private capitals and investments from State encroachments could be explained under economic security reasons. The very ratio of limited liability rests upon the idea that corporation is a problem-solving method to manage and to foster a substantial raising amount of capital.[190] Limited responsibility's underlying idea is that by shielding shareholders and investors' capitals, it allows for the development of capital markets and, allegedly, it increases social welfare. Belenzon, Lee and Patacconi carried out empirical research in this direction concluding that corporates' limited liability spurs entrepreneurship and it is likely to increase overall social welfare.[191]

A second and major corollary is that the way corporates served public welfare also changed. In this regard, one should recall that, even before processes of privatisation, they fulfilled certain public welfare functions. After all, colonial governments used corporations to expand their control globally.[192] Whilst this is surely true, the difference lies in the declination of their (alleged) contribution to public welfare.

Barkan's analysis makes this point clear. Reference should be made, once more, to the shift from the system of charters to the liberalisation of incorporation laws and to its underlying cultural move. The charter, the ancient heritage of the colonial government, represented the superiority of the sovereign's interests, the State in our case, over private ones. The charter was granted to corporates for the purpose of benefitting the sovereign and, by consequence, to directly reinforce the public welfare. By making charters freely available to private entities, States were now giving up their claims to directly provide for the common good.

In other words, corporations were not asked anymore to directly contribute, as governmental entities, to the pursuit of public welfare. Of course, such functional relation was nominally preserved, as stated above. In reality, however, it worked following an indirect way of contributing to the public

---

Furthermore, he also argues that these legal changes were conceptualized in terms of questions about the best ways to serve the public welfare. The rise of corporations as private entities was thus paradigmatic on how "economy," as both the science and practices designed to optimally organize society under conditions of scarcity, developed in response to problems of government and sovereignty.

[190] Posner, R., *Economic Analysis of Law*, 9th edn., New York, Wolters Kluwer, 2014, 536.

[191] Belenzon, S., Lee, H. & Patacconi, A., "Towards a legal theory of the firm: the effects of enterprise liability on asset partitioning, decentralisation and corporate growth", NBER Working Paper Series, Working Paper 24720, http://www.nber.org/paper/w24720, 2018, 9.

[192] On this account, fascinating is the rise of the British East India Company, through the historical lenses of William Dalrymple, *The Anarchy: The East India Company, Corporate Violence, and the Pillage of an Empire* (Bloomsbury USA 2019).

welfare. To be more precise, one thing was subordinating the granting of charters to the actual development of infrastructures (e.g. bridges, canals, railroads etc.) and another one was grounding incorporation on the basis of indirect contributions to public welfare by means, for instance, of taxation and licensing fees.

One could summarise the above as follows. Under a regime of liberal conceptions of economic governmentality, the existence of the corporation is conditioned by its profitable nature. This is so inasmuch as said conceptions establish the identification between private profit and public welfare. It follows that the State's main goal, that of ensuring the health and the stability of the economy, ultimately depends on its capability to a) set the 'structural forms' to protect private property, i.e. the legal category functional to profit; b) conditionate its use to a 'indirect' private contribution to public welfare.

8.1 Looking for the 'elephant' on-field. Recalling the work of Diphoorn and Wiegink

The above consideration could be traced in the anthropological works earlier considered. Particularly, the idea of the 'convergence of interests', that is the legitimising condition of 'corporate sovereignty' is coherent with this political-economic background. It reflects the foundational role of private profit as the (indirect) way the corporation contributes to the public welfare (or rather ought to). And precisely, to a specific declination of public welfare merely reduced to economic performances.

Besides the pursuit and achievement of profit, allegedly considered as a form of social prosperity on its own, corporates are exempted from fulfilling any form of positive engagement for the advantage of society, although they have indirect obligations such as fiscal or compensatory ones, e.g licensing fees or royalties.

Such indirectly legitimising corporate commitment emerges in the anthropological work of Diphoorn and Wiegink on contemporary corporate operations. For instance, as earlier discussed with reference to the coal mining activities in Mozambique, the authors highlight that the corporate commitment towards the local population, whilst being motivated by common security strategies,[193] was also meant to establish and maintain what the authors label as the 'social license to operate',[194] that is the beneficial effects of the corporate activity over the 'condition of existence' of the involved populations. In other words, for the corporate activity to contribute to the public welfare of the State.

[193] Lars Buur and Jason Sumich, '"No Smoke Without Fire"' cit.
[194] Diphoorn and Wiegink, 'Corporate Sovereignty, cit., 9.

In this regard, it should be noted that such contribution is not characterised by a real commitment towards the welfare of involved populations. Said obligations are indeed present, but they are temporal in nature, depending on how lasting the corporate interests in that area are, while their failure is not properly sanctioned.[195] Rather, said minor volatile commitments are necessary from a public reputational standpoint.[196] Besides economic market advantages, they mainly relate to the legitimising conditions enabling the corporation to enjoy a stronger bargaining position against the State when negotiating the scope of the 'permissive space'. The ethnographic analysis here reported highlights the corporation's 'existential need of justification', that is the need to demonstrate they actually enhance, although indirectly, the State public welfare, this ultimately being the condition that shapes the contours of the 'corporate sovereignty'.

These are ultimately the structural cultural and social issues to be considered when challenging unsustainable forms of business. Detaching such forms from their profit-making existential needs means challenging the declination of prosperity in mere economic terms. In other words, it means abandoning the idea of linear economic growth and looking for a new convergence of interests, on more social grounds. This constitutes the logic prior to be discussed for justify changes in the 'business as usual'.

SECTION IV

SOME IMPLICATIONS FROM THE LEGAL PERSPECTIVE

9 The unchallenged corporate shareholders' primacy within the corporate social responsibility.

The above considerations provide a justificatory ground to explain the resistance of what Beate Sjåfjell refers to as the social norm of shareholders primacy, i.e. "a systemically entrenched

[195] Ibid, 11. In 2019, Vale and the Mozambican state were condemned for the violation of right of communities affected by the mining exploration. This was however a rare example of successful attempts to curb the corporate power and to held it accountable for failure in fulfilling its obligations.

