Environmental, Social, and Governance (ESG) Reporting from an Environmentalist's (Not Investor's) Lens

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This paper assesses environmental, social, and governance ("ESG") reporting from an environmentalist's lens. There are two broad goals of ESG reporting: (1) reporting on environmental and social ("E&S") impacts ("E&S-centric goals"), and (2) reporting on how these E&S impacts translate to financially material risks and opportunities to a corporation ("investor-centric goals"). Environmentalists scrutinizing ESG reports should ensure that E&S-centric goals and investor-centric goals are kept conceptually distinct. Environmentalists should focus on preserving the E&S-centric goals, which are at risk of being overshadowed by an institutional analogy to financial reporting. Environmentalists should also carefully scrutinize "zones of discretion" in ESG reporting practices and leading ESG reporting standards, as a strategy to limit greenwashing and related harmful practices.

ESG reporting driven by private parties, sometimes called "voluntary" ESG reporting, is a form of private environmental governance ("PEG"). ESG reporting mandated by governmental institutions, sometimes called "mandatory" ESG reporting, is a public law tool of persuasion that relies on encouraging privately-driven improvements to control corporate environmental behavior in the absence of more direct, prescriptive, publicly-mandated laws targeting corporate behavior. These privately-driven aspects of ESG reporting can be assessed as a form of PEG. This paper uses a "PEG Assessment Framework" to assess ESG reporting, focusing on the role of ESG reporting as an imperfect "gap filler," its potential for positive and negative spillover effects (i.e. the likelihood it will facilitate a movement towards, or displace, respectively, more "optimal" publicly-mandated environmental laws), and empirical evidence showing causal connections between improved environmental corporate behavior and improved environmental quality.

There is some empirical evidence that ESG reporting (particularly E&S-centric ESG reporting and publicly-mandated ESG reporting) can improve

environmental behavior and environmental quality, particularly in an environment of lax public regulation. From an environmentalist's lens, such empirical evidence supports the desirability of ESG reporting as a gap filler and a tool of persuasion. However, ESG reporting's pro-environmental gains must be balanced against potential risks of negative spillover effects in all its forms (including displacement of its E&S-centric goals), and strong anti-greenwashing laws and careful scrutiny of "zones of discretion" are needed. Environmentalists should advocate for such governance measures as part of a broader push for publicly-mandated ESG reporting focused on E&S-centric goals.

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INTRODUCTION

Across the world, power has shifted from governments to corporations.[1] The forces of globalization, international trade, and neoliberalism have strengthened the bargaining power of large transnational corporations in relation to governments internationally and domestically.[2] Large transnational corporations can readily avoid host country environmental and social regulations by moving, or threatening to move, their operations to other countries, prompting a global race to the bottom in the public laws protecting the people and the planet.[3] Sarah Light puts it succinctly: "The corporation is ascendant."[4]

Corporations are neither inherently good nor inherently harmful; they are essentially redistributive. They extract value from some sources—harming people and the planet, often without compensating the true costs[5]—and convert them into what their decisionmakers deem as "value" elsewhere.[6] Therefore, there is an inherent public interest in what corporations do, and the public must strive to promote their goods, reduce or tax their harms, and scrutinize their redistribution of value.

Accordingly, corporations must be accountable to the public. This has traditionally been the domain of publicly-enacted laws,[7] which are laws enacted by governmental institutions.[8] However, due to the shift in power from

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[1] *See* Joshua Galperin, *Environmental Governance at the Edge of Democracy*, 39 VA. ENV'T L.J. 70, 114-118 (2021) [hereinafter *Edge of Democracy*].

[2] *See, e.g.* Mel van Elteren, *Neoliberalization and Transnational Capitalism in the American Mold*, 43 J. OF AM. STUD. 177 (2009).

[3] DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1395-1397 (4th ed. 2020) [hereinafter INTERNATIONAL ENVIRONMENTAL LAW].

[4] Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 139 (2019) [hereinafter *Corporation Law as Environmental Law*].

[5] For example, much of environmental law and policy concerns how to make polluters and users of natural resources (including sinks) bear the full brunt of the environmental and social impacts, harms, and costs of their activities, which they currently do not. *See, e.g.,* INTERNATIONAL ENVIRONMENTAL LAW*, supra* note 3, at 484-486 (discussing the polluter pays principle and user pays principle).

[6] This can be the value of the corporation and its shares, the corporation's earning potential, dividends distributed to the shareholders, or even the delivery of some public good (e.g. communication services or transportation services) which is different from the public goods (e.g. natural resources, human resources, or ecosystems services) drawn upon to supply these public goods.

[7] *See* discussion *infra* Part I, Section I.A and accompanying text on terms "public" and "private."

[8] This is not to equate governmental institutions with "the Public." While governmental

governments to corporations, publicly-enacted laws may not deliver what is needed or may not reflect widely-held public values.[9] Private governance may be able to fill this gap. The term "private environmental governance" ("PEG"), famously coined by Michael Vandenbergh, focuses specifically on achieving environmental goals,[10] and will be a key framework and focus of this paper.

PEG does not seek to replace public environmental laws, but to supplement them, especially where public laws fall behind what is needed.[11] Proponents of PEG argue that its measures should be viewed and assessed as non-"optimal,"[12] "gap-filling"[13] measures, holding the fort while public laws[14] catch up. PEG measures can also be a source of regulatory innovation, inspiring the design of public laws and leading the way: a "positive spillover effect."[15] However, PEG measures also risk displacing necessary[16] public laws: a "negative spillover effect."[17] PEG measures may also have direct, measurable positive impacts in their own right, which may be observed by empirically measuring effects on corporate behavior and environmental quality.[18]

Environmental, Social, and Governance ("**ESG**") reporting is a significant PEG

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institutions, at least in aspiration, strive to act on behalf of "the Public," the conception of "the Public" and its problems is wider than for "public" institutions. *See* discussion *infra* Part I, Section I.A.

9 *Cf.* DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 35-69 (1999) [hereinafter ECO-PRAGMATISM] (discussing how politics and markets are both flawed and incomplete ways to find the public's values, and how both should be combined in an "eco-pragmatic" manner).

10 *See* Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 129 (2013) [hereinafter Private Environmental Governance] (using "measures" to describe any actions, rules, standards, and laws, which impose a level of governance or restrictions on individuals or entities, regardless of whether "measures" may come from governmental or non-governmental sources).

11 *Id.* at 161-162.

12 *Id.* at 134, 138-139, 185-186. Vandenbergh uses the term "optimal" in this context. However, one may doubt whether "optimality," as such, can ever be achieved by *any* measure, whether "public" or "private." *Cf.* Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. (1959) [hereinafter *Muddling Through*], which discusses the practical impossibility of achieving an optimal policy outcome, and where Lindblom recommends the "branch method" of policy decision-making, which simply aims to formulate policy approaches and policy goals within a "process of successive approximations to some desired objectives in which what is desired itself continues to change under consideration." *See Muddling Through,* at 86. Accordingly, this paper suggests that the desirability of any recommended policy approach to a given problem, even those recommended in this paper, should be subject to continual assessments and necessary adjustments, broadly in line with Lindblom's "branch method."

13 *Private Environmental Governance, supra* note 10, at 185.

14 The terms "public laws" and "publicly-enacted laws" are used interchangeably and are intended to mean the same thing: laws enacted by a governmental authority, such as a legislature or executive branch agency. *But see also discussion below* at Part I, Section I.A, on the "public" and "private" distinction and definitions.

15 *Private Environmental Governance, supra* note 10, at 187-188.

16 *Id.* at 186-187. *Cf.* "optimality," discussed in *supra.* note 12.

17 *Id.* at 186-187.

18 *Id.* at 188-195.

measure that emerged recently.[19] Increasingly, corporations are publishing ESG reports or "sustainability reports" on specific environmental, social, and governance metrics (including impacts, risks, and opportunities) that intersect, affect, and are generally wider in scope than what is reported in corporations' financial reports.[20]

To assess the desirability of ESG reporting from an environmentalist's lens, the following questions are examined. First, what are the positive and negative potential impacts of ESG reporting in promoting environmental goals? Second, what changes to ESG standards, practices, and ESG-related public laws should environmentalists advocate for in attempting to improve the positive impacts of ESG reporting while mitigating its risks and potential harms? Part I, Section I.E elaborates on these environmental goals, as partly inspired by Vandenbergh's description of why private environmental governance matters. To briefly summarize, these goals, in the context of corporations' business activity, include (1) achieving "sustainability,"[21] (2) improving environmental quality, (3) improving corporate environmental behavior, and (4) enacting laws which promote environmental goals.

Accordingly, this paper assesses ESG reporting from two vantage points. First, ESG reporting is assessed with reference to the four environmental goals listed

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[19] "ESG reporting" also interchangeably refers to "ESG disclosure." "Disclosure" typically refers to public disclosure of ESG information or metrics when a publicly-traded corporation makes information publicly available for the benefit of current and potential investors. There is a significant overlap between "ESG reporting" and "sustainability reporting;" indeed, some reporting standards (e.g. Global Resource Institute ("**GRI**")) use the term "sustainability reporting" or "sustainability report" interchangeably with "ESG reporting." *See generally* GRI, *Consolidated Set of the GRI Standards* (June 30, 2022), *infra* note 120. "ESG reporting" is preferred because it distinguishes "ESG" as a "metrics-based approach intended to increase corporate accountability" with "sustainability" as "relat[ing] to time" and "shift[ing] the business's focus to the future" in a manner focused on creating long-term stakeholder value including shareholder value. "Sustainability" may have a more investor-centric quality while "ESG" may focus on both E&S-centric and investor-centric approaches. *See* discussion *infra* Part I, Section I.C, on the "E&S-centric" versus "investor-centric" goals of ESG reporting. *See also* Colin Myers and Jason J. Czarnezki, *Sustainable Business Law? The Key Role of Corporate Governance and Finance,* 51(4) ENV'T L. 991, 996, 997 (2022) [hereinafter *Sustainable Business Law*].

[20] *See e.g.,* Sarah Barker, Cynthia Williams, & Alex Cooper, *Fiduciary Duties and Climate Change in the United States* (Oct. 2021), at 54 (*citing* Financial Accounting Standards Board, *Intersection of Environmental, Social, and Governance Matters with Financial Accounting Standards* (Mar. 19, 2021), https://www.fasb.org/document/blob?fileName=FASB_Staff_ESG_Educational_Paper_FINAL.pdf (last visited Dec. 19, 2023)). *See also* European Commission, *European sustainability reporting standards – first set* (July 31, 2023), *Annex I, ESRS 1 (General Requirements)*, available for download at: https://finance.ec.europa.eu/regulation-and-supervision/financial-services-legislation/implementing-and-delegated-acts/corporate-sustainability-reporting-directive_en, §47 (adopted, but not in force until published in Official Journal) (last visited Dec. 19, 2023), (commenting on the scope of "financial materiality.") [hereinafter ESRS 1].

[21] "Sustainability" can have different meanings in different contexts. *See infra* Part I, Section I.E.

above.[22] Second, ESG reporting is assessed against the framework adapted from Vandenbergh's Private Environmental Governance and its discussion of "Does Private Environmental Governance Matter?,"[23] referred to as the "**PEG Assessment Framework**" hereinafter.[24] Vandenbergh sets out four reasons PEG "matter[s]"[25] and, in doing so, employs a framing structure that can be used to evaluate individual PEG measures.[26] This is the first paper to apply the PEG Assessment Framework.[27]

This paper's central thesis is that ESG reporting is, overall, a valuable PEG measure, and environmentalists should support it with caution and scrutiny. There is empirical evidence showing that ESG reporting sometimes promotes improved corporate behavior, which may be linked to improved environmental performance.[28] Though rare, at least one study established a direct correlation between ESG reporting and improved environmental quality.[29] Therefore, environmentalists should support ESG reporting, while also carefully scrutinizing the many "zones of discretion"[30] that exist in ESG reporting processes. In particular, environmentalists reviewing ESG reports and ESG reporting standards should scrutinize and manage these "zones of discretion" by advocating for a publicly-mandated ESG reporting regime that focuses on assessing environmental and social ("**E&S**") impacts ("**E&S-centric goals/concern**s").

E&S impact assessments must come first in ESG reporting. Since the ESG reporting process builds on E&S impact assessments to determine whether the E&S impacts also affect or potentially affect the corporation's value[31] ("**investor-centric goals/concerns**"), the potential financial impacts should be a separate inquiry from the potential E&S impacts. This overlap allows both environmentalists and investors to leverage genuine win-win synergies where they arise.[32]

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22 *See infra* Part I, Section I.E.

23 *Private Environmental Governance*, *supra* note 10, at 184-194.

24 *See* discussion *infra* Part I, Section I.B (describing circumstances in which ESG reporting can be viewed as a PEG measure); *infra* Part III (describing the PEG Assessment Framework).

25 *Private Environmental Governance*, *supra* note 10, at 184-194.

26 Although Vandenbergh may not have specifically intended for this framework to be used as a framework to assess specific PEG measures.

27 Based on a systematic review (conducted on Dec 26, 2023) of articles citing *Private Environmental Governance, supra* note 10. While a number of articles have assessed specific PEG measures using concepts like "spillover effects" (*e.g.* Amanda C. Leiter, *Fracking, Federalism, and Private Governance*, 39 HARV. EVNT'L L. REV. 107 (2015)), none of these articles appear to apply the entire PEG Assessment Framework in the manner defined and used in this paper.

28 *See* discussion *infra* Part IV, Section IV.A.

29 *See* discussion *infra* Part IV, Section IV.B. *See also infra* note 224.

30 *See* discussion *infra* Part II, Section II.D.

31 In a for-profit corporation, a corporation's or shareholders' "value" refers to financial value.

32 *See* discussions *infra* Part II, Section II.B, and Part V (discussing how environmentalists can leverage genuine win-win situations and support the success of investor-centric goals too, such as by promoting anti-greenwashing laws for all types of ESG reporting).

In these efforts, strong anti-greenwashing laws are needed.[33] Generally, greenwashing refers to when a corporation's environmental performance fails to match its environmental claims.[34] Robust, detailed, mandatory ESG reporting standards which focus on E&S impact assessment are needed, especially where governments are slow to directly regulate the E&S impacts of corporate activity.

Part I will introduce key concepts, definitions, and distinctions frequently referenced throughout. Part II will provide a background of the key features and policy logic of ESG reporting. In surveying the history and emergence of ESG reporting in its current form, it will become apparent that there are two goals of ESG reporting: E&S-centric goals and investor-centric goals. It is important to keep these two goals separate and distinct. Focusing on the E&S-centric goals, ESG reporting is described as a tool of persuasion. The paper will then provide a survey of the "zones of discretion" present in the ESG reporting process, explain how "zones of discretion" may undermine ESG reporting's effectiveness as a tool of persuasion, and discuss the closely-linked problem of greenwashing. Part III of this paper describes the PEG Assessment Framework. Part IV provides an assessment of ESG reporting, applying the PEG Assessment Framework. Recommendations for environmentalists will be provided in Part IV and developed further in Part V.

I. Context-Setting: Definitions and Distinctions

A. "Public" and "Private"

Since this paper focuses on a framework to assess private environmental governance (PEG) and assesses "voluntary"[35] ESG reporting as a PEG measure, it is important to briefly discuss the concepts of "private" and "public." In Private Environmental Governance, Vandenbergh uses an identity-centric approach in classifying governance measures as "private" or "public." [36] If the person or entity imposing the measure (which includes laws, rules, and restrictions)[37] is governmental, then the measure is "public." Put another way, if the identity of the source of the measure is governmental, then it is "public." If the identity of the source of the measure is non-governmental, then it is "private."[38]

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33 *See infra* Part II, Section II.E.

34 Menno D. T. de Jong et al., *Different Shades of Greenwashing: Consumers' Reactions to Environmental Lies, Half-Lies, and Organizations Tracking Credit for Following Legal Obligation*, 34 J. OF BUS. & TECH. COMMC'N 38, 39 (2020).

