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Stitching a Sustainable Fashion Industry: A Comparative Legal Approach

Presentata da
dott.ssa Katherine Piccolo

TUTOR
Chiar.ma Prof.ssa Rossella Esther Cerchia

COORDINATORE DEL DOTTORATO
Chiar.mo Prof. Giuseppe Ludovico

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Introduction

In the words of philosopher and writer, Ayn Rand: “The difference between animals and humans is that animals change themselves for the environment, but humans change the environment for themselves.” Sedentary civilizations cleared spaces for farming and other agricultural purposes. Industry and its advancements have created a phenomenon known as “smog”, contaminated water sources and poisoned ecosystems. Humans have transformed green forests into concrete ones, filled with residential and commercial structures. The more we “develop”, the more nature disappears – to the point where it may no longer be suitable for ecosystems and the life that depends on them.

For decades, the development discourse was driven by a notion of economic well-being: property, prosperity, free enterprise, and liberal markets. Governments played a key role in supporting and even propelling a notion of well-being based on materiality and consumption. Relaxed incorporation laws have encouraged the establishment of businesses and stimulated market competition. Market competition has been said to foster innovation and encourage growth. Indeed, economic boom typically has been preceded by some sort of industrial revolution and/or increased commercial activity. It has also often been followed by either environmental or industrial disaster – sometimes both. Furthermore, as Western societies have traditionally equated property and prosperity, wealth and happiness, an incessant pursuit of development has transgressed inherent planetary boundaries of production. To put it into perspective, the Earth’s average surface temperature has risen more than 2°F since the pre-industrial period, and 1.76°F of the total 2.14°F rise occurred after industrialization. That is a rise of 0.14°F per decade from 1880 to 1981, and 0.32°F (double!) since 1981. Most of the “warmest years in history” are concentrated in the period after 2005; and, whereas prior to 1980 (when we experienced globalization) humans would set a new record for “hottest year” every 13.5 years, we now experience a new “hottest year” every 3 years.[1] That is, we have created industries to evolve beyond the natural capacities of our planet. We have successfully changed our environment for ourselves, but at a potentially high cost to future generations. It is in this context that the notion of *sustainabl*e development emerged.

In the mid-20th century, the sustainable development movement was significant but still without a global following. Now, however, it is now possible to identify a more-or-less world-

[1] Lindsey and Dahlman (2021).

wide consensus that the same practices that drove businesses half a century ago are no longer suitable for current social needs, much less the needs of future generations. Despite the debate about whether we have already surpassed the so-called tipping point (which scientists define as a point where the Earth is beyond repairing itself), everyone must mobilize to combat climate change and that further human development must be sustainable. At the same time, however, it is impossible to ignore that any development must include industry -- both a potential driver of sustainable development and a root cause of the sustainability problem.

The fashion industry is a prime example of this paradox. To start, it has the potential to drive sustainability because of its reach and economic impact. The fashion industry spans global markets, produces around $3 trillion in value, and provides jobs to millions of people in a variety of sectors. Following trade liberalization policies, almost 75% of textile production moved overseas to developing countries.[2] Hence, it has been an important component of developing countries' economies and has contributed to improved living conditions for many. Additionally, developed countries provide lucrative markets for fashion brands and usually employ higher-paid workers (such as creative directors, technicians, stylists), thus representing a significant portion of gross domestic product (GDP) for developed nations. However, we cannot ignore the high environmental and social costs of textile production and clothing manufacturing. If fashion shapes consumer tastes, and consumer demand drives production, then the fashion industry has created a system that thrives off incessant turnover and is characterized by a vicious cycle of waste and resource depletion; fashion has created a "throwaway society" which has pushed industry expansion through increased demand for trendy clothes at affordable prices.

Cultivation of raw materials required for textile production consumes staggering quantities of water and accounts for a significant portion of pesticide use world-wide. The dying process alone uses over 15,000 different types of chemical agents, which often contaminate soil and water sources due to run-off from factories. Production further requires vast amounts of energy and emits almost as much greenhouse gases as the entire aviation sector. Concisely, in 2016, the world population was 7,464,022,049.[3] That year, the textile industry was estimated to have produced some 150 billion new garments.[4] This represents 20 new garments per capita, which

[2] The World Bank (2009).

