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Sustainable tax governance: a shared responsibility

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Abstract

Governments and businesses share the responsibility for sustainable development, the environmental, societal and economic aspects of which are expressed in Sustainable Development Goals (SDGs) and environmental, social and governance factors (ESG). Tax is fundamental to collaborative steps towards sustainability and should therefore be integrated into both public and corporate sustainability agendas. Corporate tax governance should reflect the organisation's purpose, values and principles geared towards its sustainability commitment. Sustainable tax is a boardroom responsibility. Companies committing to SDG and ESG objectives should build on CSR, which should inform sustainable corporate (tax) governance. This requires that the ethical obligation to go beyond (strict) compliance with the law be viewed as an obligation to pay a fair share of tax and be proactively transparent to enhance accountability to a wide set of stakeholders. Important challenges are the change of mindset needed to integrate tax into the ESG framework and the design of a (public transparency) benchmark which provides detailed tax data to enable a proper analysis of corporations' substantive tax performance.

Keywords: sustainability, public governance, corporate governance, stakeholder theory, shareholder primacy, taxes, tax governance, Sustainable Development Goals (SDGs), environmental, social and governance factors (ESG), CSR, beyond compliance, fair share, accountability, transparency, public country-by-country reporting

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1. INTRODUCTION

Sustainability is a highly debated topic in a world facing many environmental and social challenges. Governments have to promote sustainability, which is fleshed out in the United Nations 17 Sustainable Development Goals (SDGs). Their governance should therefore be geared to sustainable development. Governments cannot achieve these goals without the help of society and the business community. Corporations indeed have a huge impact on the environment, society and the everyday lives of countless people. Sustainable development is therefore a shared responsibility.

Corporations should embed sustainability in their purpose which determines their corporate governance. This regards management and oversight as well as accountability and transparency – being accountable to a wide set of stakeholders becoming ever more important. Rather than SDGs, often environmental, social and governance (ESG) factors are used, especially by (institutional) investors who focus on ESG reporting. However, reporting rules may invite strategic compliance, for example with disclosure rules, which may crowd out ethics.

Here the concept of corporate social responsibility (CSR) might be useful, understood as a commitment to 'do the right thing'. Companies have an ethical responsibility to society (and environment) which is captured in the voluntary obligation to go beyond (strict) compliance with the law.

What about taxation? Unfortunately, the relevance of taxation for sustainable development in the broad sense is often overlooked, but they are clearly linked. Taxes provide governments with the resources to achieve SDGs. Thus the payment of a fair share of tax is a token of shared responsibility for sustainable development. Tax should therefore be integrated into corporate governance oriented to sustainability. However, often multinational enterprises with a strong ESG agenda still engage in aggressive tax planning. Tax seems thus disconnected.

The foregoing can be brought together in the following research question: how does corporate tax governance reflect companies' shared responsibility for sustainable development?

To answer this question, first the concept of public governance and the way it is nowadays oriented to sustainable development (SDGs) will be analysed – including the need for cooperation with the business community. The next step will be a closer look at the way taxation can serve to attain SDGs (sustainable public tax governance). Tax payments by (corporate) citizens enhance governments' capacity to attain sustainable development. In which way does corporate governance reflect the shared responsibility for sustainability? And is there an intrinsic connection between public and corporate governance (also) in this respect? It will be shown that a corporation's purpose determines its governance, an important component of which is accountability, and its prerequisite transparency, to stakeholders. ESG-metrics are increasingly used by, for example, (institutional) investors. Corporate sustainability can follow the course set by CSR. CSR's ethical obligation of going 'beyond compliance with the law' embodies an important ethical dimension of corporate governance. Its meaning will be elaborated on for corporate tax governance, after having examined the need for integration of tax in corporate sustainability. This will be fleshed out for the material (paying a fair share) and procedural tax governance aspects (tax transparency).

Thus, it will be argued that corporations as powerful actors bear responsibility for sustainable development which is a shared responsibility since sustainable development is only to be achieved by cooperation with governments and other actors.

Moreover, tax is fundamental to collaborative, global steps towards sustainability and should therefore be integrated in both public and corporate sustainability agendas and should therefore not be left out of mainstream discussions of sustainable development.

Thirdly, sustainability corporate (tax) governance should build on CSR. It is argued that corporations' obligation towards society requires them to share a government's responsibility to provide a sustainable tax system. Therefore, the ethical CSR obligation entailing going beyond (strict) compliance translates into the obligation to pay a fair share of tax and be proactively transparent.

As for methodology, an interdisciplinary approach is necessary which requires a review of (corporate) governance, law and CSR and sustainability literature. The interdisciplinary character of the article is capped off with some philosophical insights.

2. SUSTAINABILITY, TAX AND GOVERNANCE

The world is facing a number of crises: rising inequality, increasing personal insecurity, and slow economic growth, climate change, polarisation in society and politics and low levels of trust in politics and business to name but a few.[1] Many of these issues appear to be closely connected to the design of tax systems. Moreover, tax avoidance and evasion by large corporations and the rich has shifted the costs public infrastructure largely onto less well-off people and small local businesses.[2] Powerful lobbies advocating wealthy and corporate taxpayers' interests often successfully redirect public policy and legislation according to their needs. Governments are oftentimes willing to cooperate with businesses, to advance their own economic policy agendas. Many of these problems concern sustainability issues; they adversely impact the sustainability of the environment and societies.

Apparently, both government and corporations are in need of (better) sustainability governance which should interact with their tax governance. The term 'governance' broadly refers to the various ways through which social life is coordinated. Governance covers the activity and process (or complex of processes) of ruling – often involving a number of levels or layers.[3] The term is typically used when examining the quality and effectiveness of rule and management of organisations and the systems for doing this.[4]

Governance is aimed at the realisation of the organisation's objectives. Importantly, governance has an internal and an external dimension. It is about relationship(s) with individuals (and organisations) internal and external who can affect or are affected by an organisation's objectives and actions. Governance thus has a relational component. After all, organisations – like people – are not islands; they are part of a larger whole. An organisation impacts and is impacted by others – organisations (for example,

[1] For a detailed overview, see Martin Wolf, *The Crisis of Democratic Capitalism* (Allen Lane, 2023).
[2] Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press, 2011) 226-230; Andrew Heywood, *Global Politics* (Palgrave Macmillan, 2nd ed, 2014) 129-130.
[3] Heywood, above n 2, 129-130.
[4] Rod Hague and Martin Harrop, *Comparative Government and Politics: An Introduction* (Palgrave Macmillan, 2007) 9.

businesses, government, civil society organisations, traditional and social media) and individuals alike. These affected parties might want to hold the organisation to account. Governance therefore comprises management and oversight, but also accountability and transparency towards relevant stakeholders.[5] Communicating and being accountable in an open manner for the benefit of stakeholders is often seen as one of the safeguards for achieving the organisation's objectives. It is the responsibility of the top management of an organization to achieve these objectives and the activities undertaken to that end: directing, controlling, monitoring, accountability and open communication. This goes for public sector and private sector organisations alike; that is, these are characteristics of both public and corporate governance.

3. PUBLIC GOVERNANCE

3.1 Purpose, accountability and transparency

This article mainly deals with sustainable corporate tax governance but there is a clear connection to governance in the public sector. Here, too, the goal is to ensure organisational effectiveness. In the context of public administration, (public) governance can be roughly defined as the exercise of political authority and the use of institutional resources to manage society's problems and affairs.[6]

The purpose, the *raison d'être*, of government is to promote the public interest and provide the goods and services that society needs. This requires good public governance to enhance decision-making to enact and implement policies that deliver public goods. Good public governance is the capacity to have public services delivered and is strongly related to concepts such as state capacity, quality of government and government interaction with the private sector and civil society.[7] Good public governance is also open and democratic. In a democracy it is a basic requirement that legislation and public administration be responsive to citizens' concerns, expectations and interests.[8] Responsiveness can help restore trust in government. It requires government to go beyond minimum norms of legality (constitutionality) and formal democratic decision-making procedures.

But many public problems are too complex to be solved and handled by a government alone. Cooperation is then needed between public agencies and the people and organisations affected, and more generally, society (including non-governmental organisations (NGOs)). Arguably, companies, and in particular large corporations, may play an important role here. Governments and corporations are partners in the business of sustainability; both are powerful institutions capable of providing sustainable solutions to the most serious problems of today and tomorrow. They therefore bear a shared responsibility.

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[5] R Edward Freeman, Jeffrey S Harrison, Andrew C Wicks, Bidhan L Parmar and Simone de Colle, *Stakeholder Theory: The State of the Art* (Cambridge University Press, 2010); Hague and Harrop, above n 4, 364-366.

[6] World Bank, *Managing Development: The Governance Dimension, A Discussion Paper* (World Bank, 1991) 1-2.

[7] Bo Rothstein, 'Good Governance' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press, 2012) 143, 143-144.

[8] For the idea of responsiveness understood as civil servants 'respond[ing] to the needs and demands of the public – especially clients of programs', see B Guy Peters, *The Politics of Bureaucracy: An Introduction to Comparative Public Administration* (Routledge, 6th ed, 2010) 265.

Liberal-democratic states employ two classical institutional mechanisms for making executive government accountable and keeping it under control: 'oversight by elected representatives and legal adjudication by an independent judiciary'.[9] The democratic mechanism of periodical open elections is nowadays supplemented by other mechanisms to involve citizens in inclusive decision-making processes to reinforce the legitimacy of the usual electoral democracy. Civil society itself should directly become involved in decision-making by way of participation and consultation. Government is accountable to the general public, but this is an increasingly complex and challenging task as publics are 'becoming ever more diverse as a result of increasing institutional differentiation, pluralization of interests, and proliferation of stakeholder groups'.[10] Perhaps states collaborating in international and supranational organisations even face a more daunting task in this respect. Transparency, as one of the principal democratic values, should help citizens to gain a clear insight and understanding of the democratic decision-making processes. 'It allows citizens to control the activity of their elected representatives, to verify respect for legal procedures, to understand decision-making processes, and to trust political institutions.'[11] The Covid-19 pandemic has created a new sense of urgency. The vulnerability of societies and the global economy exposed by the pandemic again showed the need for better governance for sustainable development's societal and economic aspects – on top of the threat of climate change.[12]

3.2 Public governance and sustainability

Public governance aims to create safeguards for the realisation of the public organisation's objectives. Sustainability is an important objective of government today. The classic definition of sustainable development applies can be found in the so-called Brundtland Report. Sustainable development 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[13] Solutions to current problems must therefore be future proof. 'Future proof' is thus the most obvious, but very abstract, meaning of sustainability, which needs to be further elaborated in more detail which will next be done in terms of Sustainable Development Goals. Public governance must be aligned with this sustainability objective. In section 5.2 below corporate responsibility for sustainable development will be discussed in terms of ESG.