35 *See also* discussion *infra* Section I.B and accompanying text on "voluntary."

36 *Supra* note 11.

37 *See supra* note 10 and accompanying text on "measure."

38 *Private Environmental Governance, supra.* note 11, at 141-145 (using "government" interchangeably with "public" because economists traditionally viewed the "government" as the key actor in providing "coercive authority necessary to resolve environmental collective action problems,"

This identity-centric approach may be contrasted with the approach in John Dewey's classic text, The Public and its Problems.[39] Dewey argues that, in searching for "the Public," there should be a shift from an identity-centric model of "the Public" to one that is tied more to the consequences of the action or decision in question, that is, more consequence-centric in approach.[40] Dewey thus introduces a subtle but important distinction. While an identity-centric approach can be helpful, in that it may be reflective of a prevailing practice, language, and understanding in how we think about environmental governance measures,[41] it may also lead us to lose sight of how many "private" actions, decisions, and transactions have a public impact, affect the public interest, and have a public character.[42]

On the other hand, if we focus on the consequence of the action, rather than the source of the actor, in determining what is "public" versus what is "private," we run into the question of where to draw the line: where do the effects of an otherwise "private" transaction between person A and person B emanate so far into the public sphere that it becomes "public?" Some have theorized and framed

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and using "private law analysis" in framing and approaching PEG).

39 *See generally* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927) [hereinafter THE PUBLIC AND ITS PROBLEMS].

40 *Id. at* 12-13 ("We take then our point of departure from the objective fact that human acts have consequences upon others, that some of these consequences are perceived, and that their perception leads to subsequent effort to control action so as to secure some consequences and avoid others. Following this clew, we are led to remark that the consequences are of two kinds, those which affect the persons directly engaged in a transaction, and those which affect others beyond those immediately concerned. In this distinction we find the germ of the distinction between the private and the public. When indirect consequences are recognized and there is effort to regulate them, something having the traits of a state comes into existence. When the consequences of an action are confined, or are thought to be confined, mainly to the persons directly engaged in it, the transaction is a private one. When A and B carry on a conversation together the action is a trans-action: both are concerned in it; its results pass, as it were, across from one to the other. One or other or both may be helped or harmed thereby. But, presumably, the consequences of advantage and injury do not extend beyond A and B; the activity lies between them; it is private. Yet if it is found that the consequences of conversation extend beyond the two directly concerned, that they affect the welfare of many others, the act acquires a public capacity, whether the conversation be carried on by a king and his prime minister or by Cataline and a fellow conspirator or by merchants planning to monopolize a market").

41 *Cf. Edge of Democracy, supra.* note 1, at 76 (adopting common, well-understood notions of "public" and "private" while "rejecting any fundamental distinction between public and private spheres, this paper instead uses the terms to reflect general practice and expectations, in which 'public' invokes notions of either widespread concern or state-centred action, while 'private' means non-state control").

42 *See also* discussion *infra* at Introduction. *See also Edge of Democracy, supra.* note 1, at 76 ("This distinction signals that state and non-state alike may impact individual liberty because both wield real, meaningful, and identifiable power. But PEG is a slight of hand when it comes to that power. It inspires us to look away from the functional distribution of power and toward the flamboyant triumphs and impressive opportunities of private undertakings. While we look in that direction we may fail to see and debate the existence of coercive power, the extent of that power, or even the process by which that power is wielded."). *See also* GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 5 (1967).

the answer to this question in terms of the restriction of liberty,[43] of interference or domination,[44] or of the legitimized ability to use violent, coercive force.[45] Nevertheless, such debates are beyond this paper's scope but are mentioned as a reminder not to lose sight of how "private" (in the identity-centric sense) actions and decisions can often have a significant public character.

Notwithstanding this important reminder, in its use of terminology, this paper adopts an identity-centric approach to the terms "private" and "public," because this paper significantly relies on the PEG Assessment Framework. Therefore, terms like "public laws," "publicly enacted laws," or "publicly-mandated ESG reporting" use an identity-centric conception of "public." Similarly, terms like "private governance," "private environmental governance," or "privately-driven ESG reporting," use the identity-centric conception of "private." However, when discussing "the public" or "public values" or "public interest"—typically a normative discussion—this paper adopts a wider definition of "the Public," one tied more to the effects of the action or decision in question rather than the identity of the person or institution carrying it out.

B. "Publicly-mandated" and "Privately-driven" (or, "Mandatory" and "Voluntary") ESG Reporting

Many commentaries identify two types of ESG reporting: mandatory and voluntary.[46] However, this distinction can be misleading. A corporation may "voluntarily"[47] issue an ESG report under a lot of external[48] pressure from supply-chain partners or shareholders, or to avoid potential liability in private lawsuits. Therefore, a more useful distinction may be to track the meaning of "private" within the definition of PEG itself, or what Vandenbergh, in defining PEG, considers "private" and "public."[49] As discussed in the above section, this appears to be tied to the identity of the actor(s) imposing the PEG measure: the measure

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43 *Edge of Democracy, supra* note 1, at 109-110.

44 *Id.* at 110-114.

45 *Id.* at 76, 79.

46 *See, e.g.* Marc S. Gerber et al., *Voluntary Environmental and Social Disclosures*, HARV. L. SCH. FORUM ON CORP. GOV'NANCE (Jul. 27, 2021), https://corpgov.law.harvard.edu/2021/07/27/voluntary-environmental-and-social-disclosures/ (last visited Dec. 19, 2023); Khrystyna Bochkay et al., *'Mere Puffery' or Credible Disclosure? The Real Effects of Adopting Voluntary ESG Disclosure Standards, 6* (Jul. 20, 2022), http://dx.doi.org/10.2139/ssrn.4167391.

47 Due to these external pressures, such disclosures should not be called "voluntary." *See* discussion *infra* Part I Section A.

48 One may take this analysis even further and question whether the distinction of what is "external" to a corporation—as a source of that pressure. For example, are shareholders "external" to a corporation? If we interrogate the line between "external" and "internal," the distinction will start to break down. Therefore, what makes a PEG measure "private" may simply be where the "locus of decision-making" lies. Joshua U. Galperin, *Private, Environmental, Governance,* 9 GEO. WASH. J. OF ENERGY & ENV'T L. 1 (2018).

49 *Cf. Edge of Democracy, supra* note 1, at 76.

is "private" if the actor(s) imposing[50] it are conventionally viewed as private, and the measure is "public" if the actor or institution imposing it is conventionally viewed as public.[51] Therefore, in this paper, the terms "**publicly-mandated ESG reporting**" and "**privately-driven ESG reporting**" are used in place of "mandatory" and "voluntary" ESG reporting respectively.

Privately-driven ESG reporting is a PEG measure, and should be assessed as such. Publicly-mandated ESG reporting is not a PEG measure, but can trigger changes in corporate behavior which are privately-driven. In this sense, publicly-mandated ESG reporting can be assessed by two related frameworks: first, by its success (or lack thereof) as a publicly-mandated tool of "persuasion"[52], and second, with reference to some aspects the PEG Assessment Framework, namely, the assessment of empirical effects on corporate behavior and environmental quality.

C. "E&S-centric Goals" and "Investor-centric Goals" of ESG Reporting

ESG reporting emerged[53] in response to two related but distinct thematic concerns: (1) the need for improved transparency and accountability for corporations' environmental and social ("**E&S**") impacts ("**E&S-centric goals/concerns**"), and (2) the need to improve investor protection, reduce information asymmetry, and promote more efficient markets[54] and overall market stability ("**investor-centric goals/concerns**").[55] Others have referred to these as the "society-centred" perspective and the "true and fair view," respectively.[56]

The E&S-centric goals of ESG reporting generally map onto the concept of "**impact materiality**," while the investor-centric goals of ESG reporting generally map onto the concept of "**financial materiality**," which are specifically

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50 Private actors may effectively impose PEG measures on other private actors by pressuring them to adopt the PEG measures.

51 *See* discussion *supra* note 38.

52 *See* discussion *infra* Part II, Section II.C ("persuasion" is one of Salzman's five policy tools of environmental governance).

53 *See* discussion *infra* Part II, Section 0 (discussing the history and emergence of ESG reporting).

54 *See, e.g.* Jianxiong Hu et al., *Research on the effect of ESG performance on stock price synchronicity: Empirical evidence from China's capital markets*, 65 J. OF ACCT. & ECON. 169 (2018).

55 "Investor" means shareholders and creditors—individuals or other corporations who fund a corporation by equity and/or debt. "Primary users of general purpose financial reports" include "Existing and potential investors, lenders and other creditors." IFRS FOUNDATION, *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information*, https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s1-general-requirements.html/content/dam/ifrs/publications/html-standards-issb/english/2023/issued/issbs1-ag/#standard (last visited June. 27, 2023) [hereinafter IFRS S1].

56 Monciardini et al., Rethinking Non-Financial Reporting: A Blueprint for Structural Regulatory Changes, 10 ACCT., ECON., & L.: A CONVIVIUM (2020) 1-44, 22 [hereinafter *Rethinking Non-Financial Reporting*].

defined terms in the European Commission's ("EC") European Sustainability Reporting Standards ("**ESRS**"),[57] recently adopted pursuant to the European Union's ("**EU**") Corporate Sustainability Reporting Directive ("**CSRD**").[58] The EU's CSRD, when read with the ESRS, combines both "impact materiality" and "**financial materiality**" into the concept of "**double materiality**."[59] The definitions of these terms in the EC's ESRS are a helpful starting point since they attempt to capture common industry usages of these terms.

D. "Materiality," "Financial Materiality," and "Impact Assessment"

In ESG reporting, "materiality" is a critical and controlling concept. It is a lens or filter through which ESG metrics are included or excluded, prioritized or deprioritized. The concept of "materiality" was adopted from the following quote from TSC Industries, Inc. v. Northway, Inc.:[60]

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

The above quote closely aligns with what may be described as "financial materiality," which refers to information likely to be relied on by investors of a corporation in making investment-related decisions. Notably, the EC's ESRS 1 defines "financial materiality" in the following way:

> In particular, information is considered material for primary users of general-purpose financial reporting if omitting, misstating or obscuring that information could reasonably be expected to influence decisions that they make on the basis of the undertaking's sustainability statement.[61]

The "primary users of general-purpose financial reporting" refer to "existing

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57 ESRS 1, *supra* note 20.

58 Directive (EU) 2022/2464 of the European Parliament and of the Council 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 [hereinafter CSRD].

59 ESRS 1, *supra* note 20, ¶¶ 37-51.

60 *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

61 ESRS 1, *supra* note 20, ¶ 48.

and potential investors, lenders and other creditors, including asset managers, credit institutions, insurance undertakings"[62]

"Impact materiality" is a specific term defined in the EC's ESRS 1 and focuses on the relevance of an E&S impact. The ESRS 1 defines "impact materiality" in the following way:

> A sustainability matter is material from an impact perspective when it pertains to **the undertaking's material actual or potential, positive or negative impacts on people or the environment over the short-, medium- or long-term**. Impacts include those **connected with** the undertaking's own operations and value chain, including through its products and services, as well as through its business relationships. Business relationships include those in the undertaking's **upstream and downstream value chain** and are not limited to direct contractual relationships. . . . In this context, impacts on people or the environment include impacts in relation to environmental, social and governance matters (emphases in bold added).[63]

Significantly, the ESRS 1 also describes the relationship between "financial materiality" and "impact materiality"—a specific ESG metric "material from an impact perspective"[64] can be financially material at the time it is identified or may later become financially material. For example, if a corporation is operating in a country which imposes a carbon tax, its measurement of greenhouse gas ("**GHG**") emissions will be both financially material and material from an impact perspective. However, a corporation's use of products linked to deforestation may be material from an impact perspective but may not be currently financially material. It may only become financially material later, if public outcry causes a reputational backlash that affects that corporation's profits, or if the countries in which it operates implement laws prohibiting the use or sale of products linked to deforestation. It may also be financially material if that corporation faces economic pressure to use eco-labels or other private certification programs which audit or track whether its products are linked to deforestation.

The term "impact materiality" is potentially problematic because it imports the concept of "materiality" from a financial reporting analogy. Part II, Section II.B below explains why using financial analogies can be problematic. In short, they tend to cause a "financialization" of E&S impact assessments, capturing and weakening the E&S-centric goals of ESG reporting.[65] As described above, the term "materiality" originated in the securities disclosure context,[66] and was

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[62] ESRS 1, *supra* note 20, ¶ 22 (defining "users of sustainability statements").

[63] ESRS 1, *supra* note 20, ¶¶ 43, 44.

[64] ESRS 1, *supra* note 20, ¶ 43.

[65] *Rethinking Non-Financial Reporting, supra* note 55, at 16. *See also* discussion *infra* Part II, Section II.B.

[66] *See supra* note 60.

originally focused on what was "material" to a reasonable investor. While "impact materiality"[67] attempts to adopt and widen the concept of "materiality" by looking to factors external to the corporation (for example, the severity, likelihood, and irremediable character of potential impacts),[68] the word "materiality" itself tends to import an inward-looking glance; the corporation, its shareholders, and their preferences[69] remain the central focus, even in an "impact materiality" assessment.

Therefore, it is better to use the term "**impact assessment**" since this shifts the focus to the locus of the E&S impacts and is consistent with "environmental *impact assessment*" which, rather than financial reporting, should be the dominant analogy to E&S-centric ESG reporting. Accordingly, this paper uses the more accurate term "impact assessment," except when referring to "impact materiality" in the narrow, specific context of the ESRS and its provisions.

This also calls into question the term "double materiality." If one facet of "double materiality" is more properly thought of as an E&S impact assessment, then the term "double materiality" is also misleading. Therefore, this paper advocates for the terms "dual goals" or "dual focus" of ESG reporting instead of the "double materiality" terminology. Again, because the term "double materiality" has gained such prominence, the term "double materiality" is used where necessary, particularly when discussing ESG reporting frameworks which expressly incorporate the concept of "double materiality."

E. An Environmentalist's Lens and Environmental Goals: Breakdown of the Means-End Distinction

As aforementioned, this paper seeks to assess the desirability of ESG reporting from an environmentalist's lens. First, what are the impacts and potential impacts (both positive and negative) of ESG reporting with reference to environmental goals? Second, what changes to ESG standards, practices, and ESG-related public laws should environmentalists advocate for in trying to improve the positive impacts of ESG reporting while mitigating its risks and potential harms?

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[67] ESRS 1, *supra* note 20, ¶¶ 43, 44.

[68] ESRS 1, *supra* note 20, ¶ 45.

[69] *See, e.g.* ESRS 1, *supra* note 20, ¶¶ 62-63 (describing "sustainability due diligence" process as "[t]he outcome of the undertaking's sustainability due diligence process (referred to as "due diligence" in the international instruments mentioned below) informs the undertaking's assessment of its material ***impacts, risks*** and ***opportunities***. ESRS do not impose any conduct requirements in relation to due diligence; nor do they extend or modify the role of the administrative, management or supervisory bodies of the undertaking with regard to the conduct of due diligence… Due diligence is an on-going practice that responds to and may trigger changes in the undertaking's strategy, business model, activities, business relationships, operating, sourcing and selling contexts" (emphases in bold and italics added)). Furthermore, the term "materiality" itself, given its original meaning and focal point (the reasonable investor: *see supra* note 60, on *TSC Indus. v. Northway*), may import an unconscious bias or preference towards what "impacts" are important to the corporation and its shareholders.

When applying an environmentalist's lens, environmental goals and the means to achieve these goals must first be defined. We cannot assess ESG reporting as a PEG measure without first defining the goals or reference points against which it is to be assessed. This is necessarily a narrow or limited reference point because to assess ESG reporting from the vantage point of every goal or every hope everyone has for ESG reporting would be to regress to an overly broad and ultimately pointless exercise.