[196] Ibid. Wiegink's interviews with Vale's community development officers show the corporate's strong interest in demonstrating the corporate performances' consistency with law and CSR. In one of this officers' words "Vale is always in the public eye. While we are not even the worst company" and from another interview "it is already very positive when the companies, for themselves without being obliged by no one, remember [the norms and the laws]."

barrier to the contribution of business to sustainability".[197] Under corporate law, the core duty of the corporate's board is to promote the interests of the company. Law varies in terms of declination of the definition of the interests of the company, ranging from 'monistic' approach, more focused on economic interest (so called shareholder value jurisdiction) to the pluralistic approach, including a variety of other involved or affected parties (referred to, often misleadingly, 'stakeholders value' jurisdictions).[198] Yet, rarely company law expressly dictates the content of the interests of the company. And, as Sjåfjell states, no company system insists on boards focusing only on returns for shareholders, allowing margin to the board and by extension to the management to shape business in a sustainable manner.[199]

Hence, shareholder primacy is not a legal norm, it rests on social grounds, and it should not be confused with the legal notion of shareholder value.[200] It stemmed from postulates and assumptions from legal-economic theories,[201] and turned into a widespread "legal myths (…) dictating that the board and senior managers are the 'agents' of the shareholders and must maximise returns to shareholders as measured by current share price".[202] And, in line with the previous considerations, this idea is based on the assumption that this is positive for society: "The idea is that companies create values, for themselves, for their employees, their business partners, their local communities and the broader society".[203] The link with the models of economic governmentalities is self-evident.

9.1 Cursory notes on the 'corporate social responsibility' movement and its limits vis-à-vis shareholders primacy

[197] Beate Sjåfjell, 'Reforming EU Company Law to Secure the Future of European Business', cit., 205. See also Sjåfjell, Beate and Johnston, Andrew and Anker-Sørensen, Linn and Millon, David K., Shareholder Primacy: The Main Barrier to Sustainable Companies (2015) Beate Sjåfjell and Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities*, (Cambridge University Press, 2015) 79.
[198] Sjåfjell, 'Reforming EU Company Law, cit., 204-205. On these approaches, see also Andreas Rühmkorf, 'Stakeholder Value versus Corporate Sustainability: Company Law and Corporate Governance in Germany' in Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2019) 232.
[199] Sjåfjell, 'Reforming EU Company Law, cit., 205. See also Andrew Johnston, Jeroen Veldman et al. statement 'Corporate Governance for Sustainability' cit.
[200] Mainly established in the United Kingdom. On this notion and on the confusion with shareholder primacy see also David Millon, *Radical Shareholder Primacy*, 10 U. St. Thomas L.J. 1013 (2013), at https://ir.stthomas.edu/ustlj/vol10/iss4/5/ (last access 09/03/2023)
[201] For a review of these theories, see Sjåfjell, Beate et al, 'Shareholder Primacy: The Main Barrier to Sustainable Companies', cit.
[202] Sjåfjell, 'Reforming EU Company Law, cit., 206.
[203] Ibid.

Such social belief permeates the 'corporate social accountability' (CSR) and the related 'corporate environmental responsibility' (CER) movements.

CSR arose in the framework of the challenges posed to the Westphalian state-centric order by the emergence, from the Second World War onward, of a plethora of non-state actors in the international arena.[204] Particularly, in the background, there is the crisis of the State-centric orders in fulfilling human rights obligations and other socially relevant duties vis-à-vis the blooming of powerful transnational corporations and other large-scale business entities that have prospered in the globalisation and that have been fuelled by the affirmation of liberal economic regimes after the end of the cold war.[205] In light of the fragmentation of power between State and non-state actors, CSR provides a conceptualisation of the relation state-corporation when social concerns are at stake.[206]

The corporate social responsibility (CSR) is rooted in business scholarship and thus it highlights the positive role that enterprises could play in promoting social needs. As such, the accent is on cooperation between state actors and non-state actors in the fulfilment of such social goals. There is not a common definition of CSR. Broadly speaking, it promotes the idea that corporate should play an ethical role in conducting their activities following the purpose of enhancing the welfare of society.[207]

At its onset, it embraced a strong social ethos, promoting a vision of ethic corporation with a pivotal role in shaping a more just and equitable society, beyond profit.[208] Scholars as Donald

[204] Mathew JT, "Power shift", (1997) 76.1 Foreign Affairs 50. On non-state actors and human rights, see also Clapham A (ed) *Human rights obligations of non-state actors* (2006 OUP); McCorquodale R, "Non-state actors and International human rights law", in Joseph S, McBeth (eds) *International human rights law* (Edward Elgar, 2009) 97; Rodley N, "Non-state actors and human right*s",* in Sheeran S, Rodley N (eds) *Routledge Handbook of International Human Rights Law,* (2013 Routledge) 523.

[205] Philip Alston, '*The "Non-a-cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors*?' Alston P (ed) *Non-State Actors and Human Rights,* (OUP 2005) 3.

[206] This is just one potential way to decline state-corporation relations. The other main view is the one advocated by accountability movements (AC), and specifically by the Business and Human Rights (BHR) strands. On CSR and BHR, see Florian Wettstein, 'CSR and the debate on business and human rights: Bridging the Great Divide', (2012) 22.4 *Business Ethics Quarterly*, 739; Renginee G Pillay, 'The Limits to self-regulation and voluntarism: from corporate social responsibility to corporate accountability' (2014) 99 Amicus Curiae 10; Anita Ramasatry, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability" (2015) 14 Journal of human rights 237.

[207]Andrew Crane et al (eds.), "*The Oxford Handbook of Corporate and Social Responsibility*" (2009 OUP). See also Rhys Owen Jenkins, 'Corporate Codes of Conduct: Self-Regulation in a Global Economy' (2001) United Nations Research Institute for Social Development (UNRISD).

[208] Ramasastry., "Corporate Social Responsibility versus Business and Human Rights", cit., 239.

David,[209] Bernard Dempsey,[210] and Harold Bowen[211] advocated for an idea of business that fulfilled desirable social, even philanthropic,[212] objectives.