The broader theme of sustainable development is broken down into the United Nations' 17 Sustainable Development Goals. The United Nations' ultimate objective is to tackle today's global challenges, including poverty, systemic inequalities, climate change and biodiversity loss. The SDGs were formulated in the resolution *Transforming Our World: The 2030 Agenda for Sustainable Development* adopted by the United Nations General Assembly on 25 September 2015. Before formulating the SDGs in concrete terms, the resolution states that this UN Agenda has three intertwined and balancing

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[9] Christopher Hood, 'Controlling Public Services and Government: Towards a Cross-National Perspective' in Christopher Hood, Oliver James, B Guy Peters and Colin Scott (eds), *Controlling Modern Government: Variety, Commonality and Change* (Edward Elgar, 2004) 3, 5.

[10] Carmen Sirianni, *Investing in Democracy: Engaging Citizens in Collaborative Governance* (Brookings Institution Press, 2009) 16.

[11] Daniel Innerarity, *Governance in the New Global Disorder: Politics for a Post-Sovereign Society*, tr Sandra Kingery (Columbia University Press, 2016) 89.

[12] John Morrissey and Patrick Heidkamp, 'Sustainability after COVID-19: Pillars for a Just Transition' (2022) 5(2) *Environmental Sustainability* 261.

[13] United Nations, *Report of the World Commission on Environment and Development: Our Common Future* (United Nations, 1987) 15 (Brundtland Report).

dimensions of sustainable development – 'the economic, social and environmental'. To achieve sustainable development, five 'P's' are then guiding: 'People, Planet, Prosperity, Peace and Partnership'.[14] This last 'P' points to an important governance aspect: collaboration among all stakeholders. Achieving the SDGs requires cooperation among many actors, such as governments, intergovernmental organisations, non-governmental organisations, businesses and society at large. Governments and the business community should therefore partner.[15]

The 17 SDGs call for action by all countries, poor, rich and middle-income to promote prosperity while protecting the planet. They were agreed upon by countries affiliated with the United Nations. The goals came about based on global input from organisations and individuals. Those goals therefore cover a broad palette and address major global issues, including poverty and hunger, climate action, affordable and sustainable energy, industry, innovation and infrastructure, life in water and on land, inequality, sustainable cities and communities, and more. Each of the 17 goals is further fleshed out into a number of specific targets – 169 in all.[16] These targets require international cooperation and thus proper governance of the various states, international (governmental) partnerships and NGOs, etc. Sustainability must thus be understood as a comprehensive concept. It is about sustainable development of all countries – not just developing countries. Moreover, the SDGs make it clear that sustainability is not limited to concern for the environment and climate change and reducing energy consumption, as it used to be.

4. PUBLIC TAX GOVERNANCE AND SUSTAINABILITY

Public tax governance is a part of public governance, namely that part that relates to taxation. Transparency serves accountability of the tax authorities and offers 'the public … a mechanism to enable it to check up on these authorities'.[17] Responsiveness to citizens' concerns, expectations and interests requires taxation for the benefit of society (the vertical dimension of the social contract).[18] Government, especially the legislature, has primary responsibility for the integrity of the tax system and has to take sustainability, one of the major problems of our time, on board.[19] Therefore, tax governance will also have to pay attention to sustainable development. Taxes can be employed to enhance sustainable development in three different ways, since taxation carries three functions, namely the budgetary, redistributive and regulatory (or instrumental) functions. Taxation provides government with revenue to pay for all kinds

[14] United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Resolution A/RES/70/1, 25 September 2015 <https://sdgs.un.org/documents/ares701-transforming-our-world-2030-agen-21254>.
[15] See Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press, 2018) 8: 'Private corporations are part of the attainment of that public purpose'.
[16] See United Nations, 'Make the SDGs a Reality' <https://sdgs.un.org/>.
[17] Judith Freedman, 'Restoring Trust in the "Fairness" of Corporate Taxation: Increased Transparency and the Need for Institutional Reform' in Sjoerd Goslinga, Lisette van der Hel-van Dijk, Peter Mascini and Albert van Steenbergen (eds), *Tax and Trust: Institutions, Interactions and Instruments* (Eleven International Publishing, 2018) 121, 124.
[18] This the reciprocal relationship between state/government and citizen/taxpayer; see Hans Gribnau and Carl Dijkstra, 'Social Contract and Beyond: Sociability, Reciprocity and Tax Ethics' in Robert F van Brederode (ed), *Ethics and Taxation* (Springer, 2020) 47.
[19] Tax legislation should be implemented in an effective, efficient and fair way, which points at another dimension of public tax governance (which is multilevel governance). See Gyöngyi Végh and Hans Gribnau, 'Tax Administration Good Governance' (2018) 27(1) *EC Tax Review* 48.

of public goods and services, it is an important means of redistribution of income and wealth. Lastly, in the regulatory state taxation is increasingly relied on to encourage citizens to act in ways deemed desirable by the state – and to (financially) discourage other types of behaviour.[20]

Consequently, taxes provide governments with the resources to achieve SDGs: the budgetary function can thus serve prosperity and wellbeing.[21] Taxes may for example be used to finance policies that aim to reduce poverty (SDG 1: 'no poverty') or to improve the health care system (SDG 3: 'good health and wellbeing') or the educational system (SDG 4: 'quality education'). Second, the redistributive function may be employed for combating income and wealth inequalities (SDG 10 'reduced inequalities'). With regard to the regulatory function, taxes may for example function as a tool to promote access to clean energy (SDG 7: 'affordable and clean energy') and climate friendly technologies (SDG 13: 'climate action').[22] Sustainable tax governance may take the form of introducing tax incentives or disincentives in existing regulations and specific taxes, such as environmental taxes and sugar taxes.[23] A system change may even promote both SDGs 13 and 10: a more sustainable society can be promoted by a shift from taxing labour to environmental taxes which would also reduce inequality.[24] Taxation is thus a sustainability issue par excellence.

However, the introduction of tax legislation to promote sustainability should be carefully considered.[25] First, the rule of law should be respected, which fits in well with target 16.3 'promote the rule of law' of SDG 16 ('peace, justice and strong institutions'). In this respect, human rights standards 'provide important individual benchmarks against which to evaluate specific tax policies'.[26] Many tax policies nowadays aim at the realisation of SDGs which comprise economic, social and cultural rights.[27] Also (other) rule of law preconditions must be met: the legislator should respect important values such as legal certainty, equality (distributive justice), and proportionality. Moreover, the use of tax incentives involves (another) balancing act, as excessive use

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[20] Reuven S Avi-Yonah, 'The Three Goals of Taxation' (2006) 60(1) *Tax Law Review* 3; Hans Gribnau, 'Why Social Responsible Corporations Should Take Tax Seriously' in Karina Kim Egholm Elgaard, Rasmus Kristian Feldthusen, Axel Hilling and Matti Kukkonen (eds), *Fair Taxation and Corporate Social Responsibility* (Ex Tuto Publishing, 2019) 103, 107-113 ('Why Social Responsible Corporations Should Take Tax Seriously').

[21] Major international organisations, including the IMF, OECD, and the World Bank Group have recognised this aspect of domestic revenue mobilisation; see Alice Pirlot, 'A Legal Analysis of the Mutual Interactions between the UN Sustainable Development Goals (SDGs) and Taxation' in Cécile Brokelind and Servaas van Thiel (eds), *Tax Sustainability in an EU and International Context* (IBFD Publications, 2020) 87, 90-92 (who calls this 'indirect interaction').

[22] For example, see Annette Nellen and Monika Miles, 'Taxes and Sustainability' (2007) 2(4) *Journal of Green Building* 57.

[23] Ricardo García Antón and Cihat Öner, 'Public Health Taxes: Should Sugar-Sweetened Beverages Be Taxed? If So, How?' (2023) 15(4) *World Tax Journal* 643; Bret N Bogenschneider, 'A "Fool" and His Sugar-Sweetened Beverage are Soon Taxed' (2017) 38(2) *Liverpool Law Review* 207.

[24] The Ex'tax Project for example, proposes to tax natural resources and pollution, and use 'the revenues to lower the tax burden on labour and increase (social) spending': Ex'tax Project Foundation, 'The Ex'tax Project' <https://ex-tax.com/>. See also Edoardo Traversa, 'The Tax Implications of Global Warming: Preparing for a Change of Climate' (2020) 48(5) *Intertax* 468.

[25] See Mart van Hulten, 'Aiming for Well-being through Taxation: A Framework of Caution and Restraint for States' (PhD Thesis, Tilburg University, 2019).

[26] Philip Alston and Nikki Reisch, 'Introduction: Fiscal Policy as Human Rights Policy' in Philip Alston and Nikki Reisch (eds), *Tax, Inequality, and Human Rights* (Oxford University Press, 2019) 1, 19.

[27] Olivier De Schutter, 'Taxing for the Realization of Economic, Social, and Cultural Rights' in Philip Alston and Nikki Reisch (eds), *Tax, Inequality, and Human Rights* (Oxford University Press, 2019) 59.

may cause a crowding-out effect of intrinsic motivations – such as ethical considerations – to comply with the law ('crowding out ethics') – or intrinsic reasons to reduce unsustainable conduct.[28] Ideally, rewarding good behaviour via tax incentives is aimed at internalisation; resulting in an internal drive to do what is right, instead of being driven merely by for example a cost-benefit analysis, good relations with the (tax) authorities or reputational concerns (strategic, extrinsic motivation).

Furthermore, governance requires ensuring policy coherence.[29] Many environmental and societal problems can only be solved by multiple sectors interacting in new ways, possible generating multiple impacts (multiplier effect).[30] An interesting example is the US *CHIPS and Science Act* which requires semiconductor companies that receive tax credits to reinvest profits in improved working conditions and energy-efficient supply chains.[31] Policy coherence is not an easy job given the enormous complexity of the tax system and the sometimes contradictory intended and unintended effects of behavioural incentives. An unbalanced system of tax incentives, however, can lead to redistribution 'upwards', as with the Dutch tax incentives to promote the use of hybrid and electric vehicles to reduce carbon emissions (SDG 13).[32] This is in stark contrast with the redistributive function of taxation.[33]

Strong institutions (SDG 16) enhance better tax laws and regulations at the domestic and international level. With respect to domestic tax policy-making there should be equal opportunities for individuals to participate in a democratic society ('social sustainability').[34] The idea of equal opportunities to participate is also of relevance at the international level. A sustainable international tax system requires good

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[28] Benjamin van Rooij and Adam Fine, *The Behavioral Code: The Hidden Ways the Law Makes Us Better…or Worse* (Beacon Press, 2021) 59-60.