[3] "World Population by Year" (n.d.).

[4] Bédat (2016).

might not seem like much per person, but on a global scale it translates to the drying up of entire lakes, the filling of landfills, and so much pesticide use that approximately 1,000 people are said to die per day from pesticide poisoning. What is more, projections do not indicate the industry will slow down in the future: according to the Global Fashion Agenda and The Boston Consulting Group (2017), 8.5 billion more people will require clothing by 2030.[5] So, while everyone needs clothes, and the global economy is practically dependent on the fashion industry, it is a highly polluting and resource intensive industry.

This enigma is aggravated by the fact that there are no uniform industry standards or international laws to regulate business. Therefore, to ensure future generations have at least the same opportunities they have presently, it appears necessary to begin by changing the corporation from within. At the same time, if we consider that voluntary, industry-wide initiatives have been in place for decades, it is plausible that self-regulation alone will not solve the current sustainability problem. As emphasized by the Court of Justice of the European Union (EU), "companies are creatures of the law" and "exist only by virtue of […] national legislation which determines their incorporation and functioning."[6] From this perspective, then, it is significant that not all governments face sustainability challenges equally. Some do nothing, while others do not do enough. And yet, even in countries that favor self-regulation, the sustainability movement advances and industry responds. This begs the question: what are governments doing (or not doing) to cause industry transformation?

If legal transplants have traditionally been motivated by prestige or imposition of a model, the fact that sustainability problems are shared by a variety of nations means that legal transplant is now also activated by efficiency. Against this background, once we have identified the problem, it is paramount to observe what others are doing to find the solution(s). Hence, as concerns the fashion industry, this dissertation will use the functional comparative method[7] –

[5] Global Fashion Agenda and The Boston Consulting Group (2017).

[6] *The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, C-81/87 [1988] ECR 5483, 5511 [19]; *Überseeing BV v. Nordic Construction Company Baumanagement GmbH*, C-208/00 [2002] ECR I-0019, I-9971 para. 81.

[7] The functional method in comparative law has three steps: (1) statement of the problem in purely functional terms; (2) objective presentation of the ways in which different legal systems resolve the legal problem; (3) comparison and evaluation of the preceding analysis. For a concise overview of the functional method: Michaels (2006); de Coninck (2010). *See also* Zweigert, Kötz, and Weir (1998); Zweigert (1972). On comparative methods, *see generally* Gambaro and Sacco (2018); Gambaro (1980); Gorla (1983); Gambaro (2004); Graziadei (2003); Graziadei et al. (2009); Bussani and Mattei (1997). *See* van Hoecke (2015) (providing a short overview and offering references on different methods in comparative research).

analyzing the approaches of the fashion industry's two largest markets: the United States (or America) and Europe – to discuss the opportunities and challenges presented by the varying development strategies.

In Chapter 1, the discussion will begin generally, with a brief overview of the role of business and company law in development. We will observe how development has traditionally been framed as economic development, and thus the pursuit of industrial growth and freedom of enterprise. We will note some of the major events leading up to World War II, as well as certain technological and industrial advancements that emerged from the period. Then, we will trace the origins of the sustainability movement and discuss its evolution in the United States and Europe by chronicling some of the major industrial accidents and disasters that sparked an acute sensitivity to the impact of industry on the environment and the public at-large. We will note that, as this awareness rose, public demand for more stringent environmental policies and laws to address polluting activities prompted legislators to impose greater limitations on business activities and development that threatened the environment or public health. Both the United States and Europe passed similar legislation aimed at containing the negative effects of unregulated industry. We will also see that by the 1970's, the international community began to mobilize and embrace the notion of sustainable development. Events such as the 1972 United Nations Stockholm Conference and the 1979 Climate Conference in Geneva, Switzerland led to the establishment of the United Nations Environmental Programme (UNEP) and the adoption of the Stockholm Declaration, with the consequent establishment of a series of principles for environmental management and the concept of sustainable development at an international level.