However, this original aspiration has been frustrated by the prevailing of neoliberal's doctrines which have conceived the CSR's mechanisms as a tool for achieving a full deregulation of labour markets and to limit the States' interventions in the economic fields.[213] As Pillay argues, contemporary CSR does not pursue social transformative goals, but rather a purely ameliorative function in tempering without challenging nor derogating exclusively profit-oriented objectives.[214] In line whit neoliberal pivotal musts, such as economic growth and development, the CSR movement pays little attention to social and human rights concerns over fulfilling economic obligation. For this reason, Wettenstein refers to this as "human rights minimalism".[215]

CER stems as a branch of CSR, specifically concerned with environment and sustainable development (one can guess a weak understanding of sustainability). As for CSR, there is not an established definition of CER. In broad terms, CER is "the responsibility of business towards various stakeholder to take into account the environmental consequences of business activities and the longer-terms environmental needs in order to avoid compromising the sustainability of future generations".[216] This is pursued through transparent reporting, measuring and auditing and means going beyond regulatory compliance.[217] Hence, the typical CSR mechanisms.

CSR and CER advocates do not deny the importance of social concerns. However, coherently with neoliberal trends, such concerns are mainly functional to ensure enterprises' competitiveness and public attractiveness,[218] hence they are not derogating profit-based goals. For

---

[209] Donald David, 'Business responsibilities in an uncertain world*'* (1949) 27(3) *Harvard Business Review*.
[210] Bernard Dempsey, 'The roots of business responsibility*'* (1949) 27(4) *Harvard Business Review* 393.
[211] Harold Bowen, *Social Responsibilities of the Businessman* (1959/2013 University of Iowa Press).
[212] Morrell Heald, *The social responsibilities of business: company and community 1900-1960* (1970 Livingston: Transaction Publisher).
[213] Pillay, "*The Limits to self-regulation",* cit., p.10.
[214] Ibid. see also Ireland P, Pillay RG '*Corporate Social Responsibility in a Neoliberal Age*' in Utting J, Marques JC (eds) Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?" (2010 UNRISD and Palgrave MacMillan) 77.
[215] Wettstein, "*CSR and the debate on business and human rights",* cit. 740
[216] Lieselot Bisschop, 'Corporate Environmental Responsibility and Criminology' (2010) 53 Crime, Law and Social Change 349, 351.
[217] Mazurkiewicz Piotr, 'Corporate Environmental Responsibility: Is a Common CSR Framework Possible?' (*World Bank*) <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/577051468339093024/Corporate-environmental-responsibility-Is-a-common-CSR-framework-possible> accessed 11 March 2023.
[218] In terms of risk management, cost savings access to capital, customer relationships, human resource management etc, as highlighted by Porter M, Kramer R (2006) 'The link between competitive advantage and corporate social responsibility' 84(12) Harvard Business Review, 78.

instance, and with specific regards to CER, this is what clearly emerged from an interview-based study on the relation between CER and green criminological concerns.[219] The study showed that business's drivers in meeting CER are threefold, including 1) direct profit interest in going green in terms of public relations and corporate image; 2) ethical motivations insofar as business is part of society; 3) the need to comply with legislation. Besides specific motivations, Pillay seems right when he argues that CSR (and consequently CER) leaves the supremacy of shareholder primacy in pursuing the strategic goals of the enterprises unchallenged, as well as the neoliberal antipathy toward mandatory State regulation in the area of corporate law.[220]

In other words, CSR/CER approaches leave unanswered the fundamental question to whom corporates must be accountable.[221] The underlying unchallenged answer to this question is 'to the shareholders' profit-oriented interests'. Or, in Milton Friedman's words, to the maximisation of profits.[222]

10 The shareholder primacy at the legal level. Insights into the EU legal framework on CSR/CER.

A recognition of positive law would reveal that in spite of an increasing attention to ensure higher corporate accountability and due-diligence standards serving the interest of external affected parties and the environment, irrespective of profit and consistently with initial conceptions of CSR,[223] the corporate goal remains self-focused (profit) and solely, and eventually, subject to

[219] Bisschop, 'Corporate Environmental Responsibility and Criminology', cit. 356.

[220] Pillay, "*The Limits to self-regulation",* cit., p.11. Note that he makes the same criticism to accountability movements, including its 'business and human rights' declination' (BHR). Specifically, he points out that BHR's call for accountability interferes with, but does not radically challenge, the corporates' governance structure. Remedies such as compensations for victims, cleaning up activities, and prison sentences, constitute externalities, i.e., mere costs for corporates that influence but do not cut through internal decisional processes. The literature in the field BHR is massive. See for instance Newell P (2002) *From responsibility to citizenship: Corporate accountability for development*, 33 IDS Bulletin 91; Christopher Avery, 'The development of arguments for the accountability of corporations for human rights abuse' (2010) in Walling CB, Waltz S (eds) *Human rights: from practise to policy proceedings of a research workshop,* Gerald R Ford School of Public University of Michigan 67, at http://humanrightshistory.umich.edu/files/2013/05/PracticetoPolicy4.pdf, also for further reference. More generically, Joseph Stiglitz, *Globalization and its discontents* (New York: W. W. Norton, 2002).

[221] Pillay, "*The Limits to self-regulation and voluntarism,* cit. 12. This question arises because in the Anglo-American corporate law, the board of directors are accountable to, and only to, the corporate's shareholders, thereby adapting the managerial decision-making to shareholders' priorities.

[222] Milton Friedman 'The Social Responsibility of Business Is to Increase Its Profits' (1970) New York Times Magazine, 13 September 1970, 122-126.

[223] See D. S. Lund, E. Pollman, The Corporate governance machine, 121 Colum. L. Rev. 2563 Columbia Law Review 12/2021.

external constraints. A different understanding, as of now, appears to be subversive of the current system of corporate governance.[224]

The following analysis offers some insights into some of the most recent EU initiatives in the CSR/CER field.[225] The analysis shows that even fine-tuned regulatory mechanisms, based upon private/public cooperation such as due diligence schemes for enhancing compliance with social and environmental standards, intend to hold the company responsible towards social spheres, without truly cutting though the 'transaction'. To recall Viñuales, law adds layers of regulations, but it fails to cut into the transaction.[226]

I address the EU system for a twofold reason. To start with, its regional scope makes it a more significant example than referring to the experiences of single member States, notwithstanding their entanglement and reciprocal influence. Secondly, because the new political course of the EU Commission seems offering some promising steps towards a novel social (and political) approach to business, despite its in-progress nature, as discussed in concluding Section V.