[29] Coherence can be identified as one of the underlying basic values of the SDGs and their underlying targets, the others being equity and equality, and environmental protection. These values show 'the contradictions and complexity of the SDGs' which are 'immanent challenges for creating sustainable tax policies': Pernilla Rendahl and Katarina Nordblom, 'Identifying Challenges for Sustainable Tax Policy' in Cécile Brokelind and Servaas van Thiel (eds), *Tax Sustainability in an EU and International Context* (IBFD Publications, 2020) 393, 400.

[30] See Mariana Mazzucato and Rainer Kattel, 'What Mission-Driven Government Means', *Project Syndicate* (7 May 2024) <https://www.project-syndicate.org/commentary/mission-driven-government-what-it-means-and-common-misconceptions-by-mariana-mazzucato-and-rainer-kattel-1-2024-05>.

[31] The White House (US), 'CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China' (Fact Sheet, 9 August 2022) <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/>.

[32] In the Netherlands, the generous tax incentives for the purchase of often (expensive) luxury hybrid (plug-in) and electric cars benefited mostly wealthy people and employees who drove a car paid for by their employer. Moreover, most drivers of these cars actually (still) drove on petrol since their employers paid for the costs (fuel included) of the car; they had no incentive to drive electric. See the report of the Netherlands Court of Audit (Algemene Rekenkamer), *Autobelastingen als Beleidsinstrument. Effecten van elektrische auto's en bestelauto's voor belastingopbrengsten, luchtkwaliteit en klimaat* (*Car Taxes as a Policy Tool. Effects of Electric Cars and Vans on Tax Revenues, Air Quality and Climate*) (2020) <https://www.rekenkamer.nl/archief/2020>.

[33] In France, for example, the government's plan to increase the carbon tax which is particularly inegalitarian' was one of the causes massive protests of the *gilets jaunes* ('yellow vests'); Thomas Piketty, *A Brief History of Equality*, tr Steven Rendall (Harvard University Press, 2022) 11.

[34] Yvette Lind, 'Political (Tax) Equity in a Global Context as a Part of Social Sustainability: Some Guidance for Researchers Who Wish to Explore Democratic Implications on Tax and Spending Decisions' in Cécile Brokelind and Servaas van Thiel (eds), *Tax Sustainability in an EU and International Context* (IBFD Publications, 2020) 175.

international tax governance with responsive, inclusive, participatory and representative mechanisms – also enabling less powerful countries and parties to successfully advance their interests.[35] Sustainable tax governance requires a framework for global and sustainable tax governance that benefits not only Western countries.[36] Moreover, cooperation and in particular the formation and maintenance of partnerships helps to achieve SDG 16, and all other SDGs (SDG 17: 'partnerships for the goals'). This also goes for taxation. There is for example an increasing need for cooperation among states at the international level to counter harmful tax competition and tax evasion and aggressive tax planning by taxpayers.[37] Diminishing tax revenues will (further) hollow out states' capacity to provide public goods and services and negatively impacts distributive justice. This also undermines their capacity to achieve SDGs – for example the reduction of poverty.[38] At this point, public tax governance interacts with the tax governance of companies, in particular those that are committed to sustainability and social responsibility.

5. CORPORATE GOVERNANCE

5.1 Governance: purpose and stakeholders

Corporate governance is 'about management and control, about responsibility and influence, and about supervision and accountability'.[39] Incidentally, there is no single definition of corporate governance, which is not surprising now that views on it are in flux.[40] However, one does see convergence between national corporate governance systems and codes through the work of international organisations.[41]

Corporate governance is aimed at the realisation of the corporation's purpose which therefore determines its governance. The aim of corporate governance is 'to promote the interests of the firm as a whole and, in particular, to assist it with achieving its

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[35] This may also include external assistance for capacity building; see, for example, Sathi Meyer-Nandi, 'Policy Coherence for Sustainable Development in International Tax Matters: A Way Forward for Donor Countries?' in Irma Johanna Mosquera Valderrama, Dries Lesage and Wouter Lips (eds), *Taxation, International Cooperation and the 2030 Sustainable Development Agenda* (Springer, 2021) 63.
[36] Martin Hearson, Rasmus Corlin Christensen and Tovony Randriamanalina, 'Developing Influence: The Power of "the Rest" in Global Tax Governance' (2023) 30(3) *Review of International Political Economy* 841; F Heitmüller, *Combatting Tax Avoidance, the OECD Way? The Impact of the BEPS Project on Developing and Emerging Countries' Approach to International Tax Avoidance* (PhD Thesis, Leiden University, 2024).
[37] Holle and co-authors recognise the need for concerted action of states and corporations and propose a rating of states based on the ratio between their sustainability performance and the corporate tax payments, which allows for a sustainable tax competition: Florian Holle, Madeleine Kockrow and Kira Thuar, '*Der Dualismus der steuerlichen Nachhaltigkeit: Wechselwirkungen zwischen staatlichem und unternehmerischem Handeln*' [2020] (20) *Internationales Steuer- und Wirtschaftsrecht* 809.
[38] 'Corruption, bribery, theft, and tax evasion cost some US $1.26 trillion for developing countries per year': UN, 'Sustainable Development Goals: Factsheet' 8 <https://sustainabledevelopment.un.org/content/documents/8326Factsheet_SummitPress_Kit__final.pdf>. See Robert Bird and Karie Davis-Nozemack, 'Tax Avoidance as a Sustainability Problem' (2018) 151(4) *Journal of Business Ethics* 1009.
[39] Corporate Governance Code Monitoring Committee (Netherlands), *The Dutch Corporate Governance Code 2022* (2022) 5 <https://www.mccg.nl/publicaties/codes/2022/12/20/dutch-corporate-governance-code-2022>.
[40] Jill Solomon, *Corporate Governance and Accountability* (Wiley, 4th ed, 2013) 5.
[41] Jonathan Charkham, *Keeping Better Company: Corporate Governance Ten Years On* (Oxford University Press, 2nd ed, 2005) 7.

corporate purposes'.[42] Purpose is therefore critical to governance serving as 'a coordinating mechanism for long-term ventures and associations'.[43] Corporate purpose determines the structure, conduct and performance of companies. Henderson argues that a deeply held shared purpose 'aligns everyone in the organization around a common mission'.[44]

But what does the concept of (corporate) purpose mean? The British Academy writes: 'The purpose of corporations is to produce profitable solutions for the problems of people and planet'.[45] Additionally companies should not profit from doing harm to others, that is, from producing problems for people or planet. Thus, the company's commitment to sustainability should serve its purpose. Sustainability can either contribute to corporate purpose or can detract from it.[46] Talking in terms of not doing harm shows that the purpose of the company cannot be separated from moral considerations. Accordingly, Charkham argues that the firm's purpose 'is to provide *ethically and profitably* the goods and services people need or want'.[47]

Since corporate governance is value-driven, assisting to realise its purpose which provides deepest values, these rather abstract values have to be fleshed out into the corporation's values and principles which are consistent with corporate purposes. These values form the core of organisational culture.[48] The corporation's governance system should therefore be structured so as to 'align managerial interests with companies' purposes and a set of values and principles necessary to deliver, 'and establish accountability to a range of stakeholders through appropriate board structures'.[49]

According to Mayer the articulation of the (moral) values and principles by which the company will abide is the first component to corporate governance. Precision in their articulation converts purpose statements into truly credible commitments, for example, to sustainability. The second component is '*accountability* and accounting for liabilities attributable to the values and principles'.[50] The company is accountable to its internal and external stakeholders who should be consulted. Accountability 'coupled with the influence of [internal and external stakeholders'] diverse value systems, makes a

[42] Mayer, above n 15, 19.
[43] Dorothy S Lund and Elizabeth Pollman, 'Corporate Purpose' (European Corporate Governance Institute Working Paper Series in Law 711/2023, 2023) 3.
[44] Rebecca Henderson, *Reimagining Capitalism: How Business Can Save the World* (Penguin Books, 2020) 92.
[45] The British Academy, *Reforming Business for the 21st Century: A Framework for the Future of the Corporation* (2018) 24 <https://www.thebritishacademy.ac.uk/sites/default/files/Reforming-Business-for-21st-Century-British-Academy.pdf>.
[46] Robert Eccles, Colin Mayer and Judith Stroehle, 'The Difference Between Purpose and Sustainability (aka ESG)', *Harvard Law School Forum on Corporate Governance* (20 August 2021) <https://corpgov.law.harvard.edu/2021/08/20/the-difference-between-purpose-and-sustainability-aka-esg/>.
[47] Charkham, above n 41, 2 (emphasis in original); see also G20/OECD, *G20/OECD Principles of Corporate Governance* (OECD Publishing, 2015) 47: 'High ethical standards are in the long term interests of the company as a means to make it credible and trustworthy, not only in day-to-day operations but also with respect to longer term commitments'.
[48] Geert Hofstede and Gert Jan Hofstede, *Cultures and Organizations: Software of the Mind, Intercultural Cooperation and Its Importance for Survival* (McGraw-Hill, 2nd ed, 2005) 8.
[49] The British Academy, *Principles for Purposeful Business: How to Deliver the Framework for the Future of the Corporation* (2019) 8 <https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf> ('*Principles for Purposeful Business*').
[50] Mayer, above n 15, 159.

business more likely to embed and bring about societal goals'.[51] Corporate governance's third component is '*attribution* of responsibility for attainment of the values and principles and adjudication over their allocation between different parties'.[52]

In this view, accountability extends to a wider group of stakeholders. For a long time, however, the corporate purpose was seen as to promote shareholder interest (short-term shareholder value maximisation).[53] However, this looks like a self-serving myth, since generally managers have the fiduciary duty to act in the best (long-term) interests of the company and enjoy some discretion to take into account corporations' effects on people and the environment.[54] It is therefore nowadays quite often accepted that there must be room for the interests of other stakeholders in the company.[55] The stakeholder theory embraces this view and presumes that 'corporations exist to serve a number of different interests and not just shareholders'.[56] The basic idea is that value creation is the result of interaction among groups which have a stake in the activities that make up business. Stakeholders are described as 'groups and individuals who, directly or indirectly, influence – or are or could be influenced by – the attainment of the company's objectives'.[57] One can distinguish between primary (including shareholders, investors, employees and suppliers) and secondary stakeholders (including governments and regulators, NGOs, media, and academic scholars).[58] Transparency is an evident prerequisite of accountability, as without adequate information one cannot assess corporate behaviour.