For the United States, we will observe the market and legal contexts of the 1950s, 1960s and 1970s and discuss some policies adopted to encourage development, as well as the effects of the same. We will note that significant outsourcing of manufacturing to developing countries occurred during the 1980s, that the 1990s and early 2000s experienced many scandals, and that evidence of corporate misconduct was met with the rise of an anti-globalization movement. We will see that as tensions between public and corporate interests increased, so did responses by policy makers and the business community. We will highlight some relevant initiatives aimed at promoting accountability, eliminating corruption, and staving off public criticism – including more restrictive legislation and the spread of corporate social responsibility programs. Importantly, it will be emphasized that the United States faced challenges related to unsustainable development by encouraging companies to self-regulate. Thus, combined with

consumer demand for more responsible practices, we will see that by the end of the 1990s, most business had introduced a “code of ethics” into their corporate governance structure.

For Europe, we will discuss how the sustainable development movement has its origins in international principles, and how the EU has attempted to translate such general and abstract rules into detailed provisions in response to global events. We will observe that while the European movement began much later than in the United States, Europe eventually surpassed the United States in terms of its focus on protecting the environment, promoting sustainability, and compelling social responsibility. Additionally, we will highlight how, following some important international gatherings, the Treaty on EU included objectives that promoted environmental protection, human dignity, and sustainable development, which – from a legal standpoint – permitted European policymakers to incorporate sustainability into development programs.

Therefore, in Chapter 1 we will see that what began as an environmental movement in the 1960’s turned into a call for “sustainability” on both continents by the 1990’s – from a social and economic perspective. In the United States, absent government-imposed regulations, businesses adopted codes of ethics largely in response to market forces and widespread publication of abuses, scandals and corruption. Europe and various Member States, however, took a different approach by enacting legislation and regulations to mandate sustainable business practices, including the advancement of social justice.

In Chapter 2, we will consider how the concept of sustainability discussed in Chapter 1 evolved to include economic and social aspects. In that regard, we will examine the impact of the fashion industry on each “pillar” of sustainability. To fully appreciate how the fashion business has been impacted by and continues to impact the sustainable development discourse, we will first provide an overview of the industry and some of its unique concepts or business models, highlighting the complexity and sophistication of the global industry and its supply chain. We will consider data that speaks to the industry’s economic impact, and it will be explained that such statistics are both facilitated by and the result of a complex business model based on “subcontracting”.

To grasp how outsourcing as a practice became widely employed, we will look at the evolution of the industry since the 1950s – similar to our review of the origins of the entire sustainability movement in Chapter 1 – and note that, in Europe, subcontracting was primarily employed to gain partial or total relief from import duties and access cheap labor in less developed countries;

while American counterparts employed the subcontracting model to escape government regulations and take advantage of that same cheap labor these poor countries offered. This will lead us to discuss the detrimental effect of the subcontracting model on the contracting parties, as well as some protections offered under Italian law. More importantly, however, we will highlight how the relatively inexpensive/economically feasible subcontracting model has led to the development of the "fast fashion" phenomenon.

In terms of the social costs of the subcontracting arrangement, we will observe how increased competition drives companies to establish further subcontracting arrangements (coined "sub-subcontracting"). In this context, we will consider two important examples of how these phenomena impact social development in producer countries, as well as some of the legal developments arising therefrom. As we will also observe, contributing to the problem are the developing countries' unwillingness to adopt or enforce laws that might deter business, leading to inadequate building and safety standards.

Finally, we will examine the environmental footprint of the industry – from the excessive amounts of water it consumes, to the amount of pollution and waste it produces, and, we will note some staggering statistics in that regard. For example, in 2015 alone, the fashion industry used 80 billion cubic meters of fresh water and emitted a million tons of carbon dioxide. Further, 20% of industrial water pollution is generated by the fashion industry due to the dyes and chemicals used to treat textiles. Not only are the products themselves damaging to our environment, but also post-production practices by fashion brands themselves, retailers, and consumers contribute further to the waste and sustainability problem of this industry. We will see that, in this context, reports exposing irresponsible practices within the fashion industry have prompted large and small firms alike to reconsider their business guidelines.