This paper adopts an environmentalist's lens[70] and is written for other environmentalists. This is not a narrow target audience as many people are environmentalists, even if they do not admit or realize it.[71] Specifically, this paper is written from the lens of the "environmental *instrumentalist*"[72]—that is, it proceeds from the assumption that the environment is worth protecting and worth sacrificing other competing values to protect and, *in a very broad sense*, leaving the only question of "How?"[73]

The last statement is qualified with "in a very broad sense" because environmentalists may not readily agree on how to frame environmental goals. Depending on the degree of specificity in defining these goals, one environmentalist's "goals" may be another's "means." Thus, even where two environmentalists can agree on high-level, abstract goals, the same two environmentalists may disagree on lower-level goals; these two environmentalists may have disagreed on the means towards achieving their common, higher-level goals. In this way, the means-ends distinction falls apart and a pragmatic[74] conversation about "What are the best means to achieve our ends?" must necessarily evolve into a conversation about the ends themselves.

To illustrate, the goals of any allegedly[75] pro-environmental measure[76] (which ESG reporting is an example of) are framed from an environmentalist's lens in

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[70] The Private Environmental Governance framework, central to this paper, is limited to adopting an environmentalist's lens. However, the "Social" in "ESG" is closely related to environmental goals and values, and may be applicable to many points made in this paper, although it is out of this paper's scope.

[71] ECO-PRAGMATISM, *supra* note 9, at 108, 109-110 (arguing how environmental values are widely shared and, in the U.S. specifically, deeply embedded in American culture).

[72] "Environmentalist" and "environmental instrumentalists" are used interchangeably, since this paper assumes all environmentalists are interested in how existing laws and extralegal frameworks (e.g. voluntary reporting standards) could advance environmental goals and values.

[73] *See* ECO-PRAGMATISM, *supra* note 9, at 93-198 (discussing the potential framework for balancing environmental goals or values and other competing goals or values where difficult tradeoffs need to be made).

[74] *See* Joshua Galperin, *Trust Me, I'm a Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. OF ENV'T L. 425, 435-440 (2017) (describing "philosophical pragmatism").

[75] A pro-environmental measure may not necessarily advance environmental goals because there can be a negligible effect or a negative effect in achieving environmental goals.

[76] This can refer to public laws or private environmental governance measures intended to protect the environment.

the following.

Top-tier goal: At the highest level of abstraction, an environmentalist's goal could be to **achieve "sustainability"** in how humanity engages[77] with its environment. "Sustainability," in this specific context, can be defined simply as preserving our environment's ability to replenish itself such that future generations have the same access to environmental "goods" (which include abstract concepts like beauty and awe, as well as more instrumental, practical aspects like ecosystem services and the use of environmental components as resources) as we currently do.[78]

Second-tier goal: A lower-level goal, also a means towards achieving the top-level goal, could be to **improve environmental quality** from its current state, which includes reducing the rate of environmental degradation from current unsustainable levels. This goal does not specify the exact environmental quality or standards that need to be reached in specific contexts (which can be, in itself, another goal-setting exercise), but simply that the environmental quality needs to be improved from its current levels.

Third-tier goal: An even lower-level goal, focusing on corporations' business activity, could be to **improve the environmental behavior of corporations**. This would include a corporation deliberately enacting an internal program to measure the impacts of its business activities on the environment, and finding ways to improve its impact on the environment. The enactment of potentially environmentally-protective internal measures may not necessarily translate into improving environmental quality[79] (a higher-level goal), but it at least increases the likelihood thereof.

Empirical studies are needed to determine whether the specific environmental programs enacted by a corporation will lead to improved environmental protection, thus linking a lower-level goal with a higher-level goal. However, in the absence of direct empirical studies, logical inferences are needed to fill the gap. For example, it is possible to rely on the broad international scientific

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[77] "Engagement" does not necessarily refer to "development." Accordingly, "sustainability" and "sustainable development" do not necessarily have the same meaning, though some commentators have adopted such an approach *Cf.* WILLIAM R. BLACKBURN, THE SUSTAINABILITY HANDBOOK 22, 32 (2d ed, 2015), (stating "The terms 'sustainability' and 'sustainable development' are used interchangeably in the GRI Standards," and adopting the Brundtland definition of "sustainable development").

[78] However, this definition of "sustainability" should not be read as advancing the generally outdated "equilibrium" view of ecosystems and of the biosphere. The environment is always in flux, resilient, and adaptable via evolution. *See e.g.* the approach in Ary A. Hoffmann & Carla M. Sgrò, *Climate change and evolutionary adaptation*, 470 NATURE 479 (2011). Thus, "sustainability" cannot mean preserving the environment "as-is" or "as-is" as far as possible, but rather preserving important values such as species and ecosystem diversity, and the natural resilience and adaptability of ecosystems in a changing biosphere in the Anthropocene era. Even this top-tier goal of "sustainability" itself is arguably framed in an anthropocentric way. Accordingly, some eco-centric environmentalists may view "sustainability" thus framed as a half-measure.

[79] *See, e.g.,* discussion *infra* Part IV, Section IV.B.

consensus reflected in Inter-governmental Panel on Climate Change ("**IPCC**") reports that human activity is linked to dangerous climate change[80] in reasoning that measurable reductions of greenhouse gas ("**GHG**") emissions are likely to improve environmental quality in the form of slowing down the rate of global warming.

Fourth-tier goal: A yet even lower-level goal, only applicable to PEG measures, would be the eventual **enactment of enforceable publicly-mandated environmental laws**. Again, there is no guarantee that the enactment of enforceable publicly-mandated environmental laws would translate into improved environmental behavior of corporations, let alone improvements in environmental quality—these potential causal linkages must, ideally, be studied empirically. Therefore, it is debatable whether this goal is worth pursuing, or whether PEG measures may do the job better in achieving the aforementioned higher-level goals.

This brief survey through defining environmentalists' goals with an increasing level of granularity illustrates the conceptual breakdown between the means-end distinction. The various nesting tiers of goals can be used to assess most allegedly pro-environmental measures (whether public or private), while the fourth tier can be used to assess PEG measures (including ESG reporting). As a strategy and approach towards achieving one or more of the above-stated environmental goals, ESG reporting can be assessed with reference to these goals.[81]

To briefly recap, this Part has defined the key concepts of "private" and "public," the "E&S centric goals/concerns" and "investor-centric goals/concerns" of ESG reporting, "privately-driven ESG reporting" and "publicly-mandated ESG reporting," "materiality," "financial materiality," "impact assessment," and the "dual goals" of ESG reporting. The four environmental goals are described at increasing levels of granularity, where a lower-tier goal can be the means for achieving a higher-tier goal, breaking down the means-end distinction. ESG reporting is assessed with respect to these environmental goals.

II. ESG REPORTING: EMERGENCE, GOALS, STANDARDS, AND "ZONES OF DISCRETION"

This Part provides a background to the key features and policy logic of ESG reporting. In surveying the history and emergence of ESG reporting in its current form, it will become apparent that there are two goals of ESG reporting: E&S-centric goals and investor-centric goals. In focusing on its E&S-centric goals,

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[80] Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC Sixth Assessment Report (AR6), Longer Report* 42, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf.

[81] *See* discussion *infra* at Introduction (assessing ESG reporting based on environmental goals and the PEG Assessment Framework).

ESG reporting can be viewed as a tool of persuasion. This Part will also provide a survey of the "zones of discretion" present in an ESG reporting process, and explain how they may undermine ESG reporting's effectiveness as a persuasion tool and are closely-linked to the problem of greenwashing.

A. History, Emergence, and Dual Goals of ESG Reporting

This section outlines the history and emergence of ESG reporting. As mentioned at Part I, Section I.C above, this history reveals that ESG reporting emerged in response to two related but distinct thematic concerns: the need for improved transparency and accountability for corporations' E&S impacts (i.e. the E&S-centric goals/concerns), and the need to improve investor protection, reduce information asymmetry, and promote more efficient markets and overall market stability (i.e. the investor-centric goals/concerns).[82]

ESG reporting can refer to the reporting or disclosure by corporations of ESG-related metrics which can be measured and reported.[83] These metrics are often quantitative, for example, greenhouse gas emissions per metric tons, or the percentage of business operations using renewable sources of energy. Quantitative metrics are often accompanied by qualitative analysis and discussions of the quantitative metrics, such as strategies aimed at improving the business's social impact or strategies to transition to renewable sources of energy. An illustration of this can be seen in the following excerpt from the Sustainability Accounting Standards Board's ("**SASB**") standard applicable for "Airlines"[84] where qualitative metrics are categorically described as "Discussion and Analysis."

SUSTAINABILITY DISCLOSURE TOPICS & ACCOUNTING METRICS

Table 1. Sustainability Disclosure Topics & Accounting Metrics

TOPIC	ACCOUNTING METRIC	CATEGORY	UNIT OF MEASURE	CODE
Greenhouse Gas Emissions	Gross global Scope 1 emissions	Quantitative	Metric tons (t) CO_2-e	TR-AL-110a.1
	Discussion of long-term and short-term strategy or plan to manage Scope 1 emissions, emissions reduction targets, and an analysis of performance against those targets	Discussion and Analysis	n/a	TR-AL-110a.2
	(1) Total fuel consumed, (2) percentage alternative, (3) percentage sustainable	Quantitative	Gigajoules (GJ), Percentage (%)	TR-AL-110a.3

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[82] *See infra* at Part I, Section I.C.

[83] *Sustainable Business Law, supra* note 19, at 998.

[84] SASB STANDARDS, AIRLINE: SUSTAINABILITY ACCOUNTING STANDARDS 6, https://www.sasb.org/standards/download/?lang=en-us (illustrating the airline sector).

Academics Monciardini, Mähönen, and Tsagas helpfully describe how the historical development of ESG reporting (which they refer to as "sustainability reporting") can be categorized into three major waves.[85] While E&S-centric concerns arise in all three waves, investor-centric concerns feature prominently in the third wave.[86]

The first wave occurred in the 1970s.[87] This was driven by governmental efforts, particularly at the international level, and gave rise to the Organization for Economic Co-operation and Development ("**OECD**") Guidelines for Multinational Enterprises (the "**OECD Guidelines**").[88] International law is often criticized for focusing too much on state actors and ignoring non-state actors like corporations.[89] Against this context, the OECD Guidelines can be viewed as the international community's attempt to improve the transparency and accountability of corporations, especially large transnational corporations. The original focus was on employment and industrial relations concerns, and environmental concerns were largely absent, reflecting the prevailing spirit and concerns of the 1970s,[90] and being the international community's response to large-scale unethical activities by multinational corporations.[91]

In the 1980s, attempts at international regulations ended, which ushered in two decades of market-led, privately-driven (i.e. "voluntary") practices around E&S-centric ESG disclosures (though these were not called "ESG disclosures" at the time).[92] Thus, the second wave, which took place from the 1980s to early 2000s, similarly reflected the specific historical context of those times. This included the prevailing neoliberal ethic of deregulation and the "retreat of the state," the emerging business thinking supporting the "business case for corporate responsibility," the rise of "voluntary" CSR in light of reputational and other financially-instrumental benefits, and an increasing emphasis on environmental and climate change issues (as compared to the greater labor-related concerns of the 1970s).[93] This period saw the emergence of the Global Reporting Initiative ("**GRI**") in 1996, the United Nations Global Compact ("**UNGP**") in 2000, and the Carbon Disclosure Project ("**CDP**") in 2000.[94]

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85 *Rethinking Non-Financial Reporting*, *supra* note 56, at 8-17.

86 *See* discussion *infra* at 18.

87 *Rethinking Non-Financial Reporting*, *supra* note 56, at 8, 13.

88 *Id.* at 12.

89 *See, e.g.,* U.N. Secretary-General, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, ¶¶ 84, 111, 112, U.N. Doc. A/73/419 (Nov. 30, 2018) (on the role of non-state actors in international environmental law).

90 *Rethinking Non-Financial Reporting*, *supra* note 56, at 8, 13.

91 INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 3, at 1442.

92 *Rethinking Non-Financial Reporting*, *supra* note 56, at 13-14.

93 *Id.*

94 *Id.*

The third wave was prompted by the 2008 financial crisis. The laissez-faire and "voluntary" approaches to regulating businesses that prevailed from the 1980s to 2007 faced a legitimacy crisis.[95] Laws and regulations in various countries were adopted to enhance corporate transparency through disclosures, and these included the Dodd-Frank Act in the U.S. (2010), amendments to the Companies Act in the U.K. (2013), the enactment of the Modern Slavery Act (2015) in the U.K, and the enactment of the 'Devoir de Vigilance' Law in France (2017).[96] This third wave saw significant revisions to existing frameworks, including the OECD Guidelines and the GRI reporting standards.[97] It also saw the emergence of new standards including, significantly, the recommendations issued by the Task Force on Climate-related Financial Disclosures ("**TCFD**") developed by the Financial Stability Board (2017), the Integrated Reporting Framework (the "**IR Framework**") by the International Integrated Reporting Council ("**IIRC**") (2014), standards issued by the Sustainability Accounting Standards Board ("**SASB**") formed in 2011,[98] and the 17 Sustainable Development Goals ("**SDGs**") set by the UN General Assembly.[99]

The potentially destabilizing, systemic impact[100] of the climate crisis is closely linked to the concerns arising in this third wave: the need to promote corporate transparency and accountability, and to preserve the broader financial stability of the market. In this context, ESG reporting boomed in importance and prominence in recent years, and has gone from a fringe corporate practice into the mainstream.[101] Worldwide, regulation lags behind, but has taken meaningful strides forward.[102]

Therefore, ESG reporting emerged from two very different concerns: E&S-centric concerns, and investor-centric concerns. While E&S-centric concerns arise in all three waves, investor-centric concerns feature prominently in the third wave. The dual goals of ESG reporting has divided its focus and given rise to two competing conceptions of materiality: so-called "impact materiality" (which should more properly be called "impact assessment"[103]), and financial materiality, where "materiality" operates as a key controlling concept.

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95 *Id.* at 14-15.

96 *Id.*

97 *Id.*

98 SASB STANDARDS, *About Us,* https://www.sasb.org/about/ (last visited May 12, 2023).

99 *Rethinking Non-Financial Reporting*, *supra* note 56, at 14-15.

100 *See, e.g.* Sarah Barker, Cynthia Williams, & Alex Cooper, *Fiduciary Duties and Climate Change in the United States, 1* (Oct. 2021) [hereinafter *CCLI US Report*] (describing the climate crisis as presenting large-scale systemic risk and potentially destabilizing the global economy).

101 *Id.*

102 For example, the European Union and United Kingdom mandate sustainability reporting. The U.S. recently proposed its new climate reporting rule, the Enhancement and Standardization of Climate-Related Disclosures for Investors.

103 *See* discussion *supra* Part I, Section I.D.

B. ESG Reporting Standards in the Context of its Dual Goals

All ESG reporting standards and practices are scoped through the lens of "materiality."[104] Hence, corporations only report on ESG metrics "material" to its business operations. ESG reporting standards tend to apply either financial materiality, or so-called "double materiality"[105] which captures both impact assessment and financial materiality. E&S impacts can also be financially-material, such as in a genuine win-win scenario where it is in the corporation's best interest to improve its E&S-related impacts. For example, it is in most corporations' long-term financial interests to plan for and mitigate the impacts of climate change-related risks (physical risks, transition risks, litigation risks), which includes transitioning to lower emitting activities, which also improves the corporation's E&S-related impacts.[106] It remains an important environmental advocacy strategy to point to these synergies and genuine "win-win" situations to spur businesses towards improving their E&S impacts.

ESG reporting standards help guide a corporation through a reporting process by helping them identify what is or is not material. Corporations may choose to not use any ESG reporting standards. However, generally the use of one or more of the leading standards lends legitimacy to a corporation's ESG report. For example, many larger corporations use and combine multiple established ESG reporting standards in slick, sophisticated ESG reports, taking advantage of where these standards overlap and are interoperable.[107] However, this could arguably lead to the problem of selectively displaying favorable metrics while downplaying those that cast the corporation in a bad light.[108]

In general, the use of established ESG reporting standards ensures that corporations approach the ESG reporting and "materiality" assessments in a more structured way which, on the whole, improves the comparability of ESG

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104 *See* discussion *supra* Part I, Section I.D.