5.2 Sustainability: CSR, SDGs and ESG

The idea of value-driven corporate governance having been explained, the next step is to understand business obligation to enhance sustainable development. Repurposing towards a wider group of stakeholders impacts the kind of interests to be taken into

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[51] The British Academy, *Principles for Purposeful Business*, above n 49, referring to Peter J Buckley, 'Can Corporations Contribute Directly to Society or Only Through Regulated Behaviour?' (2018) 6(s1) *Journal of the British Academy* 323, 340.
[52] Mayer, above n 15, 159.
[53] This still seems the prevalent creed in the United States. Business groups (the Business Roundtable) talk about dropping 'shareholder primacy', but this seems to be a strategy for holding off tax and regulatory reform. See Eric Posner, 'Milton Friedman Was Wrong', *The Atlantic* (22 August 2019). A shift in their social norms is thus required; see Beate Sjåfjell and Mark B Taylor, 'A Clash of Norms: Shareholder Primacy vs Sustainable Corporate Purpose' (2019) 13(3) *International and Comparative Corporate Law Journal* 40.
[54] Ave Geidi Jallai and Hans Gribnau, 'Aggressive Tax Planning and Corporate Social Irresponsibility: Managerial Discretion in the Light of Corporate Governance' (Tilburg Law School Working Paper, 2018) <http://ssrn.com/abstract=3119552>.
[55] See Rebecca Henderson and Eric Van den Steen, 'Why Do Firms Have "Purpose"? The Firm's Role as a Carrier of Identity and Reputation' (2015) 105(5) *American Economic Review: Papers and Proceedings* 326: 'firm purpose appears to be almost invariably directed toward a prosocial goal, ie, it offers some benefit to society'. It is thus to defined as 'a concrete goal or objective for the firm that reaches beyond profit maximization' (at 327).
[56] John Farrar, *Corporate Governance: Theories, Principles, and Practice* (Oxford University Press, 2nd ed, 2005) 5.
[57] Corporate Governance Code Monitoring Committee, above n 39, 6. See also G20/OECD, above n 47, 34.
[58] R Edward Freeman, Laurence Wainwright, Sergiy Dmytriyev and Robert G Strand, 'Stakeholder Approaches to Corporate Sustainability' in Andreas Rasche, Mette Morsing, Jeremy Moon and Arno Kourula (eds), *Corporate Sustainability: Managing Responsible Business in a Globalised World* (Cambridge University Press, 2nd ed, 2023) 75, 78-83.

account and allows for a turn towards sustainability.[59] The SDGs which are primarily to be pursued by governments also require a sustainability commitment from companies, but also embody a variety of stakeholders interests. They 'lay out a coherent road map – widely embraced by the business community – for building a just and sustainable world'.[60] Like CSR and corporate governance, sustainability is based on social responsibility and ethics – also towards future generations. Consequently, the UN's SDGs are becoming increasingly important for companies.[61]

The view that the corporation is a long-term partnership of the corporation's various stakeholders, with attention to the problems of 'people and planet' fits well with common understandings of CSR. The three dimensions 'people, planet, profit' form the 'triple bottom line' there: the company should not only focus on 'profit' (also called 'prosperity'), but also on human rights of employees ('people') and care for natural resources and the environment ('planet').[62] CSR thus flows smoothly into sustainable and responsible business. Indeed, sustainability and sustainable development are umbrella terms in this respect, also including CSR.[63] Sustainability policies can thus build on the experiences that companies have gained with CSR.[64] That is why Mayer writes that 'what a sustainable firm needs to do is exactly the same as what a responsible firm should do'.[65] He explains that it should therefore account for the cost of maintaining its physical capital as well as 'its natural, human, and social capitals'.

The increasing relevance of sustainability for companies is evidenced by the 2000 Global Compact which is 'a voluntary initiative based on CEO commitments to implement universal sustainability principles'.[66] Stating 10 principles in the areas of human rights, labour, the environment and anti-corruption, it aimed at support for the Millennium Development Goals. These MDGs were succeeded by the SDG framework in 2015. Thus, the Global Compact's focus is on supporting the Sustainable Development Goals. The UN thus set up a 'moral framework […] promoting corporate social responsibility'.[67]

In 2004, the UN invited the CEOs of 55 major financing institutions to support the Global Compact. This resulted in a report which argued for the goal of 'sustainable

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[59] This is for example recognised in the *Dutch Corporate Governance Code 2022*, principle 1.1.1, vi: Corporate Governance Code Monitoring Committee, above n 39, 11.
[60] Henderson, above n 44, 27. For a more conservative position, see Edward Rock, 'For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose' (European Corporate Governance Institute Working Paper 515/2020, 2020) <https://ssrn.com/abstract=3589951>.
[61] For example, the members of the largest employers' organisation in the Netherlands, the Confederation of Netherlands Industry and Employers (known as VNO-NCW) endorse the 10 principles of the UN Global Compact that support the realisation of the SDGs.
[62] Afua Owusu-Kwarteng and Sarah L Jack, 'International Development and Corporate Sustainability' in Andreas Rasche, Mette Morsing, Jeremy Moon and Arno Kourula (eds), *Corporate Sustainability: Managing Responsible Business in a Globalised World* (Cambridge University Press, 2nd ed, 2023) 526, 536-537.
[63] International Chamber of Commerce, *How to Inspire and Grow Your Business in the 21st Century: ICC Business Charter for Sustainable Development* (2015) 6.
[64] Alfio Valsecchi, 'What Corporate Tax Policy Has to Do with Sustainability and How Companies Should Deal with It" (2022) 14(1) *World Tax Journal* 113, 122-123.
[65] Mayer, above n 15, 133.
[66] United Nations Global Compact, 'About the UN Global Compact' <https://unglobalcompact.org/about>. For example, as noted previously, n 61 above, members of the Dutch employers' organisation VNO-NCW endorse the 10 principles of the UN Global Compact.
[67] Buckley, above n 51, 347.

development' and 'awareness of mutual understanding of involved stakeholders' for a 'better inclusion of environmental, social and corporate governance (ESG) factors in investment decisions'.[68] ESG as an acronym for 'environmental, social, governance' was born. The report refrains from using terms such as sustainability, corporate citizenship, etc. which allow many different interpretations and prefers 'to spell out the environmental, social and governance issues' that should be integrated into investment analysis.[69]

ESG has evolved into a separate corporate function. Companies feel obliged to voluntarily integrate ESG improvements 'into their business operations for the benefit of shareholders, other stakeholders, society as a whole, and the environment'.[70] Companies using ESG is to identify the risks due to their environmental and social impact. In this way, ESG is a set of reporting measurements of CSR performance. Voluntary adopting ESG measurements enables accountability to a range of stakeholders – in line with corporate purpose.[71]

ESG measurement regards three complementary dimensions. 'Environmental' concerns the impact of a company on nature and the environment, such as greenhouse gas emissions, pollution, and freshwater supply. 'Social' includes the interaction with stakeholders such as employees and communities in which the company operates and supply chain responsibility towards suppliers and customers. Finally, 'governance' is about leadership style and culture within a company, executive remuneration, (internal and external) risk management,[72] transparency, reporting policy and the relationship with and involvement of stakeholders.[73] By adding G to E and S it is explicitly acknowledged that governance is the basis for achieving every corporate goal, including E and S. Hence 'governance' (G) has been added to E and S as conceptualised in ESG. E, S and G are each referred to in sustainability reports translated into criteria, the so-called ESG metrics, that ensure measurability and comparability. However, the economic dimension should also be taken into account;[74] sustainable value creation requires therefore creating value in ecological, social and economic terms.[75]

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[68] The Global Compact, *Who Cares Wins: Connecting Financial Markets to a Changing World* (2004) 3 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/280911488968799581/who-cares-wins-connecting-financial-markets-to-a-changing-world>.
[69] Ibid 2-3.
[70] Lynn M LoPucki, 'Repurposing the Corporation Through Stakeholder Markets' (2022) 55(3) *UC Davis Law Review* 1445, 1447 (footnote omitted).
[71] Elizabeth Pollman, 'The Making and Meaning of ESG' (European Corporate Governance Institute Law Working Paper 659/2022, 2022).
[72] See SFW van den Bosch, 'Business at Risk: The Governance and Disclosure of Sustainability Risks' (PhD Thesis, Tilburg University, 2022).
[73] Andreas Rasche, Mette Morsing, Jeremy Moon and Arno Kourula, 'Corporate Sustainability: What It Is and Why It Matters' in Andreas Rasche, Mette Morsing, Jeremy Moon and Arno Kourula (eds), *Corporate Sustainability: Managing Responsible Business in a Globalised World* (Cambridge University Press, 2nd ed, 2023) 1, 3-4.
[74] A company strives for economic value creation; this is recognised in Carroll's CSR pyramid: economic obligations constitute the bottom layer: Archie B Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' (1991) 34(4) *Business Horizons* 39, 41.
[75] Florian Lüdeke-Freund and Stefan Schaltegger, 'Business Model Innovation for Sustainability' in Andreas Rasche, Mette Morsing, Jeremy Moon and Arno Kourula (eds), *Corporate Sustainability: Managing Responsible Business in a Globalised World* (Cambridge University Press, 2nd ed, 2023) 388, 395-400.

Thus, sustainability has also become an important issue for many investors, in particular, institutional investors.[76] These are important stakeholders of companies and increasingly assessing and engaging with companies in terms of their ESG policy and practice. As shown above, ESG as such evolved from the concept of sustainability, the negative externalities of business activities on people and the environment (the 'inside-out' perspective). However, social and environmental developments can have an impact on companies as well (the 'outside-in' perspective). This reciprocal relation between the corporation and its environment is known as the 'double materiality perspective'.[77]

ESG is not all 'moonlight and roses', though. Lund and Pollman, for example, argue that in the United States the corporate social responsibility movement transformed into value-enhancing ESG standards oriented toward serving shareholders and their interests (long-term shareholder value maximisation); not aimed at obtaining benefits for stakeholders or the general public.[78] Pollman discusses critics of ESG who assert that ESG engenders confusion, unrealistic expectations, and greenwashing that could inhibit corporate accountability and crowd out other solutions to pressing environmental and social issues and inhibits accountability.[79] Moreover, ESG ratings from different providers are substantially dissimilar and the information that decision-makers receive from the rating agencies about ESG performance is relatively noisy.[80] Serafeim, a leading scholar of ESG, largely provides the same picture, but nonetheless in his experience, 'most organizations have now developed commitment among their leaders to take ESG seriously'.[81]

Regulators play an important role. Governments for example are introducing an increasing number of laws and regulations to encourage ESG policies whilst pension funds and other institutional investors are also putting pressure on firms.[82] Regulation may also inject legal certainty into areas of law where uncertainty is lingering with regard to the permissibility of investing in environmental and social interests (which

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[76] ESG-driven investors sometimes urge private investors – private equity – to also take ESG seriously – partly to prevent them from taking over unsustainable investments. See UN Environment Programme, 'Net-Zero Asset Owner Alliance Outlines Requests for Asset Managers in Private Markets' (24 November 2022) <https://www.unepfi.org/industries/the-net-zero-asset-owner-alliance-outlines-its-recommendations-for-asset-managers-in-private-markets/>.