However, we will also observe that the absence of regulations or uniform standards has led to a practice dubbed "greenwashing". As a result, we will consider some of the legislation, regulations and lawsuits designed to address false and misleading business practices, and how social media has contributed to the dissemination of information to consumers about the "true cost" of their clothing. To that end, we will look at some "top-down" approaches (i.e., relevant laws) in both the United States and Europe, as well as some "bottom-up" initiatives (i.e., voluntary actions) enacted to address pollution and proper labeling of clothing. Developments, such as a materials revolution, will be mentioned, as well as some primary corporate social responsibility (CSR) certifications on the market.

Lastly, because "bottom-up initiatives" are often criticized for reliance on a company's willingness to "self-regulate", we will briefly explore the emergence of the Benefit Corporation, or B-Corporation, movement and how these entities could represent effective tools to bring about changes in the way fashion companies do business.

In Chapter 3, we will take a more detailed look at the primary legal tools and major policies employed in America and the EU. Namely, we will discuss the genesis of codes of ethics within the American framework, the reasons for their emergence and diffusion, and how fashion brands incorporate such guidelines within their organization. In the European context, we will examine the circular economy model, primarily as concerns efforts to promote more effective waste management and shortening the supply chain through protectionist trade policies. We will also consider some of the major implementation challenges with regard to both the effectiveness of codes of ethics and the transitioning from a linear to a circular economic model. For instance, we will observe how lack of regulation and clear guidelines undermine corporate accountability. This has led to the legal doctrine to frame corporate codes of ethics as instruments subject to the rules of contract law, as well as lawmakers to enact more concise laws (contributing to increased legal certainty in the case law). As concerns efforts to incorporate circularity into existing business practices without sacrificing competitiveness, we will see that the more complex the legal tool, the more complex the solution. Indeed, the transition will require significant capital investments, which not all companies can afford. Therefore, we will discuss some existing legal tools and propose more widespread use of capital financing instruments. This study will eventually lead us to consider whether the current legal frameworks are suitable for new sustainability challenges and the needs of modern society, offering some final remarks on how we might need to rethink the purpose of competition law to achieve these aims. In other words, it will be submitted that sometimes the law must bend so that society does not break.

CHAPTER 1: The Role of Business in “Sustainable Development”. A Historical Perspective

As Carl Sagan once stated, “You have to know the past to understand the present”. Thus, to understand the current state of the sustainable development discourse, it is necessary to know what prompted the movement, and how it has evolved over time.

While it is difficult to pinpoint the exact moment when sustainability became a fundamental issue[8], its relevance is undeniably greater now than in the past.

In a nutshell, the notion of sustainability[9] (and, thus, sustainable development[10]) is closely linked to the debate surrounding our society’s concept of wellbeing—an ideal that has developed over time. If at the beginning of the 20th century the concept of wellbeing went together with the notion of development in a colonial context,[11] this ideal became more complex from around the end of World War II.[12] Indeed, by the 1950s, the expression “wellbeing” sparked sentiments of *material* wellbeing; it meant more goods and services and growth in per capita income.[13] Quality of life was said to improve as wealth accumulated and consumers benefited from greater choice, market innovation, and new products at lower prices. Linked to this, convenience was a primary goal, and more consumer products were disposable rather than reusable. Accordingly, by the 1960s, international trade had become a major goal of post-war era Western economic policy,[14] Keynesian economic theory shaped fiscal and governance agendas, and expansionism was favored.[15] In other words, “development” was synonymous with “growth”,[16] consumption and waste.[17]

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[8] Without going too far back in history or into too great of detail, it is noteworthy that, already in 1949, there was a heightened awareness of the need to conserve natural resources such as land, water, wildlife and energy. *See* Pehrson and et al. (1949). On the history of sustainability, *see generally* Gillespie (2017).

[9] *See generally* Caldwell (1998); Giovannoni and Fabietti (2013); van Dieren (1995).