A caveat is necessary. The extension of the EU regulatory instruments developed in the last decade on this topic, and the massive scholarship generated, would make any attempt to carry out here an in-depth analysis not only hardly achievable, but also at odds with the very limited purpose of this paragraph, which is to merely bridge the above considerations with the general ethos enshrined by the EU in the CSR. As such, focus is given to the so-called EU 'Disclosure Agenda', that is the broad body of disclosure regulations that constitutes the traditional mechanism pursued by the EU in the field of CSR.[227]

In this regard, and on a general note, duties of disclosure should not be confused with mere corporate internal compliance mechanisms, such as self-reporting and self-policing practises, which effectiveness is, incidentally, quite debatable.[228] The company's practise of disclosure, also known

[224] See A. Karnani, 'The Case Against Corporate Social Responsibility, (2010) The Wall Street Journal, at https://www.wsj.com/articles/SB10001424052748703338004575230112664504890 (accessed 11/03/2023).
[225] Mainly CSR, given its the more established tradition. Yet, when not directly specified, the same line of reasons also apply to CER given its conceptual dependence from CSR.
[226] Viñuales, *The Organisation of the Anthropocene,* cit. passim
[227] On this, and how it relates more broadly with the environmental liabilities of companies at the EU level, see Michael G Faure' study commissioned by the European Parliament's 'Policy Department for Citizens' Rights and Constitutional Affairs' "Environmental liability of companies" (2020), at https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)651698 specifically 63 ff.
[228] An internal compliance mechanism (or a compliance management system) is basically a device which allows a corporation to signal that it is willing to seriously act in compliance with (environmental) regulatory duties. Its purpose is therefore that of making the company as the first filter against breach of obligations, relegating public authorities control activities in the background. It thus fulfils an indirect process of responsibilisation of the company itself.

as CSR reporting, entails the company's commitment in making public, i.e. in disclosing, information regarding its social and environmental performances.[229] The underlying rationale of such disclosing is that companies need to communicate on account of the economic, environmental, and social impact of their operations, in order to promote a more sustainable model of business and to retain social acceptance.[230] Hence, their relevance for the present line of argument.

Despite some sceptical positions, above all from the field of law and economics,[231] CSR reporting has increased in popularity today, because of an increasing pressure from civil society[232] and governments, as well as more business-related reasons.[233] Given their relevance in terms of

---

Faure, 'Environmental liability of companies', cit., 78 concludes that 1) internal compliance mechanisms (implying self-policing and self-reporting) can have a beneficial effect on compliance, but on the condition that those mechanisms are embedded in a robust regulatory framework. It thus follows that 2) most studies agree that internal compliance mechanisms can never provide a complete alternative for regulation but will always be used in combination with regulation. For examples of these regulations see Faure, 'Environmental liability of companies', cit., 71.

Faure draws his conclusion from several studies, including Arlen, J., "The potentially perverse effects of corporate criminal liability", *Journal of Legal Studies*, 1994, 833-867 on the need to promote such mechanisms and their advantages. For a sceptical view on these mechanisms and the need for enforcement see Gunningham, N., "Enforcing environmental regulation", *Journal of Environmental Law*, 2011, Vol. 23(2) 169, 187, who referred to them as "negotiated non-compliance"; and the empirical studies Darnall, N. & Sides, S., "Assessing the performance of voluntary environmental programmes: does certification matter?", *The Policy Studies Journal*, 2008, Vol. 36(1), 95-117. More positive, yet still cautious, is Earnhart, D. & Harrington, D.R., "Effect of audits on the extent of compliance with wastewater discharge limits", *Journal of Environmental Economics and Management*, 2014, Vol. 68, 243-261. The empirics relate to the behaviour of the US chemical manufacturing sector between 1999 and 2001 and relates to EPA data. They argue (cautiously) that self-audits improve compliance with effluent limits (emission standards) for one but not for all pollutants.

[229] The term social performance is understood in a broad sense and refers to social, environmental, and governance issues that are typically not covered by financial performance metrics. On social performances disclosing see Philipp Schreck, 'Disclosure (CSR Reporting)' in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013).

[230] See Jenkins H, Yakovleva N (2006) Corporate social responsibility in the mining industry: exploring trends in social and environmental disclosure. J Clean Prod 14:271–284.

On the importance of CSR storytelling in terms of establishing power throughout communicative strategies, see Merryn Paynter & Abdel K. Halabi, 2021 'Corporate Responsibility Reporting and Storytelling' David Crowther & Shahla Seifi (eds), The Palgrave Handbook of Corporate Social Responsibility, (Springer Books Publisher 2021) 129.

[231] Posner, R., *Economic Analysis of Law*, 9th edn., New York, Wolters Kluwer, 2014, 577-578. He argues that, especially in a competitive market, CSR represents a burden in terms of costs over corporations, e.g. additional investments in pollution reduction technology. And this would result in higher prices and, by consequence, customers would turn away from firms that engage in CSR.

[232] See in this regard, the interesting empirical research led by Yuming Zhang and Fan Yang, 'Corporate Social Responsibility Disclosure: Responding to Investors' Criticism on Social Media' (2021) 18 International Journal of Environmental Research and Public Health 7396. They investigate the Chinese public companies listed on the Shanghai Stock Exchange and the relevance of CSR disclosure in response to social media criticism posted by investors. Their empirical findings concerning the particular regional scope of their research show that investors' social media criticism not only motivates companies to disclose their CSR activities but also increases the substantiveness of their CSR reports, demonstrating that companies' CSR communication in response to a crisis is substantive rather than merely symbolic.