[77] See for example, European Commission, *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*, COM/2021/189 (21 April 2021) 1, 8. Materiality is a fundamental concept in financial reporting. 'An information is considered material if its omission, misstatement or obscurity could reasonably be expected to influence decisions made by the primary users of financial statements (IAS 1.7)': Marek Muc, 'Materiality in IFRS Standards and Financial Reporting', *IFRS Community* (last updated 2 May 2024) <https://ifrscommunity.com/knowledge-base/materiality/>.

[78] Dorothy S Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121(8) *Columbia Law Review* 2563.

[79] Pollman, above n 71, 31-45. 'Many of these challenges and critiques are "hyperboles" or at least can be partially sorted out with time', though as 'the alignment between shareholder value creation and ESG performance was asserted from the outset but never fully proven or reconciled' (at 40-41, footnote omitted).

[80] Florian Berg, Julian F Koelbel, Anna Pavlova and Roberto Rigobon, 'ESG Confusion and Stock Returns: Tackling the Problem of Noise' (NBER Working Paper w30562, 2022 (revised July 2024)).

[81] George Serafeim, 'ESG: Hyperboles and Reality' (Harvard Business School Working Paper 22-031, 2021) 20.

[82] For 'sustainable finance', see Christoph Van der Elst, 'Fostering Sustainability in The Netherlands: Companies, Ownership, Engagement, Finance and Products' (Ghent University Financial Law Institute Working Paper WP 2022-21, 2022) <https://financiallawinstitute.ugent.be/wp-content/uploads/2022/12/2022-21.pdf>.

involves ethical considerations).[83] Governance aimed at SDGs may also be made a precondition for subsidies and public procurement. Thus, there is an interaction between public and private governance.

Incidentally, it is not self-evident that politicians and government (continue to) support the 'ESG agenda' of companies that is in line with their sustainability assignment; see the US Republicans seeking legislative action against this 'woke' capitalism.[84] Nonetheless, in Europe a prevailing belief underscores the importance of ESG investing for fostering a sustainable economy.[85] This distinctly European perspective accounts for a higher commitment to ESG goals among institutional investors.[86]

Two other factors may account for a change of mindset. Climate change gives many young people a sense of purpose. It has become part of Generation Z's values. They seek to align their values and purpose with their careers and seek socially responsible employers – climate corporate responsibility being a major demand. More generally more employees want to work for sustainable companies.[87] In the wake of the Covid-19 pandemic many companies renewed their organisations' focus on sustainable business practices. A survey conducted in 2022 by Economist Impact found that there is growing evidence that ESG can be a source of value creation for companies and not just a cost centre. Eighty-four percent of 350 corporate leaders across eight different markets in the Asia-Pacific are developing clear strategies to incorporate ESG in their operations rather than seeing it as a pure compliance exercise.[88] There is also evidence that companies with well-designed ESG policies can benefit from cost savings,[89] while enhancing their credibility, brand reputation, and trustworthiness among customers.[90]

5.3 ESG, stakeholders and transparency

Transparency is a major dimension of governance. This 'procedural' element is about communicating openly and serves accountability to stakeholders. When long-term value creation should take into account the interests of stakeholders, transparency becomes particularly relevant. Communication of relevant information may enhance

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[83] Vincent Ooi and A.W.-L. See, 'Promoting ESG Investing by Trustees: Risk Management and Structuring Solutions' (2024) 35(1) *King's Law Journal* 68.

[84] Andrew Edgecliffe-Johnson, 'The War on "Woke Capitalism"', *Financial Times* (28 May 2022), and more recently Spencer Kimball, 'Judge Rules Exxon Can Sue Activist Shareholder Over Climate Proposal', *CNBC* (22 May 2024).

[85] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategy for Financing the Transition to a Sustainable Economy*, COM/2021/390 final (6 July 2021).

[86] Anne Lafarre, 'Do Institutional Investors Vote Responsibly? Global Evidence' (Tilburg Law School TILEC Discussion Paper DP2022-001, January 2024).

[87] See Emission Sentri, 'Why Employees Want to Work for Sustainable Companies' <https://emissionsentri.com/why-employees-want-to-work-for-sustainable-companies/>: '70% of employees and job seekers feel a sustainability program makes an employer more attractive, and 44% of executives acknowledge it's a key factor in attracting and retaining top talent'.

[88] The Economist, 'Sustainability Is About Value Creation as Much as It Is About Resilience' < https://impact.economist.com/projects/profiles-of-progress/article/sustainability-is-about-value-creation-as-much-as-it-is-about-resilience/?utm_source=PaidSocial&utm_medium=LinkedIn&utm_campaign=Kyndryl&utm_content=Article3 >.

[89] Dominic Tantram, 'Cost or Value? Why Is Sustainability Strategically Undervalued?', *Terrafiniti* <https://www.terrafiniti.com/cost-or-value-why-is-sustainability-strategically-undervalued/>.

[90] Philip Malley, 'The Benefits of Corporate Sustainability' *Cleaning and Maintenance Management* <https://cmmonline.com/articles/benefits-of-corporate-sustainability>.

accountability. Transparency can be defined as the accessibility of information to stakeholders of organisations, regarding matters that affect their interests.[91] Accessible and relevant information tailored to the needs and knowledge of the stakeholders may enable them to understand and evaluate companies' behaviour and is essential for stakeholder dialogues.[92] And, if necessary, companies can be held accountable for behaviour that stakeholders consider irresponsible and unsustainable.

Corporate social responsibility as ESG means that it is explicitly acknowledged that corporate governance, and therefore transparency, is the basis for achieving every corporate goal, including broad sustainability that encompasses both 'environmental' and 'social'. Hence 'governance' (G) has been added to E and S as conceptualised in ESG. Transparency takes the form of ESG reporting. The financial performance of companies, profitability and risks are placed in the broader context of their impact on society, people and the environment. ESG transparency should therefore be a boardroom responsibility as the corporate ESG agenda expresses a company's core values and principles and transparency is key for accountability, another main component of corporate governance.

Companies thus provide information about their external impacts towards stakeholders (eg, governments, employees, customers, NGOs, and communities); this can be called stakeholder materiality. This kind of information has become increasingly important for investors. Important standards have been developed by the Sustainability Accounting Standards Board (SASB). The industry-specific SASB standards for disclosures identify the sustainability-related risks and opportunities most likely to affect a company's financial condition, that is, 'cash flows, access to finance or cost of capital over the short, medium or long term'.[93]

However, Delgado-Ceballos and co-authors argue that a financialisation of sustainability occurred: the focus shifted away from this external impact. The emergence of ESG rating agencies and ESG-related products, such as metrics and indices, has contributed to the broad adoption of the term 'ESG' from a financial materiality perspective.[94] In general, however, information on ESG provided by companies is mainly targeting investors by focusing on factors that might affect the company financially, that is on financial materiality.[95] As a result, external impacts that involve no real risk to affect the company financially tend not to be taken into account.

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[91] Don Tapscott and David Ticoll, *The Naked Corporation: How the Age of Transparency Will Revolutionize Business* (Penguin, 2004) 41.
[92] See Charkham, above n 41, 8.
[93] SASB Standards, 'SASB Standards Overview' <https://sasb.ifrs.org/standards/>. The standards for 77 industries across 11 sectors are detailed in disclosure topics and accounting metrics. SASB focuses on disclosure by companies to their investors and other providers of financial capital, and not to a wider set of stakeholders. See Dimitar Zvezdov and Stefan Schaltegger, 'Sustainability Accounting' in Samuel O Idowu, Nicholas Capaldi, Liangrong Zu and Ananda Das Gupta (eds), *Encyclopedia of Corporate Social Responsibility* (Springer, 2013) 2363. See also GRI and SASB, *A Practical Guide to Sustainability Reporting Using GRI and SASB Standards* (2021) <https://sasb.ifrs.org/knowledge-hub/practical-guide-to-sustainability-reporting-using-gri-and-sasb-standards/>.
[94] Javier Delgado-Ceballos, Natalia Ortiz-De-Mandojana, Raquel Antolín-López and Ivan Montiel, 'Connecting the Sustainable Development Goals to Firm-Level Sustainability and ESG Factors: The Need for Double Materiality' (2023) 26(1) *Business Research Quarterly* 2, 5-6. See also Robert G Eccles, Linda-Eling Lee and Judith C Stroehle, 'The Social Origins of ESG: An Analysis of Innovest and KLD' (2020) 33(4) *Organization and Environment* 575.
[95] Leo E Strine, Jr, *Toward Fair and Sustainable Capitalism* (Roosevelt Institute, 2020) 6.

Moreover, sustainability reporting's shifting emphasis from morality and values to strategic value creation for corporations measured in ESG-metrics may crowd out morality.[96]

Regulators may however intervene in case of external impacts not accounted for.[97] The European Commission, for example, initiated transparency obligations such as the Sustainable Finance Disclosure Regulation (SFDR),[98] the Corporate Sustainability Reporting Directive (CSRD),[99] and the Taxonomy Regulation.[100] This is in line with EU policy to ensure that companies protect human rights and reduce their impact on the planet.

5.4 Ethics: CSR's 'beyond compliance'

Importantly, the notion of social responsibility adds to corporate governance's ethical dimension connotation – going beyond pure cost-benefit analysis or reputational considerations.[101] This produces reciprocal benefits for the company, stakeholders and society. Ethics and social responsibility are certainly essential for CSR companies – after all, they explicitly affirm themselves with social responsibility. Here it can be seen that CSR, sustainable development and corporate governance developments overlap. This also applies for three concepts which are common to both corporate governance and CSR: 'transparency, accountability and the participation of stakeholders in the decision-making process'.[102]

The terms 'corporate sustainability' and 'corporate social responsibility' are often used interchangeably. However, two different scientific perspectives are involved. The notion of 'corporate sustainability' originates in natural science and systems perspectives to companies and society, whereas CSR's point of departure is in (normative) moral theory and ideas on business ethics and considering the morality of managers and their moral responsibility to society and the environment.[103] During the 1990s and 2000s, the notions of corporate sustainability and CSR have converged. CSR literature often 'did not necessarily ignore environmental issues, but they did not

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[96] See Koen van Bommel, Andreas Rasche and André Spicer, 'From Values to Value: The Commensuration of Sustainability Reporting and the Crowding Out of Morality' (2023) 36(1) *Organization and Environment* 179.