[10] *See generally* Du Pisani (2006a); Pozzo (2020) Sustainable Development

[11] Purvis, Mao, and Robinson (2019).

[12] Pozzo (2021b).

[13] Arndt (1981).

[14] Arndt (1987).

[15] *See generally* Marglin and Schor (1991).

[16] *See* Purvis, Mao, and Robinson (2019); *See* Arndt (1981).

[17] Cerchia and Piccolo (2019).

However, the free market did not produce a win-win situation for everyone, and there was a growing concern that production harmed the environment and endangered public health. What is more, there does not appear to be a significant distinction in terms of industrialized and agricultural economies,[18] especially as globalization enabled developed countries to exploit the lands of less developed nations.[19]

This chapter will offer a historical reconstruction of the sustainability movement in general, starting from a brief overview of corporate law's role in development and outlining some of the major global events and industrial disasters that prompted advancement of the sustainable development movement. In this context, it is possible to distinguish between the concept of development as economic development prior to the 1960s, followed by the notion of sustainability in the 1960s and 1970s (when sustainability was conceived primarily as *environmental* sustainability) and the 1980s and 1990s (when increased emphasis was put on economic and *social* sustainability); given the scope of this contribution, the second part of this chapter will be limited to social sustainability aspects, and economic sustainability will not be addressed. Particular attention will be given to the market and legal environments in America, Europe and internationally. From this discussion, it will emerge that – in America – these circumstances sparked the corporate social responsibility (CSR) movement, and that companies started incorporating codes of ethics into their corporate governance structure in the absence of proper or adequate legislation. In Europe, on the other hand, the events of the second half of the 20th century prompted the adoption of a system of legislation aimed at achieving an increasingly circular economy and advancing ideals of social justice.

I. Prior to the 1930s: An economy run "by business, for business"

If the corporation is both a driver of development and a root cause of the sustainability problem,[20] then it is necessary to briefly examine the corporation's historical role in society

[18] Consider, for example, the use of chemicals and pesticides in farming, and especially once it was necessary to produce yields sufficient to feed the growing post-war era populations. Indeed, the ecological damage of chemical use in agriculture was already noticeable by the late 1940s. In America, *see* Gay (2012); Pryor (1982). For a comparative perspective, *see* Pelaez, da Silva, and Araujo (2013).

[19] For a comparative perspective on environmental damage, see Pozzo and Jacometti (2021). See also Pozzo (2016); Pozzo (2017a); Pozzo (2009); Pozzo (2017b); Pozzo (2012); Cafagno (2007).

[20] For a history of the corporation, *see generally* Stern (2017).

before analyzing the genesis of sustainable development as a concept. Thus, to outline the context in which sustainable development began to take shape and its initial characteristics, this section will primarily focus on the relationship between the "social" and the "economic" aspects of business.

The social dimension of development in a commercial context can, in a certain sense, be traced back to the origins of modern companies (or "societies") at the end of the 16th century and beginning of the 17th century.[21] More precisely, with the rise of mercantilism, it is possible to identify a correlation between high-risk business activities and high profits, as well as a propensity toward innovation.[22] For this reason, incorporation was a privilege and laws aimed to restrict the expansion of industry for specific purposes.

Indeed, it is well-known that the first modern companies were established in England, Spain, and Holland through conferral by the King or the Government of a "royal license" (or "charter") to promote economic and political interests within a state or abroad. Essentially, these were "joint-stock" companies in which a group of investors contributed financial resources for certain ventures too large for any single individual.[23] For example, to develop foreign trade and colonies in the East Indies, England established the East Indian Company (1600), the African Company (1619), the South Sea Company (1711), and the Russia Company (1554). As for the American colonies, England established, for example, the Virginia Company (1609), the Massachusetts Bay Company (1629) and the Hudson Bay Company (1670). The Dutch East India Company (1602) and the Dutch West India Company (1621) are also well-known.[24]

Obtaining a charter of incorporation was a particularly important privilege because it granted the benefit of limited responsibility; normally, additional benefits were also granted, such as the monopoly on a particular activity or geographic area, or, in certain cases, diplomatic/military

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[21] Some scholars even believe that the origins of commercial enterprises can be traced back to Roman law. See, for example, Arner (2016) 23 ff. However, it would not seem correct to superimpose the forms of organized enterprise typical of Roman Law with the proto-capitalistic enterprises of Humanism since they are profoundly different both in terms of the economic context of reference and the regulatory and organizational tools used.