105 *See* discussion *supra* Part I, Section I.D (discussing how the term "dual goals" or "dual focus" is more appropriate than "double materiality.").

106 *CCLI US Report, supra* note 100, at 2-4.

107 *See* AMAZON, *Delivering Progress Every Day: Amazon's 2021 Sustainability Report,* 81-96 (2021), https://sustainability.aboutamazon.com/2021-sustainability-report.pdf (last visited Dec. 19, 2023) [hereinafter *Amazon's 2021 Sustainability Report*] (listing compliance with the Sustainability Accounting Standards Board ("SASB"), UN Guiding Principles ("UNGP") Reporting Framework, the Task Force on Climate-related Financial Disclosures ("TCFD"), and the UN Sustainability Development Goals ("SDG").); *see also* CONOCOPHILLIPS, *Sustainability Report 2021*, 22-23 (2021), https://static.conocophillips.com/files/resources/conocophillips-2021-sustainability-report.pdf (last visited Dec. 19, 2023) ("supplemented with…as well as recommended reporting for the Sustainability Accounting Standards Board (SASB), Task Force on Climate-Related Financial Disclosures (TCFD) and the World Economic Forum: Measuring Stakeholder Capitalism.").

108 Le Luo & Qingliang Tang, *The real effects of ESG reporting and GRI standards on carbon mitigation: International evidence,* BUS. STRATEGY & THE ENV'T 1, 2986 (2022) [hereinafter *ESG Reporting, GRI, & Carbon Mitigation*] (listing corporate practices which undermine ESG reporting) *see also* discussion *infra* Part II, Sections II.D and II.E and accompanying text.

reporting. However, multiple competing ESG standards issued by multiple actors undercut such comparability, which has led ESG reporting to be "characterized by the complexity and fragmentation common in pluralistic systems."[109] As a result, the comparability of information contained in ESG reports is adversely affected.[110]

As discussed above, there are two broad categories of ESG reporting standards: (a) investor-centric ESG reporting, and (b) ESG reporting incorporating its dual goals (E&S impact assessment and investor-centric analysis).[111] Since "materiality" is always used as a scoping concept,[112] the various definitions of "materiality" used in leading ESG reporting standards illustrate the conceptual divide between the dual goals of ESG reporting.

For instance, the SASB standards, a leading set of ESG standards, describes the mission of the SASB Foundation in investor-centric terms: "The SASB Foundation's mission is to establish and maintain industry-specific standards that assist companies in disclosing **financially material, decision-useful** sustainability information to **investors**."[113] (emphases in bold added).

In a similar vein, in the most significant ongoing attempt to harmonize many investor-centric standards (including SASB),[114] the International Financial Reporting Standards ("**IFRS**") Foundation recently issued two standards: IFRS S1 on general disclosure requirements[115] and IFRS S2 on climate change related disclosures.[116] The IFRS's investor-centric objectives are captured in the following quotes:

> The objective of IFRS S1 General Requirements for Disclosure of

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[109] Adam Sulkowski & Ruth Jebe, *Evolving ESG Reporting Governance, Regime Theory, and Proactive Law: Predictions and Strategies*, 59 AM. BUS. L.J. 449, 502 (2022) [hereinafter *ESG Reporting & Regime Theory*].

[110] *Id.* at 452.

[111] *See supra* Part II, Section II.A.

[112] *See supra* Part II, Section II.A.

[113] SASB STANDARDS, *E-Commerce: Sustainability Accounting Standards* 2, https://www.sasb.org/standards/download/?lang=en-us [hereinafter SASB E-COMMERCE STANDARDS] (illustrating how SASB issues only sector-specific standards, not general reporting standards).

[114] IFRS FOUNDATION, *IFRS Foundation announces International Sustainability Standards Board, consolidation with CDSB and VRF, and publication of prototype disclosure requirements* (Nov. 3, 2021), https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/.

[115] IFRS FOUNDATION, *IFRS S1 General Requirements for Disclosure of Sustainability for Disclosure of Sustainability-Related Financial Information* (June 2023), https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s1-general-requirements.html/content/dam/ifrs/publications/html-standards-issb/english/2023/issued/issbs1-ag/#standard. [hereinafter IFRS S1].

[116] IFRS FOUNDATION, *IFRS S2 Climate-Related Disclosures* (June 2023), https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s2-climate-related-disclosures/#standard.

> Sustainability-related Financial Information is to require an entity to disclose information about its sustainability-related risks and opportunities that is **useful to primary users of general purpose financial reports** in making decisions relating to providing resources to the entity (emphasis in bold added).[117]

and,

> **Materiality** is an **entity-specific aspect of relevance** based on the nature or magnitude, or both, of the items to which the information relates, in the context of the entity's sustainability-related financial disclosures (emphases in bold added).[118]

and,

> In the context of sustainability-related financial disclosures, information is material if omitting, misstating or obscuring that information **could reasonably be expected to influence decisions** that **primary users of general purpose financial reports** make on the basis of those reports, which include financial statements and sustainability-related financial disclosures and which provide information about a specific reporting entity (emphases in bold added).[119]

SASB and the IFRS standards use financial materiality. On the other hand, GRI and the draft EU CSDR use so-called "double materiality" focusing on both impact assessment and financial materiality. Consider the following quotes:[120]

> The material topics and impacts that have been determined through this process[121] inform financial and value creation reporting. They provide crucial input for identifying **financial risks and opportunities** related to the organization's impacts, and for financial valuation. This in turn helps in making financial materiality judgments about what to recognize in financial statements (emphasis in bold added).

and,

> While most, if not all, of the impacts that have been identified through this

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[117] IFRS S1, *supra* note 114, §1. Note that the term "primary users of general purpose financial reports" is largely similar to that of ESRS 1, quoted *supra* note 65, namely: "Existing and potential investors, lenders and other creditors," IFRS S1, Appendix A Defined Terms.

[118] *Id.* at §14.

[119] *Id.* at §18.

[120] GRI, CONSOLIDATED SET OF THE GRI STANDARDS 104 (June 30, 2022), https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/ (last visited May 13, 2023) (the quotes are taken from "Box 1") [hereinafter CONSOLIDATED GRI STANDARDS].

[121] *Id.* at 103-104 (describing the materiality assessment process, i.e. "this process").

> process[122] will eventually become financially material, sustainability reporting is also highly **relevant in its own right as a public interest activity** and is **independent of the consideration of financial implications**. It is therefore important for the organization to report on all the material topics that it has determined using the GRI Standards. These material topics **cannot be deprioritized** on the basis of not being considered financially material by the organization (emphases in bold added).

The GRI Standards also define "material topics" as "topics that represent the organization's **most significant impacts** on the economy, environment, and people, including impacts on their human rights" (emphasis in bold added), and "impacts" as the "effect the organization has or could have on the economy, environment, and people, including on their human rights, which in turn can indicate its contribution (negative or positive) to sustainable development." It also includes a note that "Impacts can be actual or potential, negative or positive, short-term or long-term, intended or unintended, and reversible or irreversible."[123]

In this way, the GRI Standards use impact assessment as a starting point and, arguably, a focal point. The GRI Standards appear to promote this order of identifying "material topics" for ESG reporting: first, start by identifying all "material" E&S-related impacts—"material" in their own right because of the public interest in it; next, from the pool of identified E&S-related impacts, identify which ones are financially material based on the risks and opportunities posed to the corporation.

Financial materiality is an evolving concept and can change over time, and the GRI standards appear to take a long-term view in proposing that "most, if not all, of the impacts that have been identified through this process will eventually become financially material."[124] This appears to be based on a deliberate assumption that public laws and industry pressure will eventually catch up to a corporation's E&S impacts and force a company to internalize those harms or incur the costs of changing these practices.[125] Yet, even if specific impacts are not *presently* financially material (or *foreseeably so* within a typical investment horizon), this should not be a basis for de-prioritizing a corporation's "material" E&S impacts. Therefore, the GRI report places E&S-related impacts as a starting point, and views financial materiality as an important subset.

Similarly, the EC's ESRS 1 describes "double materiality," "impact materiality," and "financial materiality" in the following terms.

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[122] *Id.*

[123] *Id.* at 121.

[124] *Id.* at 104..

[125] *Cf.* discussion *supra* Part I, Section I.D (discussing examples of E&S-impacts that can be financially immaterial and eventually become financially material). GRI's assumption also appears to be based on the normative idea that there is an inherent public interest in every business activity of a corporation, and all the actions and decisions made by a corporation (see *supra* Introduction).

"Double materiality" is defined as follows:

> Double materiality has two dimensions, namely: impact materiality and financial materiality. Unless specified otherwise, the terms "material" and "materiality" are used throughout ESRS to refer to double materiality. . . . Impact materiality and financial materiality assessments are inter-related and the interdependencies between these two dimensions shall be considered. In general, the starting point is the assessment of impacts, although there may also be material risks and opportunities that are not related to the undertaking's impacts. A sustainability impact **may be financially material from inception** or **become financially material**, when it could reasonably be expected to affect the undertaking's financial position, financial performance, cash flows, its access to finance or cost of capital over the short-, medium- or long-term. **Impacts are captured by the impact materiality perspective irrespective of whether or not they are financially material** (emphases in bold added).[126]

"Impact materiality" is defined as follows:

> A sustainability matter is material from an impact perspective when it pertains to **the undertaking's material actual or potential, positive or negative impacts on people or the environment over the short-, medium- or long-term**. Impacts include those **connected with** the undertaking's own operations and value chain, including through its products and services, as well as through its business relationships. Business relationships include those in the undertaking's **upstream and downstream value chain** and are not limited to direct contractual relationships. . . . In this context, impacts on people or the environment include impacts in relation to environmental, social and governance matters (emphases in bold added).[127]

"Financial materiality" is defined as follows:

> The scope of financial materiality for sustainability reporting is an expansion of materiality used in the process of determining which information should be included in the undertaking's financial statements. . . . In particular, information is considered material for **primary users of general-purpose financial reporting** if omitting, misstating or obscuring that information could **reasonably be expected to influence decisions** that they make on the basis of the undertaking's sustainability statement (emphases in bold added).[128]

The EC's ESRS 1 mirrors the GRI approach towards the relationship between impact materiality and financial materiality. This is captured in how Section 38

[126] ESRS 1, *supra* note 20, §§ 37, 38.
[127] ESRS 1, *supra* note 20, §§ 43, 44.
[128] ESRS 1, *supra* note 20, §§ 47, 48.

(quoted above) states that an E&S impact (called "sustainability impact") may be financially material from the outset or later become financially material when it becomes relevant to investors and, in any event, would at all times be material from an impact perspective.

The above brief survey of "materiality" definitions reveals the dual goals of ESG reporting: E&S impact assessment (referred to by ESRS 1 as "impact materiality"), and investor-centric risk and opportunity assessments (i.e. financial materiality). ESG reporting standards which focus on E&S impact assessments tend to combine these assessments with financial materiality assessments.[129] Since E&S impact assessments provide the starting base of data from which a financial risk and opportunity assessment can be conducted, this approach is practical, efficient, and streamlined.

Yet, there is another reason that E&S impact assessments tend to piggyback financial materiality assessments. In *Rethinking Non-Financial Reporting: A Blueprint for Structural Regulatory Changes*,[130] Monciardini, Mähönen, and Tsagas point out how, historically, as a voluntary practice, E&S-centric ESG reporting (which the writers call "non-financial reporting") struggled to be accepted and recognized by business organisations.[131] Only when E&S-centric ESG reporting "came to be structured as analogous to existing financial accounting practices," did this new, emerging practice get legitimized in boardrooms.[132] Therefore, E&S-centric ESG reporting, from its outset, found its mainstream legitimacy by adopting a *financial reporting analogy* and by piggybacking on a practice business leaders were familiar with.

This institutional analogy with accounting and financial reporting led to a "financialization" of ESG reporting, where accountants take center stage in conducting and scoping E&S impact assessments through "materiality" exercises.[133] More properly suited experts like scientists, environmental lawyers, human rights lawyers, trade union experts, employment experts, and anti-corruption experts are excluded from these conversations and the decision-making conducted thereunder.[134] This exclusion may lead to "transformism," where "demands for radical transformation are . . . disarticulated and captured . . . into the dominant logic of accounting but only (or mainly) to the extent that they are also financially relevant."[135] It also leads to "cognitive capture," where regulators begin to think like the regulated actors.[136]

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[129] *See, e.g.,* CONSOLIDATED GRI STANDARDS, *supra* note 120; ESRS 1, *supra* note 20.
[130] *Rethinking Non-Financial Reporting, supra* note 56.
[131] *Id.* at 15-16.
[132] *Id.* at 26.
[133] Id. at 16.
[134] *Id.* at 26.
[135] *Id.* at 25.
[136] *Id.* at 24.

Monciardini, Mähönen, and Tsagas argue for a reclaiming of the E&S-centric goals of ESG reporting, and placing it first, front, and center. This paper makes a similar argument. Significantly, the writers remind us how governments should be viewed as the primary users of E&S-centric ESG reports.[137] This paper adds how the *public*[138] should be viewed as the primary users of ESG reports instead. In contrast, investors[139] should be viewed as the primary users of investor-centric ESG reports focusing on "financial materiality."

While a combined "dual goal" approach to ESG reporting is most likely practical and efficient from the corporation's perspective, ESG reports should ideally place E&S impact assessments first, front, and centre (like GRI does)—and environmentalists should keep advocating for this. While investor-centric ESG reporting remains relevant and important, environmentalists should be very clear about what these types of ESG reports aim to do, and do not aim to do—and scrutinize corporate and governmental policies accordingly. Investor-centric ESG reporting is not a substitute for E&S-centric ESG reporting. If investor-centric ESG reporting (or an inability to overcome the institutional analogy of financial reporting) effectively displaces an E&S-centric approach to ESG reporting, this should be viewed as a "negative spillover effect" under Vandenbergh's PEG Assessment Framework.[140]

C. ESG Reporting as a Tool of Persuasion

From an environmentalist's lens, this paper focuses on ESG reporting's E&S-centric goals, and specifically, its environmental goals. Part I, Section I.E above described how any PEG measure can be viewed as aiming to achieve four environmental goals at increasing levels of granularity, with a lower-tier goal being the means to achieving a higher-tier goal. Achieving sustainability is the top-tier goal, improving environmental quality is the second-tier goal, improving firms' environmental performance is the third-tier goal, and promoting the enactment of public laws which are more protective of the environment or which better promote the higher-tier goals is the fourth-tier goal. The logic of ESG reporting and how its E&S-centric goals are linked to these environmental goals will now be explored, particularly, the third-tier goal of improving firms' environmental performance.

James Salzman describes that the environmental law toolkit can be divided into "Five P's": Prescriptive Regulation, Property Rights, Penalties, Payments, and Persuasion.[141] Publicly-mandated ESG reporting is a form of Persuasion, which

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137 *Id.* at 32-33.

138 *Cf. also* discussion *supra* Part I, Section I.A and accompanying text in footnotes.

139 Investors include potential and existing shareholders and creditors.

140 *See* discussion *infra* Part IV, Section IV.D.

141 James Salzman, *Teaching Policy Instrument Choice in Environmental Law: The Five P's*, 23

Salzman describes as "laws requiring information production and dissemination,"[142] where the government seeks to change private behavior by forcing private parties to stop and think about the harm they are causing (or plan to cause, or risk causing), and publicizing that harm. A classic example in environmental law is the requirement of environmental impact assessments, which in the U.S. is the subject of the National Environmental Policy Act ("**NEPA**").[143] Another prominent example is the Toxic Release Inventory that requires manufacturers of certain substances to measure and publicly report their annual emissions.[144] NEPA (and not financial reporting) is the more appropriate analogy to E&S-centric ESG reporting. Similarly, laws around the world which require the conduct of environmental impact assessments ("**EIS**") are more appropriate analogues to ESG reporting than financial reporting and its closely-related concept, "materiality."