[97] See, for example, the *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM/2022/71 final (23 February 2022) ('CSDDD'), and the provisional agreement dated 14 December 2023; European Parliament, 'Corporate Due Diligence Rules Agreed to Safeguard Human Rights and Environment' (Press Release, 14 December 2023) <https://www.europarl.europa.eu/news/en/press-room/20231205IPR15689/corporate-due-diligence-rules-agreed-to-safeguard-human-rights-and-environment>.

[98] European Parliament and European Council, *Regulation (EU) 2019/2088 of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector* [2019] OJ L 317/1.

[99] European Parliament and European Council, *Directive (EU) 2022/2464 of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting* [2022] OJ L 322/15.

[100] European Parliament and European Council, *Regulation (EU) 2020/852 of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088* [2020] OJ L 198/13.

[101] Charkham, above n 41, 21.

[102] Tineke E Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR* (Kluwer, 2010) 30.

[103] Pratima Bansal and Hee-Chan Song, 'Similar But Not the Same: Differentiating Corporate Sustainability from Corporate Responsibility' (2017) 11(1) *Academy of Management Annals* 105.

integrate them into their CSR conceptualization'.[104] Some corporate sustainability scholars may seem to be less certain on integrating economic responsibility into their definitions. However, even absent a clear distinction between the two terms, one approach does not exclude the other. CSR perspectives complement corporate sustainability.[105] Corporate sustainability thus aims at managing a company as part of interacting economic, social and environmental systems – of which governments are also part. Economic, social and environmental interests have to be balanced while doing business. The focus of corporate social responsibility is more on 'relevant management practices within corporations', that is, on 'its operations, processes and core business strategy'.[106] In this article, the ethical 'complement' provided by CSR is CSR-companies' 'beyond compliance' commitment, as conceptualised by Carroll. As shown above, climate change and the Covid-19 pandemic have created greater sustainability awareness and may be additional drivers to go 'beyond compliance'.

At its core, CSR-companies voluntarily assume certain obligations because of their responsibility to society. (They take the horizontal dimension of the social contract seriously.[107]) Here this article follows Carroll's approach since he emphasises obligations for businesses that go beyond what is required by the law (and the focus on profit s. Carroll captured these beyond-compliance social responsibilities in his famous pyramid of corporate social responsibility. He makes an analytical distinction between a firm's economic, legal, ethical and philanthropic responsibilities, which are not mutually exclusive.[108] In the pyramid the ethical and philanthropic (at the top) layers are placed above the economic (at the bottom) and legal layers.[109] Thus, a company should pursue it economic purpose within the legal framework (the rules of the game) and should interpret and supplement the latter with ethical norms.[110] This ethical responsibility extends beyond what the law (strictly speaking) requires of a company – this may also apply for legally mandated corporate social responsibility.[111] The point is that laws are essential but not always adequate. Since the legal system is conceptualised

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[104] Ivan Montiel, 'Corporate Social Responsibility and Corporate Sustainability: Separate Pasts, Common Futures' (2008) 21(3) *Organization and Environment* 245, 257.
[105] Karin Buhmann, 'Corporate Sustainability and Climate Change' in Deborah C Poff and Alex C Michalos (eds), *Encyclopedia of Business and Professional Ethics* (Springer, 2023) 472, 473-474.
[106] Rasche et al, above n 73, 9.
[107] The horizontal dimension regards the reciprocal relationships among members of society; Gribnau and Dijkstra, above n 18. See Dunfee, T.W. and T. Donaldson (1999)," Social Contract Approaches to Business Ethics: Bridging the 'Is–ought' Gap" in R.E. Frederick (ed.), A Companion to Business Ethics, Blackwell, Oxford, pp. 38-55.
[108] Carroll, above n 74, 41. Carroll's statement is the most often cited definition in the general management articles reviewed in Montiel, above n 104, 252.
[109] Philanthropy, often incentivised by for example tax breaks, deserves careful consideration since it may advance some SDGs but also entrench existing inequalities more firmly. See Rob Reich, Just Giving: *Why Philanthropy Is Failing Democracy and How It Can Do Better* (Princeton University Press, 2018); Anand Giridharadas, *Winners Take All: The Elite Charade of Changing the World* (Allen Lane, 2020). See also Amy Fallon, 'Calls Renew for Australia's Corporate Religious Institutions to Pay "Fair Share" of Tax', *Crikey* (26 March 2024) <https://www.crikey.com.au/2024/03/26/religious-charities-tax-productivity-commission-lara-kaput/>.
[110] Ave-Geidi Jallai, 'Good Tax Governance: International Corporate Tax Planning and Corporate Social Responsibility – Does One Exclude the Other?' (PhD Thesis, Tilburg University) 93-96: The model was later elaborated upon (leaving the philanthropic obligations out), but the core elements remained the same, and the pyramid model is the most suitable here.
[111] Nayan Mitra and Bhaskar Chatterjee, 'India and Its Corporate Social Responsibility Mandate' in Nayan Mitra and René Schmidpeter (eds), *Mandated Corporate Social Responsibility: Evidence from India* (Springer, 2020) 11.

as a system of 'codified ethics', it should be supplemented by ethical responsibilities in cases of morality where this is not, or is inadequately, codified by law.[112] A company may for example voluntarily adopt policies that reduce a negative impact on the environment and society although that may result in lower profits. It may also invest heavily in stakeholder relationships and transparency because it is the right thing to do rather than for strategic reasons.

CSR corporations accept ethical responsibilities beyond the law, or more precisely beyond the letter of the law.[113] In other words, they go beyond a strict, minimalist interpretation of the body of legal rules. Transplanting the idea of 'going beyond compliance' to corporate sustainability ensures that businesses 'explicitly address the ethical component of business beyond taking into account impacts on society and the natural environment'.[114] Thus 'ethical aspirations beyond legal requirements' should inform ESG practices.[115] Corporate governance requires this ethical aspiration to be articulated, with due attention for accountability for implementation and attribution of responsibility for upholding it.

6. CORPORATE TAX GOVERNANCE

6.1 Corporate tax governance and sustainability

Corporate tax governance is part of public governance, namely that part that relates to taxation.

The purpose of a corporation determines of course its tax governance. The purpose of many companies contains the CSR and sustainability elements of 'People, Planet and Profit/Prosperity'. Value creation in this 'triple bottom line' must lead to more sustainable core activities of a company – not burdening future generations. Taxes are inherent to these activities and financial contributions to sustain society and the natural environment. A fourth 'P' – 'Paying a fair share' logically follows from this, which the tax policy must therefore be in line with.[116] This determines companies' tax strategy. Companies tax governance should thus more focus on sustainability.[117] As was shown, in the wake of the Covid-19 pandemic many companies renewed their organisations' focus on sustainable business practices and developed clear strategies to incorporate

[112] Unfortunately, many companies cherish the opposite, 'rules are made to be broken', ideal; Rana Foroohar, *Don't Be Evil: The Case Against Big Tech* (Allen Lane, 2019) 44.

[113] Doreen McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 9, 48-50.

[114] Mark S Schwartz and Archie B Carroll, 'Integrating and Unifying Competing and Complementary Frameworks: The Search for a Common Core in the Business and Society Field' (2008) 47(2) *Business and Society* 148, 163.

[115] Angeli Weller, 'Exploring Practitioners' Meaning of "Ethics," "Compliance," and "Corporate Social Responsibility" Practices: A Communities of Practice Perspective' (2020) 59(3) *Business and Society* 518, 539.

[116] Eelco van der Enden and Bronetta Charlotte Klein, 'Good Tax Governance? …Govern Tax Good!' (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3610858>. See also Gribnau, 'Why Social Responsible Corporations Should Take Tax Seriously', above n 20.

[117] Dutch Association of Investors for Sustainable Development (VBDO), *Good Tax Governance in Transition: Transcending the Tax Debate to CSR* (2014); Bird and Davis-Nozemack, above n 38, 1017-1020, also argue for integrating prevention of tax avoidance in 'sustainability frameworks'.

ESG in their operations. This should translate into sustainable tax governance which sees tax not just as a cost centre or a pure compliance exercise.

The three components of corporate governance (see section 5.1) have to be elaborated for tax. Corporate tax governance therefore requires the precise articulation of tax values and principles, which converts purpose statements into genuinely credible commitments. Sustainability should be taken on board. Tax should be integrated into the ESG objective.[118] Stakeholders expect board members to address sustainability concerns also through the corporate tax governance system, aligning it with the company's sustainability policy.[119] Around 15 years ago, Erle wrote: 'tax cannot stay in the splendid isolation in which its technical nature has historically placed it'.[120] This statement has lost none of its topicality; to the contrary. The articulated set of 'responsible tax principles' (or 'sustainable tax principles') inform the tax strategy with regard to tax planning, tax risk management, tax compliance and the desired relationship with tax authorities and other stakeholders.

The second component is the company's accountability to its internal and external stakeholders. Accountability requires engagement with stakeholders on their expectations with regard to the company's tax management and reporting about relevant tax issues. Accountability in turn requires transparency, that is, to the tax authorities, but also to other stakeholders. This public transparency can entail, for example, publishing the tax strategy,[121] reporting on corporate tax payments and lobbying activities on tax.

The third component is attribution of responsibility for tax. Responsibilities must be identified and assumed by implementing the necessary processes to enable the company to comply with tax law and other regulations. The primary responsibility for tax rests with the board.[122] To manage and control the tax risks associated with sustainability a tax control framework will have to be implemented – as part of the business control

[118] IKEA, the popular Swedish furniture retailer, is not exactly setting an example. Some think that IKEA is leading the way in sustainability: DGB Group, 'IKEA: Leading the Way in Sustainability' (13 March 2023) <https://www.green.earth/net-zero/case-studies/ikea-leading-the-way-in-sustainability>. However, see the report on IKEA's tax structure: Marc Auerbach, *IKEA: Flat Pack Tax Avoidance* (Study Commissioned by the Greens/EFA Group in the European Parliament, [2016]). Moreover, the contributions made by Stichting INGKA Foundation often go to companies within the IKEA sphere and not to charity; Nubia Evertsson, 'Corporate Tax Avoidance: A Crime of Globalization' (2016) 66(2) *Crime, Law and Social Change* 199, 208-213.