[233] For details, see Faure, 'Environmental liability of companies', cit., 72

sustainable business, and despite their voluntary-based nature, there is an increasing trend in regulating such disclosing practices. As Faure puts it, this is so because there is a serious risk that without supplementary regulation concerning environmental (social) reporting, the corporations may misrepresent their environmental performance leading to information asymmetry between them and the consumer.[234]

10.1 The European Union 'Disclosure Agenda'

Disclosure is the traditional tool used by the EU legislator in order to promote sustainable governance.[235] The EU first efforts in this sector trace back to the early 2000s.[236] It is however only after the 2008 global financial crisis that the 'EU Disclosure Agenda'[237] was strengthened and took shape. The EU Strategy 2011/2014,[238] launched in October 2011 represented a novelty for the

---

Lu, M. & Faure, M.G., "The regulation of corporate environmental responsibility", in Philipsen, N. et al. (eds.), *Market Integration: The EU Experience and Implications for Regulatory Reform in China*, Berlin, Springer, 2016, 239-265, 248-249; Lu, M., *Corporate Social and Environmental Responsibility. Another Road to China's Sustainable Development*, Leiden, Brill Nijhoff, 2018, 71-77. Kitzmueller & Shimshack 2012, 74-75. These reasons could range from public appeal, lower compliance costs with environmental regulations, also in terms of less need for governmental regulations, to more investments in innovation to meet higher standards of environmental and social protection. On this, see Porter, M.E. & Vanderlinden, C., "Toward a new conception of the environment-comparativeness relationship", *Journal of Economic Perspectives*, 1995, Vol. 9(4), 97, 99-100.

[234] Faure, 'Environmental liability of companies', cit. 74. On the role that government could play in promoting CSR/CER see McBarnet, D., "Corporate social responsibility beyond law, through law, for law: the new corporate accountability", in McBarnet, D., Voiculescu, A. & Campbell, T. (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge, Cambridge University Press, 2007, 9-56.

[235] For an overview of initiatives at the international level, see Faure, 'Environmental liability of companies', cit, 74.

[236] In 2001 the European Commission issued its first CSR policy, the Green Paper on promoting a European framework for corporate social responsibility (COM(2001) 366 final). The aim of this Green Paper was to "stimulate a wide debate on new ways of promoting corporate social responsibility at both the European level and at the international level" (COM(2001) 366 final, p. 23). About the traditional self-restraint of the EU in the governance sector, see Conac Pierre-Henri, "Sustainable Corporate Governance in the EU: Reasonable Global Ambitions?", *RED*, 2022/1 (N° 4), p. 111-118. URL: https://www.cairn-int.info/journal-red-2022-1-page-111.htm. The author explains the reasons of such self-restrain, including the, above all at that time, liberal nature of the Commission itself.

[237] Borrowing the expression from Conac Pierre-Henri, "Sustainable Corporate Governance in the EU" cit., 114.

[238] COM(2011) 681 final.

understanding of CSR. Whilst the 2001 Green Paper still defined CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis",[239] the 2011 Strategy redefined it as "the responsibility of enterprises for their impact on society".[240] Accordingly, the Accounting Directive was amended in 2013 in order to force large companies and public-interest entities active in the extracting and logging of prime forest industries to report payments to governments.[241]

In 2014, the EU legislator adopted requirements for large companies to disclose non-financial and diversity information.[242] This Directive, also known as the non-financial reporting Directive (NFRD) represents a turning point in the EU Disclosure Agenda, since it made compulsory for companies of a certain size to include non-financial information in their management report relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. Despite its scope being limited to large companies with 500 employees, the NFRD is a fundamental step since it changes the idea that CSR/CER is necessarily fulfilled on a voluntary basis.

The NFRD is currently under a process of amendment and updating by a proposal of directive of 2021 on corporate sustainability reporting (CSRD).[243] This proposal's goals include enhancing the reliability of the disclosure by proposing an audit requirement for sustainability information and to improve the accuracy of non-financial statement by providing more detailed information relating to the fields already covered by the 2014 NFRD.

Another recent development in the field is the 2019 Communication on reporting climate-related information,[244] in which the Commission has adopted the concept of 'double-materiality', requiring that companies have to report about how sustainability issues affect their business and about their own impact on people and the environment. This concept inspires the 'Financing Sustainable

[239] COM(2001) 366 final, p. 6.
[240] COM(2011) 861 final, p. 6.
[241] Art. 41-48. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182/19, 29.6.2013.
[242] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330/1, 15.11.2014.
[243] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, Brussels, 21.4.2021 COM(2021) 189 final, 2021/0104 (COD).
[244] Communication from the Commission, Guidelines on non-financial reporting: Supplement on reporting climate-related information (2019/C 209/01), OJ C 209/1, 20.6.2019.

Growth' action plan, of November 27, 2019,[245] imposing upon EU investment funds duties to disclose about the potential adverse impacts of investment decisions on sustainability factors. Following the 'Financing Sustainable Growth' action plan, and still in the climate-related disclosing, one can finally also mention the recent Taxonomy Regulation, of June 18, 2020, establishing the world's first-ever 'green list'.[246]

11 The 'existential need of justification', CSR and corporates' narratives of compliance.

The aforementioned CSR/CER reporting schemes within the EU, i.e. the EU Disclosure Agenda, is not designed to challenge business status quo requiring corporations only an indirect commitment towards public welfare. This is not merely related to the lack of enforcement measures associated to these disclosure duties, this being undoubtedly a weak point of said aforementioned EU regulations. For instance, the fact that the 2014 NFRD does not establish any enforcement or sanctioning mechanism to support its reporting requirements, in the words of Sjåfjell and Taylor, "undermines the legislative aim of shifting businesses onto a sustainability path".[247] Besides these enforcement-related considerations, the issue at stake refers to a deeper layer of considerations. That the very idea of reporting and of disclosing, and CSR more broadly, fits coherently with the aforementioned idea of liberal economic governmentality. One could even dare saying that CSR is not only consistent with, but also, so to speak, a way to enhance it.

To better grasp this point, one could frame the corporations' narratives of compliance with their social commitments and with their 'non-harm principle' statements in what we earlier referred

[245] Standing for Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, the 'Sustainable Finance Disclosure Regulation', OJEU, 9 Dec. 2019, L 317/1. This regulation provides for a classification system (taxonomy) for sustainable economic activities, that requires companies under the duties set by the NFRD to disclose the extent to which their sales, investments and/or expenditures are linked to activities defined in the EU taxonomy. See in this respect also the Commission delegated regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities and specifying the methodology to comply with that disclosure obligation, OJEU, 10 Dec. 2021, L 443/9.