Within the framework of Salzman's Five P's,[145] privately-driven ESG reporting does not fall within the environmental law policy toolkit, since it is not publicly-mandated. Yet it exists because of private, industry-driven pressures. Whatever a given corporation's motivations to report on its ESG-related risks and impacts are, ESG reporting can, in theory, play a role as a tool of "Persuasion," especially when E&S impacts are being reported.

ESG reports publicize information on a corporation's E&S impacts. This enables greater scrutiny by affected stakeholders, and increases' stakeholders' ability to meaningfully participate in a corporation's decision-making by providing feedback, and utilising levers that increase the chance feedback be heard, such as shareholder activism, targeted litigation, reputational attacks, and boycotts. Where such actions are anticipated by boards and executives, they are incentivized to engage relevant stakeholders at earlier stages of the decision-making process.

For example, Beth-ann Roth, in "*Board Oversight of the Dynamic ESG Landscape*," a chapter in *ESG in the Boardroom: A Guidebook for Directors*,[146] recommends that, in light of increasingly adversarial shareholder activism, a corporation's board should proactively establish non-adversarial relationships with shareholders, and take measures like establishing shareholder-specific channels to encourage early, proactive engagement with shareholders seeking responses on ESG issues.[147] Lawyers and in-house counsel are likely to give

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DUKE ENV'T L. & POL'Y F. 363, 364 (2013) [hereinafter *The Five P's*].

[142] *Id.* at 373.

[143] 42 U.S.C. §4321 et seq.

[144] 42 U.S.C. §11023.

[145] *The Five P's*, *supra* note 141.

[146] Beth-ann Roth, *Board Oversight of the Dynamic ESG* Landscape, ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS 103 (Katayun I. Jaffari & Stephen A. Pike, eds. 2022).

[147] *Id.* at 113.

corporations' boards of directors similar advice in response to rising shareholder activism driven by increased ESG reporting.

ESG reporting also encourages internal deliberation, breaks down siloes within a corporation,[148] and fosters a more holistic consideration of a corporation's E&S impacts by critical corporate decisionmakers. This, in theory at least, may help shift corporate decision-making (at the many levels it occurs) to an expanded consideration of the scope of risks and harms.[149] This can help internalize more of the true costs of business operations, at least in a deliberative way. Such an approach echoes the views expressed in Zygmunt Plater's *Environmental Law and Policy: Nature, Law and Society*, a leading environmental law text, which suggests that all of environmental governance is about getting decisionmakers (governmental or corporate) to consider and internalize the widespread consequences of their activities and decisions due to the deep interconnectedness of human and natural systems.[150]

Since ESG reporting is a tool of persuasion, greenwashing and the related ills of informational overload, complexity, and subjectivity can seriously undermine ESG reporting's persuasive function.[151] These ills are facilitated when the ESG reporting process affords too much discretion in how corporations select, prioritize, measure, and present on specific E&S impacts.[152] These "zones of discretion" are further explored in Section II.D below. (Greenwashing and closely-related harmful practices (e.g. the strategic use of ambiguity) are discussed more below, in Section II.E.)

D. "Zones of Discretion" in ESG Reporting Practices and Standards

"Zones of discretion" refer to parts of the ESG reporting process where the persons responsible for ESG reporting[153] have discretion in how to select,

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148 For example, a team assessing ESG factors may speak to various departments within an organization and thus promote the exchange of information between different departments.

149 For example, the ESG reporting process may sensitize corporate departments to sector-specific risks.

150 ZYGMUNT PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 6-7 (5th ed. 2016) ("It may be that what makes issues *environmental* is that they all reflect a characteristic battle between two very different ways of looking at the world: Almost every environmental case starts in response to someone's decision to do something: a new product or technology; a construction project; the start, continuation, or cessation of various programs that affect the physical world. A common complaint of environmentalists is that most people who make project proposals do not adequately consider their project's problematic aspects. Resulting decisions thus are often predicated on irrationally and unrealistically narrow grounds, focusing on narrowed advantage to the promoters and unwisely ignoring facts, costs, and impacts on public values that have real importance to the well-being of the community and natural systems").

151 *See* discussion *infra* Part II, Section II.E.

152 *See* discussion *infra* Part II, Section II.D.

153 This may refer to a corporation's directors, officers, or employees who are responsible for monitoring ESG-related risks and prepare ESG reports.

prioritize, exclude, measure, and present specific E&S impacts. Zones of discretion provide opportunities for greenwashing, decrease comparability, and increase subjectivity. Therefore, environmentalists scrutinizing ESG reports should pay attention to them.

To illustrate, consider the following significant "zones of discretion" which typically arise in the ESG reporting process.

Whether to use ESG standards. The first zone of discretion is whether to use any established ESG standards at all. Where no laws publicly mandate ESG reporting, a corporation preparing an ESG report can, in theory, choose not to use any ESG reporting standards. However, in general, the use of specific ESG standards (especially leading ESG standards) improves the legitimacy of the ESG report, and larger corporations face pressure to expressly align their ESG reports with specific ESG standards.[154]

Which ESG standard or standards to use; Financial materiality versus dual goals (i.e. so-called "double materiality"). The second zone of discretion is which ESG standard or standards to use and, relatedly, whether to use one or multiple standards. A closely-related zone of discretion is what approach to take—whether to adopt a financial materiality approach or the so-called "double materiality" approach. Certain ESG reporting standards use financial materiality (e.g. SASB, TCFD, IFRS standards) while others adopt a dual-goal approach (e.g. GRI, ESRS).

When using multiple ESG reporting standards, a common practice is to draft and structure the main body of the ESG report in terms that present the corporation in the best possible light, often with the use of slick graphics and virtuous terms.[155] Various appendices directly using the reporting metrics required under specific ESG reporting standards follow, and are then mapped back onto specific page numbers in the main report. For example, Amazon's 2021 Sustainability Report has 79 pages in its main body (organized along the broad themes of "environment," "society," and "governance"), followed by appendices which map the specific metrics of the various reporting standards and frameworks it is aligned with (SASB, UNGP Reporting Framework, and TCFD).[156] It also includes a loose mapping of Amazon's specific sustainability-related programs (e.g. supply chain, buildings and transportation, renewable energy) onto the United Nation's Sustainable Development Goals, but without more elaboration or justification to explain the mapping.[157]

Deviations from the recommendations or requirements imposed by specific ESG reporting standards. Across every ESG reporting standard, a simple way to identify zones of discretion is to look out for where they use discretionary

[154] *See supra* note 107.

[155] *See supra* note 107, at 5, 8, 14, 20 (listing titles on sustainability with accompanying visuals).

[156] *Amazon's 2021 Sustainability Report*, *supra* note 107, at 2.

[157] *Id.* at 96.

language similar to discretionary language found in other legal instruments, such as statutes, treaties, and contracts. The words "may" or "should" tend to denote permissibility and discretion, while the word "shall" denotes a strict, mandatory obligation. The word "recommends" is permissive; the word "requires" imposes a mandatory obligation. Many ESG standards also have provisions to deal with deviations, incorporating a degree of flexibility intended to help first-time users ease into the reporting process. The following are illustrative examples.

SASB, an investor-centric reporting standard, has a provision governing "Standards Conformance"[158] which provides as follows:

> The term "shall" is used throughout the SASB standards to indicate those elements that reflect requirements of the standards. The term "should" is used to indicate guidance, which although not required, provides a recommended approach for the implementation of the standard. The term "may" is also used to indicate guidance that is not required, but provides an optional approach for the implementation of the standard.
>
> Because the use of the SASB standards is voluntary, requirements of a standard (as indicated by "shall" clauses), along with the guidance contained herein, refer to those conditions that must be followed in order for disclosure to be **in conformance** with the applicable industry standard(s) (emphasis in bold added).

and

> When reporting using a SASB standard, an entity shall cite the relevant SASB standard in order to be in conformance with the standard.

and

> The SASB recognizes that standardized disclosures of financially material sustainability information to investors is a relatively new area of practice, and certain accounting metrics may be infeasible to disclose in the near term for some entities. The SASB encourages entities to use the standards to guide investor disclosures even in the event that certain disclosure topics and/or associated metrics must be omitted and/or modified.
>
> An entity that omits one or more disclosure topics and/or accounting metrics should **disclose the omission(s)**, as well as the **rationale for the omission(s)**. For example, if a disclosure topic does not apply to an entity's business model, the entity should disclose that the topic and its associated metrics were omitted based on the lack of applicability. . . . If an entity believes it **necessary to modify a metric**, the entity shall disclose the fact

158 IFRS, *SASB Standards Application Guidance*, SASB STANDARDS (2022), https://sasb.org/wp-content/uploads/2018/11/SASB-Standards-Application-Guidance-2018-10.pdf.

> that the metric was changed, as well as the rationale for the change[159] (emphasis in bold added).

The above provisions illustrate that SASB contains mandatory ESG metrics a corporation must report on to be "in conformance" with the SASB standards. Yet it appears that conformance with the SASB standards is, itself, safeguarded by another voluntary approach—the "comply-or-explain" approach, a common feature of privately-driven ESG reporting.[160] There appears to be no indication that SASB has taken private action or litigation to enforce any non-conformance or misuse of its standards, whether in trademark infringement or otherwise.[161]

Under the GRI standards, the issue of conformity is dealt with in the following manner:[162]

> Reporting in accordance with the GRI Standards enables an organization to provide a comprehensive picture of its most significant impacts on the economy, environment, and people, including impacts on their human rights, and how it manages these impacts. This allows information users to make informed assessments and decisions about the organization's impacts and its contribution to sustainable development.
>
> The organization **must comply** with all nine requirements in this section to report **in accordance with** the GRI Standards. . . .
>
> Requirement 1: Apply the reporting principles
>
> Requirement 2: Report the disclosures in GRI 2: General Disclosures 2021
>
> Requirement 3: Determine material topics
>
> Requirement 4: Report the disclosures in GRI 3: Material Topics 2021
>
> Requirement 5: Report disclosures from the GRI Topic Standards for each material topic
>
> Requirement 6: Provide reasons for omission for disclosures and requirements that the organization cannot comply with
>
> Requirement 7: Publish a GRI content index
>
> Requirement 8: Provide a statement of use
>
> Requirement 9: Notify GRI
>
> If the organization does not comply with all nine requirements, it cannot

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159 *Id.* at 1-2.

160 *See, e.g.,* Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21(2) LEWIS & CLARK L. REV. 317 (2017) (surveying the many jurisdictions which have implemented a comply-or-explain approach in ESG reporting).

161 This is the most current information as of May 14, 2023.

162 *See* CONSOLIDATED GRI STANDARDS, *supra* note 120 at 14.

> claim that it has prepared the reported information in accordance with the GRI Standards. In such a case, the organization may be able to claim that it has prepared the reported information **with reference to** the GRI Standards, provided it complies with the requirements specified in 'Reporting with reference to the GRI Standards' at the end of this section (emphases in bold added).

Requirement 6, which adopts a "comply or explain" approach, is captured in the following diagram:[163]

Requirement 6: Provide reasons for omission for disclosures and requirements that the organization cannot comply with

a. If the organization cannot comply with a disclosure or with a requirement in a disclosure for which reasons for omission are permitted, the organization shall in the GRI content index:
i. specify the disclosure or the requirement it cannot comply with;
ii. provide one of the four reasons for omission included in Table 1 and the required explanation for that reason.

Table 1. Permitted reasons for omission and required explanations

REASON FOR OMISSION	REQUIRED EXPLANATION
Not applicable	**Explain why the disclosure or the requirement is considered not applicable.**
Legal prohibitions	**Describe the specific legal prohibitions.**
Confidentiality constraints	**Describe the specific confidentiality constraints.**
Information unavailable / incomplete	**Specify which information is unavailable or incomplete. When the information is incomplete, specify which part is missing (e.g., specify the entities for which the information is missing).** **Explain why the required information is unavailable or incomplete.** **Describe the steps being taken and the expected time frame to obtain the information.**

"Reporting with reference to the GRI standards" provides three minimum qualifying requirements: (1) publish a GRI content index, (2) provide a statement of use, and (3) notify GRI. For specific metrics prepared "with reference" to GRI standards, GRI imposes the following requirements:[164]

> The organization must comply with all three requirements [i.e. publish a GRI content index, provide a statement of use, and notify GRI] in this section to report with reference to the GRI Standards. The organization should also apply the reporting principles specified in section 4 of this Standard to ensure high quality reporting.[165] Additionally, the organization should explain how it manages its impacts for the topics it reports on using Disclosure 3-3 in GRI

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[163] *Id.* at 17.
[164] *Id. a*t 21.
[165] *Id.* at 23-27 (describing the principles of accuracy, balance, clarity, comparability, completeness, sustainability context, timeliness, and verifiability).

3: Material Topics 2021.[166]

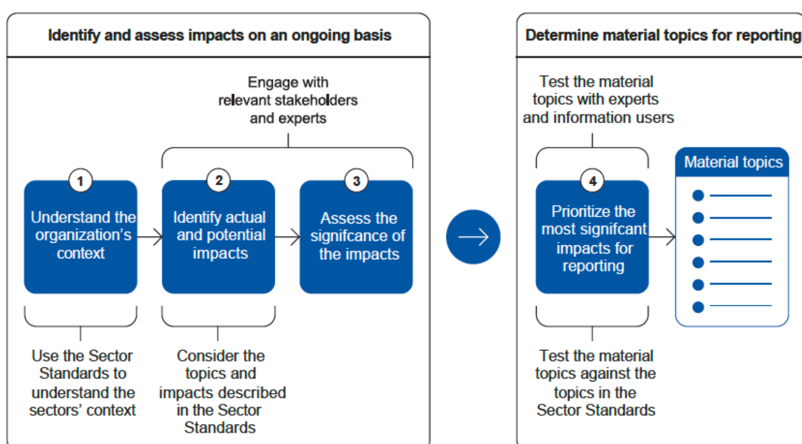
The above indicates how GRI provides a more robust approach to non-conformance, and requires corporations to notify GRI whenever it makes reference to its standards. However, similar to SASB, there does not appear to be any indication that GRI has taken private action or litigation to enforce any non-conformance with or misuse of its standards.[167]

Another significant example is how TCFD requires the reporting of Scope 1 and 2 GHG emissions, but leaves the reporting of Scope 3 emissions to a materiality assessment.[168]

Identifying material topics. Even where a report incorporating double materiality has been chosen (e.g. GRI), the process of identifying and prioritizing material topics to measure and report is a major zone of discretion.

Here, the process in GRI standards illustrates a recommended approach towards materiality assessments, particularly as they apply to E&S impact assessments. The following is a helpful illustrative diagram from GRI 3, which captures the materiality assessment process:[169]

Figure 2. Process to determine material topics



Under Step 3 ("Assess the significance of the impacts"), the GRI standards explain that this is both a quantitative and qualitative assessment, and requires a consideration of the severity (including scale, scope, irremediable character) and

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166 *Id.* at 115-119 (providing guidance on "Management of material topics").

167 This is the most current information as of May 14, 2023.

168 TCFD, *TCFD Recommendations*, https://www.fsb-tcfd.org/recommendations/ (last visited Dec. 19, 2023) (describing the extent of disclosing greenhouse gas (GHG) emissions and the related risks).

169 *See* CONSOLIDATED GRI STANDARDS, *supra* note 120, at 103.

likelihood of impacts, and an assessment of the severity of potential human rights impacts. The assessment under Step 3 includes significant zones of discretion. Although GRI specifies what factors to consider, such as severity, likelihood of impacts, and special consideration for human rights impacts, it does not provide any specific or objective guidance for thresholds. For example, there is no guidance on whether to report the possibility of a low probability, high severity event such as a disaster.[170]

Under Step 4 ("Prioritize the most significant impacts for reporting"), the organization is asked to set a threshold to determine which topics are material, ranking them based on "significance." Step 4 in conjunction with Step 3 provides for a very significant degree of discretion since topics which are deprioritized will not be reported. However, this discretion is limited by the step of "testing the material topics," where an organisation is required to test the material topics against GRI Sector Standards to ensure that key material topics are not overlooked.