[119] This requirement does not allow for opportunistic behaviour like the gaming of the Dutch system of tax incentives to reduce carbon emissions by car producers who engineered hybrid (plug-in) cars (often SUVs) which did qualify for tax credits but had a very limited electric range of 35 kilometres or so, and therefore mostly consumed petrol.

[120] Bernd Erle, 'Tax Risk Management and Board Responsibility' in Wolfgang Schön (ed), *Tax and Corporate Governance* (Springer, 2008) 205, 209.

[121] For certain companies in the United Kingdom it is already mandatory to publish the tax strategy; Dennis de Widt and Lynne Oats, 'Co-operative Compliance: The UK Evolutionary Model' in Ronald Hein and Ronald Russo (eds), *Co-operative Compliance and the OECD's International Compliance Assurance Programme* (Wolters Kluwer, 2020) 216, 223-225.

[122] See OECD, *Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing, 2023) 51-52; Katarzyna Bronzewska and Eelco van der Enden, 'Tax Control Framework – A Conceptual Approach: The Six Nuances of Good Tax Governance' (2014) 68(11) *Bulletin for International Taxation* 635, 636.

framework. A tax control framework contains all procedures within the company pertaining to taxation.[123]

The three components of (good) corporate tax governance can be articulated with an eye to the interaction of ESG and taxation. With regard to taxation, the three ESG pillars can interact with tax, and the Global Reporting Initiative (GRI) provides some examples of this interaction. Tax in 'Environmental' includes the amount of, eg, carbon taxes, plastics taxes companies pay, and the amount of green subsidies and incentives companies receive. For 'Social', examples are social insurance, health care and pension premiums. Finally, in the case of 'Governance' applied to tax concerns, examples are the alignment of the ESG policy with tax behaviour, tax risk management and assurance, tax reporting and the relationship with and involvement of stakeholders.[124]

This article will elaborate on two aspects of the first and second component of corporate tax governance going beyond compliance, that is, paying a fair share of tax (taking into account the spirit of the law) as companies' key tax value, and, transparency as precondition of accountability, respectively.

6.2 Fair share

Corporate tax governance impacts a government's ability to collect sufficient tax revenues to provide public goods and services to its citizens (the vertical dimension of the social contract).[125] Thus, it impacts the living standards of other members of society.[126] Moreover, aggressive tax planning shifts the tax burden to fellow citizens whose tax behaviour is less elastic who have to shoulder it (the horizontal dimension of the social contract). This implies a shared responsibility taxation for the benefit of society not only *vis-à-vis* government but also *vis-à-vis* fellow citizens. Corporations, as powerful tax actors, have a special responsibility for the integrity of the tax system.[127]

Corporate governance's moral dimension should impact a company's tax governance. Tax minimisation does not fit in with that. On the contrary, sustainable (or good) tax governance's starting point is that taxes provide the necessary funding for a sustainable society. The tax purpose to be realised by tax governance must therefore be the payment of a fair share of taxes.[128] This is in line with the CSR principle that companies voluntarily accept ethical obligations on top of legal and economic obligations towards

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[123] Ronald Russo and Rebwar Taha, 'Corporate Governance and Taxes' in R Russo and R Hein (eds), *Tax Assurance: Latest Developments on Tax Control Frameworks, Technology and Governance* (Kluwer, 2022) 31, 38.

[124] GRI, 'We Need to Talk About Tax', *The GRI Perspective* (Issue 5, March 2022) 3. See also Vasiliki Koukoulioti, 'T for Taxation: The Fourth Pillar in the ESG Framework' (2024) 22(3) *eJournal of Tax Research* 420.

[125] Hans Gribnau, 'Voluntary Compliance Beyond the Letter of the Law: Reciprocity and Fair Play' in Bruno Peeters, Hans Gribnau and Jo Badisco (eds), *Building Trust in Taxation* (Intersentia, 2017) 17, 18-49.

[126] Hans Gribnau and Ave-Geidi Jallai, 'Sustainable Tax Governance and Transparency' in Susanne Arvidsson (ed), *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (Palgrave Macmillan, 2018) 337.

[127] Hans Gribnau, 'The Integrity of the Tax System after BEPS: A Shared Responsibility' (2017) 10(1) *Erasmus Law Review* 12.

[128] See, for example, the *Dutch Corporate Governance Code 2022*, Principle 1.1.1 which states, among other things, that when developing the strategy for long-term value creation, the board will in any event pay attention to 'vii. paying a fair share of tax to the countries in which the company operates': Corporate Governance Code Monitoring Committee, above n 39, 11.

society. Of course, they have a right to arrange their tax affairs in such a way as to achieve a favourable tax treatment within the limits set by the law. Tax planning may be motivated to avoid double taxation. However, this is not the aim of aggressive tax planning, a far more serious problem which for example is aimed at double non-taxation. To tackle aggressive tax planning, measures have been proposed at the international level, such as a global minimum tax ('Pillar 2').[129] This is however not a watertight solution; gaming the rules is still possible.[130]

Sustainable social responsibility, however, entails the ethical obligation to go 'beyond compliance' with the law which is at odds with complying with the (tax) law in a minimalist way.[131] Responsibility goes beyond the mere legal requirements (legality).[132] This requires embedding ethics into corporate sustainability strategy and acknowledging the spirit underlying tax regulations and the need for moral considerations and judgments.[133] In this way, a company moves from the economic and legal layer further in the pyramid to the ethical layer, which reflects the key substantive part of good tax governance.[134] Voluntarily going beyond minimalist compliance with the letter of the law evidently entails a sustainable choice to comply with the law. Going beyond strict compliance with the tax law is thus a matter of exercising economic self-restraint with regard to legal obligations.[135] To be sure, it is a choice within the band width of possible interpretations of the tax laws, and therefore not a matter of paying more than the law requires.

In brief, companies should value long-term sustainability whilst taxes are an important means of achieving the SDGs. This requires compliance with the letter and spirit of the law, amounting to paying a fair share of tax. It follows that companies which summarily state as one of their tax principles that they comply with the tax laws in the jurisdictions they operate probably do not act responsibly, because they apparently seek to carry out the bare minimum behaviour required by the law.[136] They apparently do not see tax as

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[129] Michael Devereux and John Vella, 'The Impact of the Global Minimum Tax on Tax Competition' (2023) 15(3) *World Tax Journal* 323.

[130] See Stefan Greil and Madeleine Kockrow, 'Shaping the UN's Future Role in International Tax Cooperation: Resolution A/RES/77/244 and the Options Raised in Tax Report 2023 as an Opening for Legally Binding Tax-Norm Setting by the UN' (2024) 78(2) Bulletin for International Taxation 75, 79: 'Tax planning is still possible, and profits may be allocated in a way that is erroneous from an economic perspective'.

[131] Hans Gribnau, 'Corporate Social Responsibility and Tax Planning: Not by Rules Alone' (2015) 24(2) *Social and Legal Studies* 225 ('Corporate Social Responsibility and Tax Planning').

[132] Reijo Knuutinen and Matleena Pietiläinen, 'Responsible Investment: Taxes and Paradoxes' (2017) (1) *Nordic Tax Journal* 135.

[133] Perhaps in exceptional circumstances, such as corrupt governments, tax avoidance may be morally and democratically 'justified if companies counterbalance this behaviour with higher contributions to society'; Francesco Scarpa and Silvana Signori, 'Understanding Corporate Tax Responsibility: A Systematic Literature Review' (2023) 14(7) *Sustainability Accounting, Management and Policy Journal* 179, 193.

[134] This can be called the substantive dimension of good corporate tax governance. See: Hans JLM Gribnau and Ave-Geidi Jallai, 'Good Tax Governance: A Matter of Moral Responsibility and Transparency' [2017] (1) *Nordic Tax Journal* 70; Jallai, above n 110, 161-170.

[135] Gribnau, 'Corporate Social Responsibility and Tax Planning', above n 132. For the need for economic self-restraint, see Axel Hilling and Daniel T Ostas, *Corporate Taxation and Social Responsibility* (Wolters Kluwer, 2017) 90-107.

[136] For example, see IKEA's UK Tax Principles: 'INGKA [Holding B.V] pays taxes in accordance with laws and regulations, wherever we are present as a retailer or in any other role': Ingka Group, 'Ingka Group Governance' (Web Page) <https://www.ingka.com/this-is-ingka-group/how-we-are-organised/>.

an integral part of their ESG agenda. Good tax governance should however ensure responsible tax behaviour.

6.3 Public tax transparency

Companies should account for the way they deal with the substantive component of sustainable tax. A company's accountability, the second corporate tax governance component, is conditional upon transparency to stakeholders. It is about transparency not only to the tax authorities but also to society as a whole as they influence and could be influenced by the way a company integrates tax into its sustainability objectives. Increasing demands for public tax transparency force corporations to take accountability. Accessible and adequate tax information can lead to a better understanding of companies' tax behaviour, and of the tax ecosystem. As such it is a precondition for a better informed and more nuanced public debate. As Stevens notes, transparency 'will force all stakeholders in a tax system to answer difficult moral and justification questions about how that system works and the foundations on which it is based'.[137] Transparency has an educational function because it allows stakeholders to gain greater insight into the complex, highly technical area of (corporate) taxation and to discuss this with companies. Tax complexity implies however that reporting inevitably has a certain degree of complexity: overly simple, one-dimensional information can mislead stakeholders.

Transparency enhances multi-stakeholder dialogues and enables stakeholders to exchange and debate views on their expectations. Transparency on policy choices and (moral) dilemmas promotes stakeholders' understanding of the complex balancing act of their different interests, arguments and expectations. Being open and transparent towards society shows stakeholders that the company 'walks the talk'. Communication should not be restricted to the dissemination of information in the public space. It 'is also, and increasingly, to construct a discourse with a view to explaining and convincing,' as Gutmann emphasises.[138] However, in the present author's view, it is not a one-way street. Corporations should also want to be educated themselves about societal perspectives, concerns, needs, etc. As stakeholders urge corporations to take ESG seriously, there should be a shift in tax reporting towards a sustainability discourse. Indeed, corporate tax reporting increasingly portrays tax as a meaningful corporate responsibility to society, rather than as a risk management issue or even as a burden.[139] Tax transparency may also improve the behaviour of those lagging behind; 'it makes it harder for others to hide in the shadows, and focuses the attention of scrutineers'.[140]

Transparency can be voluntary but also mandatory. Think of the mandatory country-by-country reporting to the tax authorities (only) which is exchanged among tax

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[137] Stan A Stevens, 'The Duty of Countries and Enterprises to Pay Their Fair Share' (2014) 42(11) *Intertax* 702, 708.