[246] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a
framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJEU, 22 June 2020, L 198/13

[247] Sjåfjell, B. & Taylor, M., "Planetary boundaries and company law: towards a regulatory ecology of corporate sustainability", University of Oslo, Faculty of Law Legal Studies Research Paper Series, No. 2015-11, 20.

to as the corporate 'need of justification' related to the liberal conceptions of the relations between State and corporates. The fact that the legitimizing condition for corporations to be granted their extraordinary powers and privileges, such as limited liability principles, rests on their contribution to public good, despite its indirect nature.

Out of the many, an example in this sense could be drawn from the JP Morgan Chase's reporting. The tone of such reporting, analysed by Merryn Paynter and Abdel K. Halabi, denotates a hero-epic ethos particularly evident in those company's statements that emphasized the salvific role that JP Morgan played in the aftermath of the Global Financial Crisis in 2008.[248] Quoting the commentary "JP Morgan Chase did everything it possibly could do to help during this time".[249] The report's narrative continued describing these efforts, including the fact that they acquired assets from both Bear Stearns and Lehman Brothers who had failed as a result of the crisis and loaned billions of dollars to US state governments, municipalities, hospitals, and schools to minimise disruption to the US and global economy. As pointed out by Merryn Paynter & Abdel K. Halabi,[250] these storytelling strategies served to draw attention to the company's resilience and heroic actions that had allowed it to withstand the crisis and the nobleness of its endeavours, by rescuing others in need and averting a much greater disaster.

Specific case aside, such kind of narratives are nothing but expressions of that 'existential need' of justification, that the corporate is performing in the interest of society. More specifically, those duties of transparency and of veracity of the information, imposed in the form of due-diligence and of disclosure duties that the EU currently promotes and presents as attempts to shape business in more sustainable ways, represent little more than the corollary stemming from said 'existential need' upon corporates to demonstrate their actual fulfilment of a positive role for society. In this sense, one can also read the business' 'ethical' reasons in going green, to be a good member of society.[251]

Barkan's analysis of the U.S. experience in the nineteenth century is again of help.[252] Precisely, he emphasized that because of the emergence of liberal economic governments with limited powers of interventions, standardized auditing and reports turned to be the sole mechanisms that allowed a governmental public oversight over the way corporates manage the economy. And to distinguish between those combinations of conditions that were reasonable, or should have been, for economic growth and those that were not. As the U.S. Industrial Commission stated, "the purpose of

[248] Paynter, Halabi, 'Corporate Responsibility Reporting and Storytelling', cit., 142.
[249] JP Morgan Chase & Co LLC (2018a) Annual Report. JP Morgan Chase & Co, p 27.
[250] Paynter, Halabi, 'Corporate Responsibility Reporting and Storytelling', cit., 142.
[251] See above discussion on CER.
[252] Barkan, *Corporate Sovereignty*, cit., 61 passim.

such publicity is to encourage competition when profits become excessive, thus protecting consumers against too high prices and to guard the interest of employees by a knowledge of the financial condition of the business in which they are employed".[253]

To put it bluntly, given the assumption that private could have organised the productive relations of society better than the public sphere, said duties were (and essentially are) meant to demonstrate such assumption. The difference lying, at best, in quantitative social-consistency thresholds for the equation profit-public welfare to be met: raw profit in the nineteenth-twenties century; profit conducted in a, so to speak, social way today. Sustainability laws determine such further conditions for the traditional equation to be maintained. Hence, a higher complexity in the CSR reporting itself in light of more criteria to be met.

In conclusion, CSR/CER mechanisms, such as duties of disclosure, are arguably beneficial for the public being potential drivers towards more sustainable and more social-concerned, or 'less harmful' to use a more critical wording, ways of doing business. However, as the historical roots of such duties demonstrate, their very rationale is coherent with a traditional understanding of corporate social commitment. Hardly then, one could consider them as a real challenge to conventional liberal models of business.

12 The 2022 EU Commission's Proposal for a Directive on Corporate Sustainability Due Diligence. Something new under the sun?[254]

Before concluding, few final considerations should be paid to the recent efforts undertaken by the EU Commission in imposing substantive requirements on companies incorporated or active in Europe. More precisely, to a kind of requirements aimed at directly interfering with the governance structure of the corporate. Said measures should be framed within the 2018 'Action Plan: financing Sustainable Growth'[255] and above all, the new course of action inaugurated by the Ursula von der Leyen 'Political' Commission (2019-2024) in green finance and sustainable corporate governance through the adoption of the 2019 landmark political act 'European Green Deal'[256] and the 2021

[253] U.S. Industrical Com-mission, *Preliminary Report on Trusts and Industrial Combinations*, 6.
[254] The expression has biblical roots (Ecclesiaste (1, 10) from Latin *nihil sub sole novi*). However, here it is meant to recall the notable (and slightly more modern) historical work of John R McNeill, *Something New Under the Sun: An Environmental History of The Twentieth Century World* (W W Norton & Company 2001) for thematic coherence. This expression has also inspired the recent novel from Alexandra Kleeman, *Something New Under the Sun* (Random House Publishing Group 2021), on climate change.
[255] Communication from the Commission 'Action Plan: Financing Sustainable Growth', COM(2018) 97 final, 8.3.2018.
[256] Communication of the Commission, The European Green Deal, COM/2019/640 final, 11.12.2019.

Communication on 'Strategy for Financing the Transition to a Sustainable Economy'.[257] The goal of these initiatives is to make the EU the global standard setting in the sector of sustainable finance and sustainable corporate governance, through extra-territorial application, to secure the future of EU business while addressing the existential challenge posed by sustainability.[258]

Following this strategic commitment and backed by a growing civil[259] and political consensus,[260] the Commission has adopted a Proposal for a Directive on Corporate Sustainability Due Diligence (CSDD), published on the 23rd of February 2022, and presented by Didier Reynders as a "real game changer in the way companies operate their business activities throughout their global supply chain".[261] Alongside duties of disclosure,[262] CSDD establishes human rights due-diligence obligations and environmental mitigation impact obligations[263] and, particularly, it establishes a general duty of care, requiring company directors and executives to take into account sustainability matters in fulfilling their obligations to act in the best interest of the company. The CSDD also

[257] Communication from the Commission 'Strategy for Financing the Transition to a Sustainable Economy, COM(2021) 390 final, 6.7.2021.