On this note, GRI has only issued three Sector Standards to-date,[171] deliberately focusing on and prioritizing sectors with the largest E&S impacts: oil and gas, coal, and the agriculture, aquaculture, and fishing sectors. In contrast, SASB has issued up to 77 industry-specific standards.[172] SASB does not issue general standards.[173] Hence, in the case of sectors not falling under the GRI Sector Standards, using the SASB standards may currently provide a more structured, objective approach, at least from an investor-centric perspective.

Discussions around qualitative metrics. Every ESG reporting standard requires a discussion of qualitative components, in addition to quantitative metrics. This process is inherently discretionary.

For instance, Amazon's 2021 Sustainability Report's SASB-aligned appendix, metric CG-EC-130a.3, refers to a "Discussion of the integration of environmental considerations into strategic planning for data center needs."[174] Metric CG-EC-130a.3 is expressly categorized by SASB as a "qualitative metric," and was preceded by (and, to some extent, controlled by) a prior section seeking quantitative measurements on this topic.[175] Amazon's answer illustrates the

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170 *Cf.* Daniel A. Farber, *Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty*, 37 U.C. DAVIS L. REV. 145 (2003).

171 These are the Sector Standards for Oil and Gas (GRI 11), Coal (GRI 12), as well as Agriculture, Aquaculture and Fishing (GRI 13), *see* Global Reporting Initiative, SECTOR PROGRAM, https://www.globalreporting.org/standards/sector-program/ (last visited Dec. 19, 2023).

172 SASB Standards, *SASB Standards Overview*, https://www.sasb.org/standards/?lang=en-us (last visited Dec. 19, 2023). SASB has a fairly detailed system of identifying which industry or sector a given corporation. SASB Standards, *Find Your Industry*, https://www.sasb.org/find-your-industry/ (last visited Dec. 19, 2023).

173 *Id.*

174 *Amazon's 2021 Sustainability Report*, *supra* note 107, at 81.

175 *Id.* Quantitative metrics included "total energy consumer," "percentage grid electricity," and "percentage renewable."

highly discretionary nature of qualitative metrics such as these:

> AWS [Amazon Web Services] carefully chooses our data center locations to mitigate environmental risk, such as flooding, extreme weather, and seismic activity. We also leverage weather data from the Amazon Sustainability Data Initiative to better assess the impact of weather on AWS data centers. Read more about how we are innovating for sustainability in the cloud on pages 35–38.[176]

Discretion within the measurements of quantitative metrics. Even where a corporation is required to measure specified quantitative metrics, zones of discretion may exist in the measurement methods of these metrics. For example, SASB's industry standard for "Airlines"[177] require reporting of "gross global Scope 1 [GHG] emissions." Under guidance provided by the accounting metrics for metric TR-AL-110a.1., SASB requires the use of "the methodology contained in The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard (GHG Protocol),"[178] and specifies "[a]cceptable calculation methodologies include those that conform to the GHG Protocol as the base reference, but provide additional guidance, such as industry- or region-specific guidance."[179] It then provides a non-exhaustive list of examples including the U.S. Environmental Protection Agency's Greenhouse Gas Inventory Guidance, the India GHG Inventory Program, the ISO 14064-1, and the Petroleum Industry Guidelines for reporting GHG emissions.[180] The possibility of choosing between the many calculation methodologies described above reflects a significant zone of discretion in measuring global Scope 1 GHG emissions.

E. Greenwashing and Related Harmful Practices

Zones of discretion provide opportunities for greenwashing. They can also decrease comparability and increase subjectivity. Therefore, environmentalists scrutinizing ESG reports should pay close attention to these zones of discretion. This section will discuss greenwashing and related harmful practices, and the need for anti-greenwashing laws aimed at directly addressing the public harms caused by greenwashing.

Greenwashing can seriously undermine ESG reporting and its environmental goals.[181] Greenwashing occurs where corporations' environmental claims do not

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[176] *Amazon's 2021 Sustainability Report*, *supra* note 107, at 81.

[177] SASB STANDARDS, AIRLINES: SUSTAINABILITY ACCOUNTING STANDARDS, https://www.sasb.org/standards/download/?lang=en-us (illustrating SASB sectoral standards for the airline industry).

[178] *Id.* at 8.

[179] *Id.* at 8.

[180] *Id.* at 8-9.

[181] Greenwashing can undermine almost every PEG measure such as carbon pledges, eco-

match their environmental performance.[182] ESG reporting seeks to empower the public through improving transparency and accountability as a tool of persuasion. Therefore, falsehoods and misleading statements directly undermine this effort.

Current U.S. laws which may be used to combat greenwashing are founded on a notion of private harms. For example, securities disclosure laws protect investors from issuing misleading public disclosures.[183] However, where misleading disclosures do not cause shareholder losses, there is little incentive to litigate. For example, there is currently no litigation on the under-reporting of greenhouse gas emissions.[184]

Greenwashing results in public harms. PEG envisions private individuals and corporations "voting with their dollars"; they use means, backed ultimately by capital,[185] to pressure corporate entities to act in a more environmentally-friendly manner. This may be for financial, instrumentalist reasons,[186] or in pursuit of environmental goals and values. Where greenwashing proliferates, capital intended for genuinely sustainable, clean investments are diverted to dirtier, business-as-usual operations.[187] Where greenwashing proliferates, public trust in environmental claims erodes.[188] A market filled with quality uncertainty and informational asymmetry drives out legitimate products.[189] These are public harms. Therefore, laws are needed to address these public harms.

There are also multiple related practices which give rise to harms similar to greenwashing. These are the problems of informational overload, complexity, and subjectivity, which are fueled by overly extensive zones of discretion. Some

labelling, and sustainable investing. *See ESG Reporting, GRI, & Carbon Mitigation, supra* note 108, at 2.

182 Menno D.T. de Jong et al., *Different Shades of Greenwashing: Consumers' Reactions to Environmental Lies, Half-Lifes, and Organizations Taking Credit for Following Legal Obligations,* 34 J. OF BUS. & TECH. COMMC'N 38, 39 (2020).

183 *See, e.g.,* In re Vale SA Securities Litig., No. 1:15-cv-9539, 2017 WL 1102666, (S.D.N.Y. March 23, 2017) (regarding the tragic collapse of a dam in Brazil, and shareholder losses stemming from the disaster).

184 Emily Strauss, *Climate Change and Shareholder Lawsuits*, DUKE L. SCH. PUB. L. & LEGAL THEORY SERIES NO. 2022-41 at 1-2.

185 For example, as consumers, or shareholders, or supply chain partners. *See generally Private Environmental Governance, supra* note 10.

186 For example, in a manner which relies on the "business case for sustainability" and a genuine belief in its benefit for businesses.

187 Cara Beth Musciano, *Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing*, 57 GEORGIA L. REV. 427, 443, 444 (2022).

188 Mariam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing,* 14 UC DAVIS BUS. L. J. 281, 301 (2014); George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84(3) Q. J. OF ECON. 488 (1970) [hereinafter *The Market for Lemons*].

189 *The Market for Lemons, supra.* note 188, at 495 (describing when "lemons," defective, dishonest products, start to enter the market, "cherries," genuine, high-quality products, are priced out and the market is filled with lemons).

corporations deliberately flood investors with ESG data.[190] Others strategically take advantage of generality, ambiguity, or vagueness.[191] Others take an "impression management" approach, carefully cherry-picking their data and presenting ESG metrics and programs which place them in the best possible light, while downplaying, side-lining, or directly omitting factors which would cast them in a poor light.[192] This places too much of an informational burden on the individuals who ESG reporting are supposed to empower—they are required to check, verify, and compare large swathes of information in adjusting their capital allocation decisions.

Holistic, effective anti-greenwashing laws should address this problem as well. Commentators have advocated mandating justifications and summaries for environmental claims, and standardizing their presentation.[193] This reduces consumers' informational burden and aids comparability across products. In Part V below, the EU's latest proposals for a robust anti-greenwashing law and its features are discussed as a possible model for what anti-greenwashing legislation can embody.

This concludes Part II, which discussed the main features of ESG reporting: its history, emergence and dual goals, its logic as a tool of persuasion, the various zones of discretion that can arise in ESG reporting, and the need for strong anti-greenwashing laws to prevent greenwashing and related practices from eroding the efficacy of ESG reporting. The following part describes the PEG Assessment Framework used to assess ESG reporting.

III. PEG ASSESSMENT FFRAMEWORK AND ESG REPORTING

The Introduction above describes the PEG Assessment Framework and how it was adopted from Part III, Section D of Vandenbergh's classic article, *Private Environmental Governance*.[194] The following demonstrates how Vandenbergh introduced this section:

> But does this [PEG] activity affect firm behavior or environmental quality? . . . The widespread adoption of these programs does not demonstrate that these programs have substantial impacts, and the absence of government coercion raises concerns about whether these programs are simply providing a public relations cover for participating firms and advocacy groups. The discussion below examines the effects of private

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[190] Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 949 (2019).

[191] *Id.* at 948.

[192] *Id.* at 948.

[193] Thomas M.J. Möllers, *European Green Deal: Greenwashing and the Forgotten Good Corporate Citizen as an Investor,* 28 COLUM. J. EUR. L. 203, 231 (2002). *See also* Ryan Clements, *Why Comparability is a Greater Problem Than Greenwashing in ESG ETFs*, 13 WILLIAM & MARY BUS. L. REV. 441, 445 (2022).

[194] *Supra* note 10.

> environmental governance activities in three areas: (1) the effects on the standards used for environmental instrument choice and for judging the performance of those instruments; (2) the effects on the environmental behavior of corporate firms; and (3) the effects on environmental quality.[195]

Under the first item, Vandenbergh uses the sub-headings "Standard of Review" and "Spillover Effects." Under "Standard of Review," Vandenbergh argues:

> If we take private governance seriously, however, a different standard is appropriate for judging which measures should be pursued and for evaluating their performance. Since private governance often will be gap-filling or complementary to public governance, it may succeed without solving the problem or being the optimal solution.[196]

Accordingly, the first item may be more helpfully divided into "*Appropriate* Standard of Review" and "Spillover Effects." Vandenbergh describes both positive and negative spillover effects, occurring at the individual and institutional levels,[197] which will be discussed further in Section III.B below.

Therefore, the PEG Assessment Framework involves four dimensions of review: (1) an appropriate standard of review, (2) an analysis of positive and negative spillover effects, (3) an assessment of effects on corporations' environmental behavior, and (4) an assessment of effects on environmental quality. These features will now be summarized.

A. Appropriate Standard of Review

Vandenbergh emphasized the gap-filling role of PEG in relation to public governance.[198] Bearing in mind this more limited role and value-add, a PEG measure can "succeed" without solving the problem or being the "optimal"[199] solution.

Therefore, while PEG measures should be evaluated with reference to an ultimate goal (e.g. Does this specific PEG measure make a specific fishery's operations sustainable?), PEG measures should also be judged or evaluated with reference to "whether the change from what would have happened in the absence of the [PEG] measure is worth the cost."[200] Vandenbergh provides this illustrative

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[195] *See supra.* note 10, at 184-185. Many private certification and labelling systems also have economic and social goals, but the environmental goals are typically at the core of these systems, and I focus on them here. *See* STEERING COMM. OF STATE-OF-KNOWLEDGE ASSESSMENT OF STANDARDS & CERTIFICATION, TOWARDS SUSTAINABILITY: THE ROLES AND LIMITATIONS OF CERTIFICATION 57 (2012).

[196] *Id.* at 185.

[197] *Id*. at 186-187.

[198] *Private Environmental Governance, supra* note 10, at 185.

[199] *See supra* note 12 (discussing optimality).

[200] *Private Environmental Governance, supra* note 10, at 186.

example: if no public environmental law measure was viable at the time of the PEG measure's enactment, and the PEG measure extended the depletion date of the fishery from 10 years to 50 years, it can still be regarded as a successful measure, even though the fishery was not made sustainable.[201]

Vandenbergh's reference to "cost" probably refers to the "cost" of adopting the PEG measure. This "cost" could refer to risks as well, such as the risk that adopting the PEG measure may have displaced governmental action. Such displacement may occur where, for example, environmentalists advocating for mandatory, publicly-mandated rules lower their ambitions and support a PEG action aimed at achieving similar environmental goals, but less effectively.

In weighing whether a particular PEG measure (and the interim environmental benefits it brings) is worth the "cost," environmentalists should be careful not to accept too readily the premise that governmental action is impossible and focus solely on and devote resources towards the PEG measure. Environmentalists should, in our advocacy, have a strong sense of what a PEG measure can achieve, cannot achieve, or is not set up to achieve.[202] We, environmentalists, should not be defeatist about the lack of governmental action and allow this worldview to be a self-fulfilling prophecy.

B. Spillover Effects

Spillover effects refer to the positive or negative effects that a PEG measure can have on existing governance measures or on the likelihood of adopting other public or private governance measures.[203] A PEG measure can "undermine, enhance, delay, accelerate, or complement government actions in situations where government can act."[204] Spillover effects can apply at the institutional or individual levels.

A positive spillover effect at the institutional level occurs where PEG measures or programs can "serve as a means of experimenting with policy options (e.g., offsets) at low risk to policymakers, enhancing the prospects for later government action."[205] Applied to ESG reporting, this may refer to instances where publicly-mandated ESG reporting starts to mirror standards or practices developed by private standard setters.[206] However, there is also the risk that this is a form of

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201 *Id.*

202 For example, investor-centric ESG reporting is not designed to assess E&S impacts nor act as a tool of persuasion.

203 *Private Environmental Governance, supra* note 10, at 186-188.

204 *Id.* at 186.

205 *Id.* at 188.

206 For example, Singapore's financial regulator requires Singapore Exchange (SGX) listed companies to issue sustainability reports, which must be consistent with the TCFD recommendations. Also, the EU's ESRS has many similar features to GRI reports in its focus on the dual roles of ESG reporting. *See, e.g.,* discussion *supra* Part II, Section II.B.

"cognitive capture," where the regulators start to think like the regulated.[207]

A positive spillover effect at the individual level may occur where certain psychological phenomena such as "gateway effects, cognitive dissonance, availability, [and] active learning" can cause an individual to increase support for public governance.[208] For example, there is empirical research which shows that when an individual performs a first pro-environmental behavior ("**PEB1**"), he or she is more likely to perform a subsequent pro-environmental behavior ("**PEB2**"), where both PEBs "target intrinsic motivation" and where PEB1 and PEB2 are similar.[209]

A negative spillover effect at the institutional level may occur "[i]f there is a fixed pool of management time and money in an organization [e.g. corporations, foundations, universities, and other non-profit organizations], [and] spending it on advocating for developing and implementing private governance measures could reduce the amount available for public governance."[210] This is particularly relevant to environmentalists engaged in advocacy work, and, in particular, in figuring out strategic focal points and trade-offs.[211]

A negative spillover effect at the individual level may occur because of the role of "single action bias" which "suggests that by taking a small measure, individuals will be induced to believe they have reduced the risk from the underlying problem and will becomes less supportive of other steps to address the problem."[212] In a manner similar to the institutional level negative spillover effect (discussed above), "[a]t the individual level (e.g., whether the individual is acting as a voter, civic group participant or leader, or is engaging in household behavior), time and money spent on advocating for or engaging in private governance could drain resources from public governance."[213] Moreover, the abovementioned study also found a small negative spillover effect where PEB1 and PEB2 are not similar, both in actual behavior and policy support.[214] Another study on the negative spillover effects on individuals' policy support, reveals how "nudges aimed at reducing carbon emissions could have a pernicious indirect effect if they offer the promise of a 'quick fix,'" and undermine public support for policies with greater potential impact (like a carbon tax).[215]

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[207] *See Rethinking Non-Financial Reporting, supra* note 56.