[138] Daniel Gutmann, 'Corporate Groups in the Age of Tax Communication' (2023) 63(4) *European Taxation* 154, 155.

[139] Axel Hilling, Niklas Sandell, Amanda Sonnerfeldt and Anders Vilhelmsson, 'The Development of a Multidimensional Meaning of Tax: From Unfair Tax to Fair' (2023) 17(1) *Discourse and Communication* 57.

[140] Jeremy Hirschhorn, 'Tax in a Transparent World' (Australian Taxation Office, 7 November 2019) 11 <https://www.ato.gov.au/Media-centre/Speeches/Other/Tax-in-a-Transparent-World/>.

authorities.[141] The same applies for the mandatory reporting in the European Union about possible tax avoidance schemes by certain tax intermediaries (DAC 6).[142] Other stakeholders, such as investors, also insist on (public) transparency for their assessment of companies' tax sustainability performance. In Europe, the public country-by-country reporting Directive has been in force since 9 December 2021.[143] However, this mandatory provision of information probably does not contain sufficiently detailed tax data to enable a proper analysis of the tax behaviour of multinational enterprises.

Responsible (sustainable) tax governance therefore entails companies voluntarily going 'beyond compliance' with hard law transparency obligations. Top management should promote a proactive 'beyond compliance' policy also in this context. However, there may be little incentive to over-disclose where additional information might be misinterpreted.[144] This makes an open dialogue with stakeholders all the more important – which allows for reciprocal education. Institutional investors, like insurance companies, pension funds and banks, are major actors in this respect as they exercise power at the annual general meeting and in private shareholder engagements like meetings, phone calls and letters.[145] Both institutional investors and senior executives should seriously engage in discussions and knowledge exchanges about tax conduct. Otherwise, the resulting oversimplification of tax data will impact the quality of the information that flows into the public domain, significantly affecting public tax knowledge.[146] Moreover, consistent reporting is required and not opportunistic disclosure (for example, diminished reporting in times when there is less media attention for corporate tax practices).[147] This may also be helpful to counter strategic compliance and self-promotion, driven by reputational considerations, in the guise of transparency.

Powerful actors such as institutional investors and ESG rating agencies, both important actors in the ESG arena, should play an active role in this respect and 'discipline' corporations. Unfortunately, many institutional investors and ESG rating agencies are often taking a passive approach toward tax. They tend to overlook tax avoidance in their evaluation of companies' ESG profiles and are remarkably tolerant of aggressive tax planning; and to some extent may even encourage it.[148] They should therefore flex their muscles and integrate tax in their ESG ratings and evaluations. Otherwise, many (US)

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[141] Jeffrey Owens, 'Tax Transparency: The "Full Monty"' (2014) 68(9) *Bulletin for International Taxation* 512; Alessandro Turina, '"Visible, Though Not Visible in Itself": Transparency at the Crossroads of International Financial Regulation and International Taxation' (2016) 8(3) *World Tax Journal* 378.

[142] European Council, *Directive 2018/822 of 25 May 2018 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation in Relation to Reportable Cross-Border Arrangements* [2018] OJ L 139/1 (DAC 6).

[143] European Parliament and European Council, *Directive EU 2021/2101 of 24 November 2021 Amending Directive 2013/34/EU as Regards Disclosure of Income Tax Information by Certain Undertakings and Branches* [2021] OJ L 429/1; see Willemien Netjes and Dominik Freyer, 'Tax Transparency Is Here to Stay: An Analysis of the Public CbCR Directive' (2022) 50(8/9) *Intertax* 612.

[144] Lynn Oats and Penelope Tuck, 'Corporate Tax Avoidance: Is Tax Transparency the Solution?' (2019) 49(5) *Accounting and Business Research* 565.

[145] Lafarre, above n 86.

[146] Carla Edgley and Kevin Holland, '"Unknown Unknowns" and the Tax Knowledge Gap: Power and the Materiality of Discretionary Tax Disclosures' (2021) 81 *Critical Perspectives on Accounting* 102227, 20. See also Rebwar Taha, 'Tax Policy and Asset Management' (PhD Thesis, Tilburg University, 2021).

[147] See Kevin Holland, Sarah Lindop and Fatimah Zainudin, 'Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies' Financial and CSR Reports' [2016] (3) *British Tax Review* 310.

[148] Danielle A Chaim and Gideon Parchomovsky, 'The Missing "T" in ESG' (2024) 77(3) *Vanderbilt Law Review* 789, 800.

corporations, which often tout their ESG credentials, will continue tax planning practices and resist communicating their tax approach and payments to stakeholders.[149]

There are important exceptions to this bleak picture. Norges Bank Investment Management (officially 'Government Pension Fund Global'), for example, one of the largest asset managers worldwide, views tax as a sustainability topic. It has developed three main 'tax and transparency' principles.[150] In 2021 it announced that it had divested shares of firms due to 'aggressive tax planning and cases where companies do not give information of where, and how, they pay tax'.[151]

Corporations outside the United States of America, for example in Europe, seem to be more willing to integrate tax into their sustainability agenda as shown by the 2023 Tax Transparency Benchmark of the Dutch Association of Investors for Sustainable Development (VBDO). This benchmark comprises a comparative survey of 51 Dutch and 65 EU stock-listed companies. It appears that in recent years companies have shown (sometimes strong) progress on a number of principles (each fleshed out in a number of criteria); taxes are for example more often seen as contributions to sustainable society, though ESG tax reporting in particular is still underdeveloped.[152] In 2019, another standard-setter, GRI, which develops global standards for (voluntary) sustainability reporting, released the *GRI 207: Tax Standard*.[153] An analysis of the July and August 2023 publicly available ESG document(s) from the 1,000 largest public companies worldwide showed that in Europe 34 per cent of the companies mentioned the GRI 207, whilst in Asia this proportion was 23 per cent and in United States 18 per cent.[154] A more detailed analysis is of course needed in order to assess whether companies go beyond compliance with hard law regulations in force, but it is important to note that businesses, investors and various organisations are developing frameworks and benchmarks for the assessment of corporate sustainability practices.

7. CONCLUSION

Sustainable development is aimed at solving major contemporary environmental, social and economic issues. Both governments and businesses are major actors in this respect and should be committed to sustainability since sustainable development can only be

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149 Ibid 818: 'the percentage of US companies that voluntarily provide public CbCR is remarkably low'. Multinationals like Amazon indeed strongly resist tax transparency; see GRI, 'Tax Transparency Debate Moves Center Stage' (30 May 2022) <https://www.globalreporting.org/news/news-center/tax-transparency-debate-moves-center-stage/>.

150 Norges Bank Investment Management, 'Tax and Transparency' (Web Page) <https://www.nbim.no/en/the-fund/responsible-investment/principles/expectations-to-companies/tax-and-transparency/>.

151 Gwladys Fouche, 'For First Time, Norway's Wealth Fund Ditches Firms over Tax Transparency', *Reuters* (1 February 2021) <https://www.reuters.com/article/us-norway-swf-idUSKBN2A11TR/> (quoting Fund CEO Nicolai Tangen); VBDO, *Tax Transparency Benchmark 2023: A Comparative Study of 51 Dutch and 65 EU Stock-Listed Companies* (2023) <https://www.vbdo.nl/> ('*Tax Transparency Benchmark 2023*'). The Benchmark was developed in 2014 (and recently updated). Global Reporting Initiative, *GRI 207: Tax Standard 2019* (2019) ('*GRI 207*').

152 VBDO, *Tax Transparency Benchmark 2023*, above n 151.

153 Global Reporting Initiative (2019), *GRI 207*, above n 151. See Arne Schnitger, Florian Holle and Madeleine Kockrow, 'Tax and Transparency: Reporting in Accordance with the Global Reporting Initiative' (2021) 49(8/9) *Intertax* 702.

154 Page Allen and Miguel Perez Ludena, *Global Adoption Trends for the GRI Tax Standard: An Analysis of the Use of* GRI 207: Tax 2019 *by the 1,000 Largest Public Companies Worldwide* (Global Reporting Initiative, 2024).

achieved by cooperation with governments and other actors. They share the responsibility for sustainable development, the environmental, societal and economic aspects of which are expressed in SDGs and ESG.

Unsurprisingly public governance and corporate governance are increasingly required to focus on sustainable development. Transparency is required to ensure accountability to a wide set of stakeholders. Companies committing to SDG and ESG objectives should build on CSR, in particular the ethical dimension of 'going beyond compliance' with the law, that is, hard law sustainability obligations.

Tax is fundamental to collaborative steps towards sustainability and should therefore be integrated into both public and corporate sustainability agendas. Without tax revenue any government's sustainability policy would be doomed to fail. Moreover, tax law itself can be used as a regulatory instrument for SDGs, for example environmental taxes. Aggressive tax planning and tax evasion by (corporate) taxpayers reduce governments' capacity to attain SDGs and shift the tax burden to other members of society. Corporations' tax behaviour therefore impacts sustainable development twice. Taxation is thus special in the sense that (corporate) taxpayers are responsible to provide revenue to government to advance its sustainability agenda – on top of their own responsibility to society to contribute to sustainable development. Corporate tax governance should therefore reflect the organisation's purpose, value and principles. Moreover, public tax transparency should be endorsed in order to render account to stakeholders. Sustainable tax is a boardroom responsibility.

Taxation's integration into the corporate sustainability agenda implies that it plays an autonomous role: gross underperformance cannot be sidestepped by, for example, excellent performance on the other pillars of the ESG framework. CSR should therefore also inform sustainability corporate (tax) governance. Corporations' shared responsibility for the integrity of the tax system requires that the ethical obligation to go beyond (strict) compliance with the law be viewed as an obligation to pay a fair share of tax and be proactively transparent.

Thus, good corporate tax governance requires tax values and principles embodying the ethical CSR dimension (beyond compliance) oriented to sustainability, and accountability with its prerequisite of transparency to stakeholders and responsibility attribution. These components should be fleshed out in more detail so as to provide a practical benchmark for sustainable corporate tax governance.

Nonetheless, important challenges are the change of mindset needed to integrate tax into the ESG framework and the design of a (transparency) benchmark which provides detailed tax data to enable a proper analysis of corporations' substantive tax performance.