[258] See Sjåfjell, Beate, Reforming EU Company Law to Secure the Future of European Business (March 4, 2021). University of Oslo Faculty of Law Research Paper No. 2021-05, Preprint of article in European Company and Financial Law Review, 2/2021., Nordic & European Company Law Working Paper No. 21-13, Available at SSRN: https://ssrn.com/abstract=3797685.

[259] See for instance the EU-funded project on 'Sustainable Market Actors for Responsible Trade (SMART), Beate Sjaŋell, Jukka T. Mahonen, Tonia A. Novitz, Clair Gammager, Hanna Ahlstrom, 'Securing the Future of European Business: SMART Reform Proposals' (7 May 2020). University of Oslo Faculty of Law Research Paper No. 2020-11, Nordic & European Company Law Working Paper No. 20–08, available on SSRN: https://ssrn.com/abstract=3595048. The report identifies the shareholder primacy as a major obstacle to sustainable companies.

[260] See the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), 10 March 2021.

[261] The European Commissioner for Justice, at https://single-market-economy.ec.europa.eu/news/just-and-sustainable-economy-commission-lays-down-rules-companies-respect-human-rights-and-2022-02-23_en. The proposal aims to foster sustainable and responsible corporate behaviour throughout global value chains. CSDD Article 3 imposes the respect for such obligations throughout companies' subsidiaries and global value chains, both upstream and downstream, even if only with regard to so-called 'established business relationships'.

[262] CSDD Article 11.

[263] Namely, Articles 4, 5, 6, 7, 8 and 10. Article 15 imposes climate obligations. Human rights and environmental impacts are defined by referring to a number of international legal sources listed in the Annex to the CSDD.

establishes a robust enforcement apparatus,[264] based on "national supervisory authorities"[265] with the power of, inter alia, ordering appropriate remedial actions[266] and imposing sanctions.[267]

The Proposal envisions a future corporate sustainability due diligence directive that "will set out a horizontal framework to foster the contribution of businesses operating in the single market to the respect of the human rights and environment in their own operations and through their value chains, by identifying, preventing, mitigating and accounting for their adverse human rights, and environmental impacts, and having adequate governance, management systems and measures in place to this end".[268]

Strongly inspired by French[269], German[270] and Dutch[271] bodies of law in the corporate governance realm, the CSDD presents an aspirational ethos that meets the Commission's objective of achieving a sustainable model of business. Such ethos emerges above all from the three provisions directly related to corporate governance,[272] namely CSDD Articles 15, 25 and 26. Article 15 on 'Combating climate change' requires companies "to 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".[273]

Article 25 pertains to the directors' duty of care. This article prescribes that 'when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.'[274] Together with the goal to harmonise the directors' duty of care at the EU

[264] CSDD Articles 16, 17, 18, 19, 20, 21, and 24.
[265] CSDD Article 17.
[266] CSDD Article 18(4).
[267] CSDD Article 20. A preference toward remedial solutions emerges from Article 20 since it rules that the authorities under Article 17 must take into account company's compliance and remedial efforts when imposing sanctions.
[268] CSDD, p. 3, "Explanatory Memorandum. 1) Context of the proposal".
[269] The French 'Duty on Vigilance Act' of 2017 (Article L. 225-102-4 of the French Commercial Code) and the '*Plan d'action pour la croissance et la transformation des entreprises*', so-called 'PACTE' law of 2019.
[270] The German Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chain (Lieferkettensorgfaltspflichtengesetz – LkSG) of 2021.
[271] Dutch Law on child labour (Wet zorgplicht kinderarbeuidm) of 2019.
[272] For a detailed analysis see Pietrancosta, Alain, Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives (July 20, 2022). European Corporate Governance Institute - Law Working Paper No. 639/2022. For a critical reading see, European Coalition for Corporate Justice 'European Commission's proposal for a directive on Corporate Sustainability Due Diligence. A comprehensive analysis', Legal Brief 1 Apil 2022, at https://corporatejustice.org/publications/analysis-of-eu-draft-directive-on-due-diligence/.
[273] CSDD Article 15.
[274] CSDD Article 25(1).

level, it also links the idea of company's best interest with that of implementing a sustainable governance.

Article 26 relates to the setting up and the oversight of due diligence. It requires that the directors take due consideration for relevant input from stakeholders and civil society organisations when putting in place and overseeing the due diligence actions of the company. In the words of Conac Pierre-Herni, "this calls in practice for an involvement of NGOs into the decision-making process of companies. A major shift in capitalism"[275].

Overall, there is ground to argue that such Proposal could not just represent a landmark step in the direction of minimising the negative impacts of business on social spheres, such as workers, communities and the environment, and of advancing accountability and justice for harm. Furthermore, it seems to pose a challenge to traditional liberal views of capitalism. This seems so, when considering that contrary to traditional CSR enforcement mechanisms, it directs company behaviours towards specific obligations. And it dictates an enforcement apparatus to ensure compliance, beyond voluntary schemes. The overall impression is that the social and environmental ethos seems able to challenge, at least culturally, the social norm of shareholder primacy, by presenting a model of business no longer "striving to be the best company in the world but the best company for the world". Hence, one that forces corporates, in a not far future to change their 'condition of existence' by seeking for a legitimisation through proactive engagement towards both the environment and the society (or more precisely, outside dualizations, towards strong sustainability).

Whether this Proposal and more broadly the new political course of the EU would achieve such goals falls beyond the scope of this investigation.[276] As properly noted by Conac, the underlying issue pertains to the due-diligence obligations' costs that could backfire EU's business in a scenario of global competitiveness.[277] And, more generically, on the capability of the current (and the ensuing one) 'political' Commission's capability to harmonise its aspirational goals with practical business-related concerns.[278] Whether this would be the actual case, only the future could say.