[208] *See Private Environmental Governance, supra* note 10, at 188.

[209] Alexander Maki et al., *Meta-analysis of pro-environmental behaviour spillover,* 2 NATURE SUSTAINABILITY 307 (2019) [hereinafter *Meta-analysis of pro-environmental spillover*].

[210] *Private Environmental Governance, supra* note 10, at 187.

[211] *See, e.g.,* Joshua Galperin, *Board Rooms and Jail Cells- Assessing NGO Approaches to Private Environmental Governance,* 71 ARK. L. REV. 403 (2018).

[212] *Private Environmental Governance, supra* note 10, at 187.

[213] *Id.* at 187.

[214] *Meta-analysis of pro-environmental spillover, supra* note 209.

[215] David Hagmann, Emily H Ho & George Loewenstein, *Nudging out support for a carbon tax*, 9 NATURE CLIMATE CHANGE, 484 (2019) [hereinafter *Nudging out support for a carbon tax*].

C. Effects on the Environmental Behavior of Corporations

In Private Environmental Governance, Vandenbergh provides a survey of all the ways PEG measures have effected changes in corporate behavior, in arguing for the real-world effectiveness of PEG measures generally. For example, environmental certification systems help audit and verify that environmentally-protective management processes are followed.[216] Another example is how information conveyed through certification systems was shown to have substantial impacts on consumer behavior, such as how labelling for dolphin-safe tuna slowly became the market norm after consumers were sensitized to the killing of dolphins to catch tuna.[217] Many corporations were also found to have been pressured to adopt environmental management systems, including environmental management standard ISO 14001, despite the lack of public laws requiring this.[218]

Part IV, Section IV.A below will discuss recent empirical studies showing the effect of ESG reporting on corporate environmental behavior. This updates the 2013 examples provided in Private Environmental Governance[219] with a focus on ESG reporting.

D. Effects on Environmental Quality

In *Private Environmental Governance*, Vandenbergh observes that changes in environmental behavior (such as corporations' implementation of and adherence to environmental management systems) may not necessarily translate into improvements to environmental quality.[220] Turning to public environmental laws, Vandenbergh observed that "we understand a great deal about the relationship between government enforcement activities and the compliance rates and emissions of regulated firms, but we understand less about the relationship between public environmental governance and environmental quality."[221] The knowledge of the effects of private governance measures on environmental quality is even more shallow.[222]

In Part IV, Section IV.B below, I will discuss a notable 2017 study on the effect of mandatory ESG reporting (in the form of CSR reporting) on the improvement of environmental quality in China, as well as other metrics such as spending and the corporate behavior of state owned enterprises.

This concludes the description of the PEG Assessment Framework and how its

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216 *Private Environmental Governance, supra* note 10, at 189.
217 *Id.* at 190.
218 *Id.*
219 *Id.*
220 *Id.* at 189, 192.
221 *Id.* at 192.
222 *Id.* at 193.

four aspects were discussed in Private Environmental Governance. The next Part will perform the assessment of ESG reporting under this PEG Assessment Framework.

IV. ASSESSMENTS

In this Part, I will use the PEG Assessment Framework to assess ESG reporting. I will start by focusing on the empirical effects of ESG reporting on corporate environmental behavior and environmental quality. These reveal interesting observations and provide the main basis for this paper's thesis that environmentalists should, on the whole, support ESG reporting.

The Part will then focus on the positive and negative spillover effects of ESG reporting, both current and potential. The positive spillover effects provide further support for ESG reporting. The negative spillover effects reveal risks that environmentalists, when supporting privately-driven ESG reporting and advocating for publicly-mandated ESG reporting, should be wary of and pay attention to.

The factor of "Appropriate Standard of Review" is an overarching element applicable to how we may assess the success and desirability of ESG reporting. "Appropriate Standard of Review" simply means that PEG measures (like privately-driven ESG reporting) should be assessed as imperfect, "gap filling" measures.[223]

A. Effects on Environmental Behavior

There are a number of notable studies on the empirical effects of ESG reporting on corporate environmental behavior. First, a May 2021 study conducted a literature review across various disciplines, including economics, finance, accounting, and management, to investigate the impact of "mandatory CSR" (Corporate Social Responsibility).[224] It cited a number of earlier studies, some of which are quoted below. The study observed that empirical evidence on the "real effects of CSR reporting"[225] is relatively rare, but it is fast-growing.[226] This is

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223 *See discussion supra* at Part III, Section III.A.

224 Hans B. Christensen, Luzi Hail, & Christian Leuz, *Mandatory CSR and sustainability reporting: Economic analysis and literature review,* 26 REV. OF ACCT. STUD. 1176 (2021) [hereinafter *Mandatory CSR Empirical Study, Literature Review*]

225 Corporate Social Responsibility ("CSR") is closely related to ESG. *See Sustainable Business Law, supra* note 19, at 997 (defining CSR as "'[a] responsibility among firms to meet the needs of their stakeholders and a responsibility among stakeholders to hold firms to account for their actions.' CSR focuses on the process a firm uses and the actions it takes to respond to its stakeholders' collective set of needs"). *See also* DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: SUSTAINABLE VALUE CREATION 997 (Laureen Gleason et al. eds., 5th ed. 2020) (describing how "ESG has emerged as a metrics-based approach intended to increase corporate accountability" in relation to CSR commitments otherwise used only as a public-relations tool).

226 *Mandatory CSR Empirical Study, Literature Review*, *supra* note 224, at 1213.

because many countries' regulators have recently imposed CSR reporting mandates.[227] Following a descriptive survey of prior empirical studies (two of which will be discussed further below[228]), the study observes[229]:

> In sum, most academic studies find that firms tend to expand and adjust CSR activities subject to disclosure requirements. One potential mechanism is benchmarking; firms want to avoid the public backlash associated with looking worse than their peers.[230] They could also learn from their peers. However, the improvements in CSR often come at a cost (i.e., in the form of lower productivity, financial profitability, or market share). An important limitation of these studies is that their settings tend to be focused on specific disclosure items.

An earlier 2018 study[231] (cited in the May 2021 literature review discussed above), focused on studying the "real effects" of a "widespread CSR reporting mandate,"[232] using the EU's earlier Non-Financial Reporting Directive ("**NFRD**")[233] as an example. The study found that corporations affected by the NFRD "increase their CSR activities in response to the directive," and started before the NFRD came into effect in 2018.[234] The study also found that the "real effects" are strongest in corporations with low levels of CSR reporting and activities prior to the NFRD coming into effect. These "real effects" refer to the

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[227] *Id.* at 1213. *See also* GRI & Uni. of Stellenbosch Bus. Sch., *Carrots & Sticks, Sustainability Reporting Policy: Global trends in disclosure as the ESG agenda goes mainstream* (Jul. 2020) https://www.carrotsandsticks.net/media/zirbzabv/carrots-and-sticks-2020-june2020.pdf. (last visited Dec. 19. 2020) (the URL has been updated)(names China, the European Union, United Kingdom, United States, and South Africa). However, it should be noted that if countries simply mandate that any one or more of the established ESG reporting standards should be used, the "zones of discretion" can cause the effectiveness of the ESG reporting regimes to vary wildly. *See, e.g., Rethinking Non-Financial Reporting, supra* Note 55 (discussing how the EU's NFRD was too lax in allowing any of the leading ESG standards to be used and, therefore, ultimately ineffective).

[228] Peter Feichter, Jörg-Markus Hitz, & Nico Lehmann, *Real Effects of a Widespread CSR Reporting Mandate: Evidence from the European Union's CSR Directive*, 60 J. OF ACCT. RSCH. 1499 (2022) [hereinafter *EU CSR Empirical Study*], and Yi-Chun Chen, Mingyi Hung, & Yongxiang Want, *The effect of mandatory CSR disclosure on firm profitability and social externalities: Evidence from China*, 65 J. OF ACCT. & ECON. 169 (2018) [hereinafter *China CSR Empirical Study*].

[229] *Mandatory CSR Empirical Study, Literature Review, supra* note 224, at 1215.

[230] Jia Cao et al., *Peer Effects of Corporate Social Responsibility,* 65 MGMT. SCI. 5487 (2019) ("For instance, exploiting a regression discontinuity design, Cao et al. (2019) find that the passage of close call shareholder-sponsored CSR proposals is followed by similar CSR proposals and investments by peer firms").

[231] *EU CSR Empirical Study*, *supra* note 228 (an earlier 2018 draft was available on SSRN before its 2022 acceptance—this was the version cited).

[232] *Id.* at 1142-1143.

[233] Directive 2014/95/EU of the European Parliament and of the Council of October 22, 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance. The EU's NFRD was the predecessor of the EU's CSRD.

[234] *EU CSR Empirical Study*, *supra* note 228, at 1542.

"meaningful" and financially costly effects of CSR activities, including reduced injury rates, and investments made in CSR infrastructure.[235]

A later June 2021 study[236] investigated the effects of the U.K.'s Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (the "**UK's GHG Reporting Regulations**"), which required corporations to disclose, in their Directors' Reports, their Scope 1 and Scope 2 GHG emissions in the last 12 months.[237] Corporations also needed to report on a carbon intensity metric in relation to the sales and cost of their goods.[238] The UK's GHG Reporting Regulations required corporations to use "robust and accepted methods," and recommended the use of a "widely recognized independent standard,"[239] which would refer to established ESG reporting standards. The study revealed that, on average, corporations reduced their GHG emissions by about 8% between the period before and after the UK's GHG Reporting Regulations came into effect.[240]

The above studies focused on publicly-mandated ESG reporting. A later May 2022 study[241] focused on isolating the impacts of privately-driven ESG reporting, specifically, the GRI Standards. This study produced a few notable findings.

Empirical evidence did not show associations between a general form of ESG reporting and carbon emission mitigation.[242] However, when ESG reporting was controlled for, corporations which follow GRI standards when preparing ESG reports were found to be more likely to achieve greater carbon emission mitigation.[243] These corporations tend to set more proactive policies and strategies for carbon mitigation, make environmental investments, and actively engage stakeholders.[244] However, these observed effects are only significant in countries with lower climate consciousness, less stringent carbon regulations, and weaker legal enforcement.[245] These findings lend support to the effectiveness of ESG reporting as a gap-filling measure.[246] Where public laws or the enforcement of

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235 *Id.*

236 Benedikt Downar et al., *The impact of carbon disclosure mandates on emissions and financial operating performance*, REV. OF ACCT. STUD.1137 (2021).

237 *Id.* at 1142.

238 *Id.* at 1143.

239 *Id.*

240 *Id.* at 1139.

241 *ESG Reporting, GRI, & Carbon Mitigation, supra* note 108.

242 In this context, carbon emission "mitigation" refers to the net reduction of greenhouse gas emissions.

243 *ESG Reporting, GRI, & Carbon Mitigation, supra* note 108, at 9-11.

244 *Id.* at 11.

245 *Id.* at 11-12.

246 Note that there are two types of "gaps" being filled here. The first type is that described by Vandenbergh—the gap between an imperfect PEG measure and a more "optimal" publicly-mandated law. The second type is the gap inherent in Salzman's "Persuasion" tool—the gap between a public law tool of Persuasion and a public law tool which more directly regulates the externalities, such as Prescriptive regulation or Penalties. That said, it is also possible that when Vandenbergh speaks of the "gap" between an imperfect PEG measure and a more "optimal" measure, he may also be referring to

public laws are weaker, ESG reporting focused on its dual goals tends to promote improved environmental behavior, at least in the area of carbon emissions mitigation.

In the case of carbon emissions mitigation, improvements in corporate environmental behavior can be linked to improved environmental quality by a few logical steps in reasoning. Based on the IPCC report linking dangerous climate change to anthropogenic GHG emissions, it is rational to attribute reduction in GHG emissions with improved environmental quality, specifically, in the form of a world that has moved closer to climate mitigation targets established under the Paris Agreement.[247] Further, because of the uncertainty[248] surrounding climate change tipping points, every ton of GHG the global community manages to reduce is significant. This leads us into our more general discussion of whether ESG reporting can improve environmental quality.

B. *Effects on Environmental Quality*

In *Private Environmental Governance*, Vandenbergh observes that it is very difficult to isolate and empirically measure the effect of environmental measures (both public and private) on environmental quality and observed how the "understanding of the environmental quality effects of private governance is very shallow."[249] Hence, the following study is significant because it contains a rare example showing a direct correlation between a PEG measure and environmental quality.

A 2017 study[250] investigated the effects of a 2008 Chinese CSR disclosure mandate on "social externalities" and "firm profitability." [251] The study linked the CSR disclosure mandate with a decrease in firm profitability due to the increased CSR-related spending. The cities most affected by the disclosure mandate found a decrease in their industrial wastewater and sulfur dioxide emissions levels. The study observed that "decrease in firm profitability is driven primarily by state-owned enterprises (SOEs), while the observed decrease in environmental pollution is driven primarily by cities with fewer SOEs."[252] This suggests a less efficient CSR spending by SOEs.[253]

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bridging both these gaps, if the more "optimal" measure is a stricter public law tool, such as Prescriptive regulation or Penalties. However, for the sake of clarity, this paper maintains the conceptual distinction between both types of gaps. In the case of privately-driven ESG reporting based on the GRI standards improving carbon emissions mitigation in the absence of stricter public laws and public enforcement, this can be viewed as filling both of the gaps described in this footnote.

[247] Intergovernmental Panel on Climate Change, *supra* note 80.

[248] *Id.* at 27, 33, 42.

[249] *Private Environmental Governance, supra* note 10, at 192.

[250] *China CSR empirical study*, *supra.* note 228.

[251] *Id.* at 169.

[252] *Id.* at 170.

[253] *Id.* at 186.

The study represents the most current study available directly connecting ESG reporting with environmental quality.[254] Decisionmakers in SOEs are perhaps incentivized to demonstrate adherence to general state policy or publicly-mandated laws. This may drive increased spending on CSR activities in a performative manner. It also demonstrates how changes in corporate environmental behavior may not necessarily correlate with changes in environmental quality.[255] Additionally, the improvement in environmental quality at the expense of corporations' profitability demonstrates how, sometimes, there is a tradeoff between environmental impact and profit and shows how, in that context, ESG reporting may drive an internalization of externalities.

C. Positive Spillover Effects

ESG reporting can generate positive spillover effects. Positive spillover effects include increased support for more "optimal" measures, for example, where publicly-mandated, E&S-centric ESG reporting arises from prior gap-filling, privately-driven ESG reporting. E&S-centric ESG reporting can be a tool of persuasion by improving transparency and accountability, and have served as a gap-filling measure[256] in countries with lower climate consciousness, less stringent carbon regulations, and weaker legal enforcement.[257] An example of a publicly-mandated, E&S-centric ESG reporting is the EU's CSRD (read with the EC's ESRS).[258] The ESRS is focused on the dual goals of ESG reporting (called "double materiality"), which is the central focus of E&S impact assessment (called "impact materiality"), followed by the identification of financially material E&S impacts.[259] Therefore, if privately-driven ESG reporting spurs institutional or individuals' support for publicly-mandated, E&S-centric ESG reporting, there is a positive spillover effect.

Consider the history of privately-driven ESG reporting schemes, such as GRI and TCFD. Increasingly, some countries' governments are enacting similar

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[254] *Mandatory CSR Empirical Study, Literature Review, supra* note 224, at 1198.

[255] *Private Environmental Governance, supra* note 10, at 192.

[256] *See* discussion *supra* note 246 (on the nature of the gaps being filled).

[257] *ESG Reporting, GRI, and Carbon Mitigation, supra* note 108, at 11-12.