[22] On the transition from a pre-capitalist to a capitalist economy, *see* Libertini (2009). *See also* Addante (2012) 15 ff.

[23] Williston (1888) 109.

[24] It was also common for charters to grant jurisdictional and political powers in the name and on behalf of the state. For example, the charter establishing the Dutch West India Company authorized the company to form contracts, agreements and alliances with the rulers and the local populations in regions in which it operated, and even granted the power to appoint and dismiss local governors, militias, jurisdictional bodies and other public offices. *See* Lopez (2004) 739 ff (especially p. 744).

support of the State.[25] Thus, charters were only granted to companies with precise public interest objectives that could guarantee important economic returns to the Crown through tax revenues.[26] It follows, then, that corporations in the 17th and 18th centuries pursued both public and economic interests – which were either established or approved by the State.[27]

This model is additionally noteworthy because, as an English colony, it was exported to North America,[28] shaping the economic and social fabric in which the first corporations developed.

In fact, at the end of the 18th–beginning of the 19th century, the "first generation"[29] of corporations in United States mostly served "social" purposes. That is, the government guided industry by chartering companies that carried out activities of public utility, such as banking, insurance, construction and management of new buildings, canals, bridges, rail lines, and means of communication,[30] as well as universities, churches, and charitable institutions[31] – in a nutshell, activities which are currently regulated by specific laws because of their impact on civil society.[32] The Philadelphia Contributionship for Insuring Houses from Loss by Fire (1768), the Bank of North America (1781), the Massachusetts Bank (1784), the Proprietors of Charles River Bridge (1785), the Mutual Assurance Co. (1786), and the Associated Manufacturing Iron Co. (1786) are some examples.

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[25] *See* Harris (2000) 41: "monopoly became an almost inherent characteristic of the early business corporations, and a major factor in their future development [...] the corporate trade monopoly not only gave permission to self-enforce the monopoly but also granted State enforcement of the monopoly against competition from nonmember English-men [...] in these early days of the business corporation, monopolistic privileges were seen as almost integral to the act of incorporation because of the nature of the companies' activities."

[26] In the English context, *see* Avi-Yonah (2005) 784. Moreover, the fact that only the sovereign could approve and grant charter (and revoke it) meant a pervasive public control in the affairs of the corporation. *See* Harris (2000), *passim.*

[27] It is significant that general incorporation laws in Europe, first introduced in France in 1867, did not spread throughout the Continent until the late 19th century. Blumberg (1986) 596.

[28] *See* Chaffee (2017) 347 ff (especially p. 353).

[29] Reference to "generations" of corporations is made by Hurst (1970); Cox and Hazen (2016) 22.

[30] Cox and Hazen (2016) 53: "Corporations were uncommon prior to the 1800s, and those that existed were specifically chartered by the state to operate banks, insurance companies, and companies to build and operate canals, bridges, and roads."); Padield (2004) 79 ff (especially p. 87). *See also* Williston (1888) 109.

[31] *See* Palmiter (2009) 7.

[32] Hurst (1970) 17-22: "From the 1780's well into the mid-nineteenth century the most frequent and conspicuous use of the business corporation - especially under special charters - was for one particular type of enterprise, that which we later called public utility and put under particular regulation because of its special impact in the community [...] the predominance of public-utility- type enterprises among this first generation of business corporations"; Avi-Yonah (2005) 353; Lopez (2004) 744 ff.; Hamill (1999) 81 ff.; Schaeftler (1983) 81 ff.; Atkinson (2008) 43 ff. (especially p. 56).