[275] Conac Pierre-Henri, "Sustainable Corporate Governance in the EU", cit. 115.
[276] The analysis on the implementation of the French PACTE suggests a caution approach in this sense. Despite the social ethos of this French legislation (e.g. the notion of corporate *raison d'etre*, art. 169 PACTE), as of now its practical implementation does not seem to challenge firms' profit-oriented priorities.
[277] Conac Pierre-Henri, "Sustainable Corporate Governance in the EU", cit. 115-117.
[278] In this respect, and with specific focus to the different, yet related aspect of the EU industrial strategy as envisioned by the Green Deal, see Stefano Porfido (2021) 'Pragmatic Considerations vs Normative Goals. The New EU Industrial Strategy', in Rivista Quadrimestrale di Diritto dell'Ambiente 1, 29 – 43.

CONCLUDING OBSERVATIONS

The aim of this work was to provide a picture of the underlying structural reasons that hamper new and strong sustainable models of business vis-à-vis harm to nature. To this end, it first presented the background order of issues concerning the unsustainability of property law. Then, it gazed into the entangled relations of power between the State and the corporations and their legitimising conditions. A specific anthropological notion of 'corporate sovereignty' was adopted and discussed to highlight the underlining processes of negotiation between the State and the corporate, that establish the shift of power between these two subjects, from the former to the latter.

Said shift is however unsustainable, at least in the strong meaning of sustainability, for it is justified on the basis of a 'converge of interests' between the corporate and the State declined in mere economic terms.

The analysis then framed this convergence within the broader discourse on the relation between governmentality and economy. The historical evolution of the corporate towards privatisation reflects the establishment of forms of economic governmentalities. In the background, the idea of public welfare declined at the advantage of private interests stands. Hence, the corporate's pursuit of its own private profit legitimises its powers and privileges, on the basis of the equation private profit-public welfare.

The strength of the social norm of 'shareholders primacy' reflects this equation. As of now, reality shows that, within corporate law, profit remains the core legal corporate's ultimate end, as well as the corporate managers' objective. In short, stakeholder value is relevant insofar as it is a means to create profit. As Stone warned, responsibility should not be confused with altruism.[279] Legal initiatives and instruments in the CSR and CER field confirmed this.

Although glimmers of change appear to be at the horizon, as the CSDD seems to promise, this work should have made clear that whatsoever innovation towards a strong sustainable model of business has to cope with economic declinations of public welfare. More specifically, what a strong sustainability model of doing business seems to require is not a radical abandonment of this declination tout court, but rather to concretise it outside the logic of infinite economic growth. In other words, this means reshaping the (still lively) Friedmannian argument that it is precisely by making the maximum amount of lawful profit that the company can best act in consideration for the

[279] Christopher D Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (Waveland Press 1991), 111.

interests of the society or the environment.[280] In sustainable terms, these would be 'by making the maximum amount of lawful profit within the Hearth limits'.

Adding these few words implies making an epochal cultural shift as the one occurred between the eighteenth and the nineteenth century. Since at that time there were prestigious personalities fostering the shift, such as Adam Smith, likewise ours has its own influential quests for a change stemming from scientific evidence, the voices of growing bottom-up social movements[281] and distinguished scholars' work. Mariana Mazzucato,[282] Katharina Pistor,[283] Kate Raworth,[284] Tim Jackson,[285] and Lieven de Cauter[286] are just few examples of distinguished voices that, coming from different perspectives, row together for such change to take place.[287]

Where should this shift ultimately lead? In the words of Joseph Guth, "if we are ever to develop an ecologically sustainable economy (…) our law must enforce a limit to the scale of environmental damage that we are collectively permitted to inflict upon the Earth. This would represent a transformation in the law's understanding of the public welfare, and a dramatic evolution in the structure of property law".[288]

This work's conclusions refer us back to our starting point: property law. Precisely, challenging economic imperatives of infinite growth should lead to more than adding external limits to property. It requires a more radical reshaping of property law in a way that ingrains ecological limits within its legal structures. A growing scholarship has started to engage with this challenge. For instance, distinguished contributors to 'Property Rights and Sustainability' attempt, from different

[280] Friedman 'The Social Responsibility of Business Is to Increase Its Profits', cit.
[281] Reference is for instance to the Friday for Future movement, see at https://fridaysforfuture.org/. On this and other social movements taking place in our current times, see the analysis from Eva von Redecker, 'Revolution for Life' (S. Fisher 2020).
[282] She dedicated extensive work on rethinking the role of government within the economy and society. In addition to her foundational Mariana Mazzucato, *The Entrepreneurial State: Debunking Public Vs. Private Sector Myths* (Penguin Books 2018), see also the recent Mariana Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (Penguin UK 2021).
[283] In Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2020), she offered a comprehensive analysis on the role of law in enabling processes of capital creation within broader political economy of wealth and inequality.
[284] In *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist*, cit., Kate Raworth offers a model for sustainable development – shaped like a doughnut or lifebelt – combining the concept of planetary boundaries with the complementary concept of social boundaries.
[285] Tim Jackson, *Prosperity Without Growth: Economics for a Finite Planet* (Routledge 2011).
[286] Lieven de Cauter, *Ending the Anthropocene: Essays on Activism in the Age of Collapse* (Nai010 Publishers 2021).
[287] In addition to the authors already quoted in this work, see also the number of contributions in Katharina Pistor & Guy Canivet (eds) 'Rethinking Capitalism' (2022) 4/3, *Revenue Européenne du Droit*, at https://geopolitique.eu/en/issues/rethinking-capitalism/ accessed 12/03/2023.
[288] Guth, 'Law for the Ecological Age' cit, 511.

approaches and views, to reconcile property laws with the more sophisticated social goal articulated by sustainability. The goal, more specifically, is that of developing a property regime with inherent responsibilities towards nature, one that reconciles individual freedom with ecological harm.[289] This is not an easy task. In synthesis, this goal requires nothing less than a new property Sustainable law.

[289] David Grinlinton and Prue Taylor, *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers 2011). See also Viñuales, *The Organisation of the Anthropocene,* cit..