[258] CSRD, *supra* note 58. However, note that even within such ESG reporting standards, significant zones of discretion can still exist. For example, §29 of the ESRS specifies that certain modules (e.g. ESRS 2) are mandatory, and reporting of the metrics in these modules cannot be opted out of via a materiality assessment. An earlier draft of the ESRS had a longer list of mandatory modules, including the module on climate change reporting (i.e. the draft ESRS E1) (*see* earlier draft of ESRS 1 (Nov. 2022), §31 (the former equivalent provision to the current §29 in ESRS 1), available for download here: https://www.efrag.org/lab6 (last visited: Dec. 19, 2023). In my opinion, the recent decision by the EC to remove of ESRS E1 as a mandatory module for reporting was a disappointing development.

[259] *See* discussion *supra* Part II, Section II.B (on the relationship between financial materiality and E&S impact assessment).

requirements. For instance, the EU's CSRD[260] is probably the best example of positive spillover effects at the institutional level, but there are others like the U.S.,[261] and Singapore.[262] These examples are consistent with Vandenbergh's view that PEG programs can "serve as a means of experimenting with policy options (e.g., offsets) at low risk to policymakers, enhancing the prospects for later government action."[263]

As the use of ESG reporting grows into an increasingly standard industry practice, the resistance to publicly-mandated ESG reporting may soften, because it is a practice that industry professionals are familiar with, and the additional costs of complying with publicly-mandated ESG reporting are accordingly reduced since a privately-driven form of it is already being practiced.

However, there are significant risks that ESG reporting will be co-opted and overshadowed by investor-centric concerns, which can be viewed as a serious negative spillover effect.[264] Environmentalists should take strategic advantage of the momentum surrounding ESG reporting to promote E&S-centric ESG reporting. Sometimes, strategic analogies or compromises may be necessary,[265] but environmentalists should be aware of what is given up or compromised, if such strategic tradeoffs are required.

Thus, investor-centric ESG reporting remains a valuable tool from an environmentalist's standpoint so long as its risks are properly managed. Where there are genuine synergies between environmental goals and investor-centric goals—the "business case for sustainability"—these synergies can be leveraged to genuinely pursue environmental goals.[266]

D. Negative Spillover Effects

ESG reporting may give rise to negative spillover effects. This may occur where E&S-centric ESG reporting is overshadowed by investor-centric ESG reporting because of the "institutional analogy" to financial reporting. As discussed, the "positive spillover effect" of privately-driven ESG reporting

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260 The EU's CSRD has notable similarities with GRI, particularly in how it frames financial materiality in relation to so-called "impact materiality." *See* discussion *supra* Part II, Section II.B.

261 In the form of the SEC's proposed climate disclosure rule, although this only has a financial materiality focus, and a narrower focus on climate-change related issues. *See generally* U.S. Securities and Exchange Commission, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors* (March 21, 2022), https://www.sec.gov/news/press-release/2022-46 (last visited Dec. 19, 2023).

262 *See supra* note 206.

263 *Private Environmental Governance, supra* note 10, at 188.

264 *See* discussion *supra* Part II, Section II.B (on the "financialization" of ESG reporting, and overshadowing of its E&S-centric goals or concerns).

265 Like how, historically, "voluntary" ESG reporting had to adopt analogies to financial reporting to gain legitimacy in boardrooms. *See* discussion *supra* Part II, Section II.B.

266 *See* discussion *supra* Part II, Section II.B.

inspiring the enactment of publicly-mandated ESG reporting is undercut by the wide adoption of investor-centric ESG reporting. For instance, consider how in implementing the EU's NFRD (which purportedly focused on "non-financial reporting," effectively referring to E&S-centric ESG reporting), a legislative compromise was reached which allowed affected corporations to choose from any of the leading ESG reporting frameworks leading to a plurality of reporting standards, zones of discretion there were far too wide, and an overall lack of comparability undermining the effectiveness of the EU's NFRD.[267]

From an institutional standpoint, governments and public institutions have been largely side-lined in the development and use of ESG standards. The development of ESG standards is dominated by the major private standards issuers with governments often playing a minimal role in crafting these standards.[268] In effect, governments may be left out of conversations which shape ESG reporting standards as they continue to evolve, and this may lead to the perception that government should not have a role in developing standards due to their apparent lack of requisite experience or expertise. This is likely to lead to a "hardening" of current practices and norms in ESG reporting, which relies too much on the financial reporting analogy, and provides for zones of discretion that are too wide.

At the individual level, negative spillover effect can also occur where ESG reporting displaces more direct forms of public environmental law such as prescriptive regulations or penalties (including taxes). A close analogy was seen in the study discussed above,[269] which observed that the use of green energy "nudges" may undermine support for carbon taxes. This occurs when "nudges" are wrongly perceived as providing a "quick fix" that overstate their impact,[270] leading to a decrease in the overall public support for more intrusive but more effective and necessary solutions (such as a carbon tax), rendering these necessary solutions less likely to be implemented.[271] Similarly, since ESG reporting is essentially a tool of persuasion, this heightens its analogy to the carbon "nudge" discussed. Where the positive impacts of ESG reporting are overstated, this may lead to an overall displacement of public environmental laws which may be more optimal measures towards achieving higher level environmental goals, such as improving environmental quality, or achieving "sustainability."

Across this assessment of ESG reporting based on the PEG Assessment Framework, several recommendations were made which will be further developed in the next Part.

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[267] *Rethinking Non-Financial Reporting, supra* note 56, at 17-23. *Cf. also* discussion *supra* note 258, on how the EC removed certain elements of mandatory reporting, such as the mandatory inclusion of ESRS E1 (on climate change) metrics.

[268] *ESG Reporting & Regime Theory, supra* note 109, at 454.

[269] *See Nudging out support for a carbon tax, supra* note 213.

[270] *Id.* at 484.

[271] *Id.* at 488.

V. RECOMMENDATIONS

In this Part, recommendations are provided for how environmentalists can view, support, and scrutinize ESG reporting, while promoting reforms to further environmental goals.

Worldwide, global power has shifted from governments to corporations.[272] Since corporations are essentially redistributive, there is a deep and inherent public interest in corporations' business activity which extract value from sources or sinks,[273] and redistribute that value elsewhere.[274] Governments and regulators, who act on behalf of the public, may regulate business activity from a range of tools from the environmental toolkit.[275] One such tool is persuasion—ESG reporting can act as such a tool, empowering the public to meaningfully engage with corporations, and encouraging changes in corporate behavior through internal deliberation.[276]

For ESG reporting to be an effective tool of persuasion, it needs to be focused on E&S impact assessments. The ESG reporting process must also manage and restrict zones of discretion, so as not to allow a corporation to avoid or downplay its most serious impacts, where the seriousness of these impacts is measured objectively by the severity (including scale, duration, irreversibility) and likelihood of the impacts. In implementing this process, inspiration may be drawn from the analogous practice of environmental impact assessments conducted under regimes like NEPA or the Toxic Release Inventory,[277] with which governments, regulators, and the public have had decades of experience in implementing.

An overriding financial reporting analogy in ESG reporting is harmful, potentially obfuscating, and should be avoided. While a financial materiality assessment has its proper place in ESG reporting, environmentalists should be clear about what ESG reporting is intended to do and not do, and which ESG reporting standards use a financial materiality framework (e.g. SASB, TCFD, IFRS standards).[278] Financial materiality places the E&S impact through an additional screening—the filter of asking which E&S impacts are likely to translate into risks and opportunities for the corporation and its shareholders.[279]

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[272] *See* discussion *supra* Introduction; *Edge of Democracy, supra* note 1.

[273] *See* discussion *supra* Introduction and *supra* note 6; *Cf.* Laura Pulido, *Geographies of race and ethnicity II: Environmental racism, racial capitalism and state-sanctioned violence*, 41(4) PROGRESS IN HUM. GEOGRAPHY 524, 529 (describing human bodies as "sinks" for environmental harms).

[274] For example, share value or dividends or other forms of value to society in general; *see also supra* note 6.

[275] *The Five P's, supra* note 141, at 374.

[276] *See* discussion *supra* Part II, Section II.C.

[277] *See* discussion *supra* Part II, Section II.C.

[278] *See* discussion *supra* Part II, Section II.B.

[279] *See* discussion *supra* Part I, Section I.D.

The institutional analogy to financial reporting tends to lead to a "financialization" of ESG reporting, where accountants take center stage in conducting and scoping E&S impact assessments, displacing more properly suited experts like scientists, environmental lawyers, human rights lawyers, trade union experts, employment experts, and anti-corruption experts.[280] Investor-centric ESG reporting can thus capture the more radical push for meaningful transformation into the "dominant logic of accounting."[281]

Therefore, the institutional analogy to financial reporting should be avoided. The concept of "impact materiality" should be reclaimed and recast as "impact assessment" or "E&S impact assessment," and the concept of "double materiality" should be accordingly recast as the "dual goals" or "dual focus" of ESG reporting.[282] If the institutional analogy to financial reporting is to be used for strategic reasons in environmental advocacy, environmentalists should be clear about what is being lost in the process,[283] and make such tradeoffs knowingly.

Environmentalists should also carefully scrutinize zones of discretion, both in terms of corporate practices in ESG reporting and the processes by which ESG reporting standards issuers develop their standards.[284] The dominant ESG standard setters essentially compete for dominance and influence, and may not be incentivized to give up their self-interest along what is more in line with public interest and environmental goals.[285] This may lead to a preservation of wide zones of discretion, many of which were described at Part II, Section II.D above. Environmentalists should continue to consider how zones of discretion can be better managed, and possibly restricted to make ESG reporting more supportive of environmental goals and values. One possible approach can be the use of a publicly-mandated ESG reporting framework that better manages the wide zones of discretion, reduces the scope for greenwashing, reduces the problems of a plurality of standards (and associated problems of cherry-picking) and weakened comparability.[286] An example of a publicly-mandated, E&S-centric ESG reporting is the EU's CSRD (read with the EC's ESRS).[287]

Strong anti-greenwashing laws are also needed. Such laws should address the closely-related problems of informational overload, complexity, and subjectivity,

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280 *See supra* note 133; *see also* discussion *supra* Part II, Section II.B.

281 *See supra* note 134; *see also* discussion *supra* Part II, Section II.B.

282 *See* discussion *supra* Part I, Section I.D.

283 For example, where E&S-centric concerns or goals are overshadowed by investor-centric concerns or goals.

284 *See, e.g.,* SASB Standard-Setting Process, SASB STANDARDS, https://www.sasb.org/standards/process/ (last visited Dec. 19, 2023).

285 *ESG Reporting and Regime Theory, supra.* note 109, at 477-478.

286 *See* discussion *supra* Part II, Section II.E (on greenwashing and related harmful practices); *see also* discussion *supra* Part IV, Section IV.C.

287 CSRD, *supra* note 58. ESRS 1, *supra* note 20. *See also* discussion *supra* Part IV, Section IV.C and note 254.

which are linked to overly wide zones of discretion.[288] A notable model is the European Commission's proposed directives targeting greenwashing.[289] The EC's first proposal prohibits misleading consumers about environmental impacts, and requires claims on future environmental performance to have verifiable targets and independent monitoring.[290] Significantly, it prohibits generic, vague environmental claims (like "eco" or "green") where excellent environmental performance cannot be demonstrated.[291] The EC's complementary second proposal[292] mandates independent verification and substantiation of environmental claims,[293] and provides criteria for this substantiation.[294] The EC's proposals are a potential model for anti-greenwashing legislation, and it is worth watching what form the final directives will take and how they are enforced. This matches commentators' recommendations for the use of "summary and justification" in ESG reports, to reduce informational burden on individual investors.[295]

Finally, environmentalists should also support corporations and their decisionmakers who genuinely want to improve their environmental impacts. Where ESG reporting is not simply taken as a regulatory or impression management exercise, it has great transformative potential, especially where top-level buy-in is achieved, and where an ESG and sustainability culture is implemented across all levels and departments of a corporation.[296] Education and capacity building within corporations can help unlock the full potential of ESG reporting,[297] for those motivated by the "business case" for sustainability or environmental values or both.[298]

CONCLUSION

ESG reporting was assessed from the lens of an *environmentalist*—focusing on

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[288] *See* discussion *supra* Part II, Section II.E.

[289] Press Release, European Commission, *Circular Economy: Commission proposes new consumer rights and a ban on greenwashing* (Mar. 30, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2098 (last visited Dec. 19, 2023).

[290] *Id.*

[291] *Id.*

[292] European Commission, *Green claims* (Mar. 2023), https://environment.ec.europa.eu/topics/circular-economy/green-claims_en (last visited Dec. 19, 2023).

[293] *Id.*

[294] *Id.*

[295] *See supra* note 193.

[296] *See, e.g.,* BETH-ANN ROTH, *supra* note 146, at 103-113 (emphasizing the importance and role of board leadership on the dynamic ESG landscape); WILLIAM R. BLACKBURN, THE SUSTAINABILITY HANDBOOK 22 (2d ed., 2015).

[297] *See generally* ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS 103 (Katayun I. Jaffari & Stephen A. Pike, eds., 2022); *CCLI US Report, supra* note 100;. *see, e.g., Sustainable Business Law, supra* note 19, at 996, 997.

[298] *See* discussion *supra* Part II, Section II.B.

the environmental goals of achieving “sustainability,” improving environmental quality, improving corporate behavior, and implementing necessary public laws protective of the environment.

In surveying the history and emergence of ESG reporting, this paper identified its two broad goals: (1) the E&S-centric goals of measuring the impacts of a corporation’s business activities, and (2) the investor-centric goals of assessing and publicizing the ESG-related risks to the corporation and its shareholders. Environmentalists should work to keep these dual goals separate to prevent the E&S-centric goals from being eclipsed by the investor-centric goals. The environmental logic of ESG reporting should be thus protected.

The logic employed is persuasion. Like NEPA and other laws around the world mandating environmental impact assessments, ESG reporting forces a corporation and its decisionmakers to slow down, to pause, and to deliberate, hopefully in ways that break down silos within a corporation. By incentivizing corporations to disclose ESG-related risks and impacts in the process of ESG reporting, it also improves the transparency and accountability of decisions made by corporate decisionmakers. Corporations’ stakeholders and members of the public are empowered to participate more meaningfully in corporate decision-making via the various pathways to participation available to them (shareholder activism, litigation, reputational campaigns, boycotts, and through their elected representatives).[299] This empowerment of the public is normatively resonant with the deep public interest in corporations’ business activities, which are essentially redistributive.[300]

ESG reporting’s logic of persuasion can only work if its “zones of discretion” are not too wide and are adequately monitored and managed. Strong anti-greenwashing laws are needed to support and enable ESG reporting to perform its function and its logic of persuasion.

ESG reporting was assessed using Vandenbergh’s PEG Assessment Framework, focusing on using the appropriate standard of review (viewing ESG reporting as a “gap-filler”), and examining positive and negative spillover effects, as well as the empirical effects of ESG reporting on corporate environmental behavior and environmental quality. Since there is empirical evidence that ESG reporting can positively impact corporate environmental behavior,[301] and can even positively impact environmental quality,[302] environmentalists should support ESG reporting with caution. In particular, environmentalists should promote and encourage positive spillover effects, while working to avoid negative spillover effects such as the possible capture of ESG reporting’s E&S-centric concerns by ESG reporting’s investor-centric focus.

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[299] *See* discussion *supra* Part II, Section II.C.

[300] *See* discussion *supra* Introduction.

[301] *See* discussion *supra* Part IV, Section IV.A.

[302] *See* discussion *supra* Part IV, Section IV.B.

The global power shift from governments to corporations[303] necessitates environmentalists' focus on corporations and their decision-making processes, since there is great public interest in how corporations make decisions, view their risks, and chart their future strategy, policies, and plans. ESG reporting can provide an important tool which aids in this critical scrutiny, and the recommendations made in this paper—and the various blind spots, biases, zones of discretion, and potential pitfalls of ESG reporting revealed—can, hopefully, shape and sharpen ESG reporting into the public and private governance tool so urgently needed.

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[303] *See supra* note 1. *See also* discussion *supra* Introduction.