At the same time, the period[33] was marked by a broad sentiment that prosperity and wellbeing are closely linked to property and material wealth. In fact, the Declaration of Independence outlined these as unalienable rights, the 14th Amendment prohibits states and the federal government from depriving "any person of life, liberty, or property without due process of law", and property is central in the private law systems of the Western legal tradition; whereas, in continental Europe, the paramount role of property is evidenced by the structure of civil codes, for instance, and the constitutional right to private property and free enterprise. So, as incorporation went from being a privilege to a right, more people began pursuing economic initiatives aimed at generating profit (or property) and requesting charters.[34] In this sense, the corporation's role in society and development changed from an entity that provided public utility to one that served individual interests (namely, profit for its owners).

With increased demand for charters, it became evident that the then-current charter system (which required a special bill adopted by the state legislature) was no longer suitable to handle the numerous requests for incorporation. As such, individual states began passing general incorporation statutes allowing corporations to be formed without a charter from the legislature. The first states to enact general incorporation laws were North Carolina in 1795 and Massachusetts in 1799, then New York in 1811 and Connecticut in 1837, followed by Ohio in 1852 and Delaware in 1899.[35]

Furthermore, as the political influence of expanding industry grew, so did the pressure on state legislatures to enact statutes providing limited liability for private companies.[36] New Hampshire (1816), Connecticut (1818) and Maine (1823) were the first states to adopt limited liability statutes for manufacturing companies, and limited liability for corporations was generally accepted by 1840.[37] The corporation's weight can also be identified in the case law, starting

[33] Which coincided with the American Revolution (1765-1791) and the Industrial Revolution (1760-1820).

[34] *See* Williston (1888) 166.

[35] *See* Hansmann and Pargendler (2014) 948 ff (especially pp. 993 ff). *See generally* Avi-Yonah (2005) 786.

[36] The debate about whether stockholders of private enterprises were responsible for corporate debt appears to have started in the first decades of the 19th century, when many businesses failed (Blumberg 1986, p. 592 nt. 120), an issue that was resolved by the case law. *See Wood v. Dummer*, 30 F. Cas. 435, 436 (C.C.D. Me. 1824) (No. 17,944) ("The individual stockholders are not labile for the debts of the banks in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead"); *Myers v. Irwin*, 2 Serg. & Rawle 368, 371 (Pa. 1816) ("personal responsibility of a stockholder is inconsistent with the nature of a body 'corporate'").

[37] Blumberg (1986) 587-592. *See also* Angell and Ames (2004) 24 ("the public, therefore, gain by acts incorporating trading associations, as by such means persons are induced to hazard a certain amount of

especially with the 1886 case, *Santa Clara County v. Southern Pacific Rail Road* [38] in which the court recognized the corporation as a "natural person" under law.

Thus, combined with a general acceptance that incorporation meant limited liability, general incorporation laws became an important trend[39] with significant consequences for the United States' legal and market contexts. More specifically, by the late 19th century, competition between states for investment (or incorporation) was so intense that a phenomenon called "charter-mongering" emerged. That is, certain states began actively soliciting charters by creating favorable regulatory frameworks. For instance, to sidestep the prohibition under the Sherman Act of 1890 of agreements or business practices that restrict trade, in 1893, New Jersey amended its laws to allow corporations to merge horizontally and hold stock in other corporations.[40] In Delaware, corporations could not only hold stock in other corporations, but they could also exercise all rights. Accordingly, the general liberalization of corporation law activated a "race to the bottom" and eventually all states recognized the authority of a corporation to own stock in another corporation.[41] In this context, the United States Congress (Congress) enacted the Clayton Antitrust Act[42] in 1914 to add further substance to the Sherman Act. But whereas antitrust legislation of the period was still generally permissive of mergers, the more restrictive legislation essentially led to a "merger movement"; between 1898 and 1902, "at least 2,700 firms disappeared into the manufacturing and mining mergers reported in the financial press."[43] In fact, it was during this period that corporate groups began to emerge, and society witnessed the establishment of large companies, such as U.S. Steel, American Tobacco, International Harvester, DuPont, Anaconda Copper, Corn Products, American Smelting and

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property for the purposes of trade and public improvement, who would abstain from doing so, were not their liability limited").

[38] *Santa Clara County v. Southern Pacific Rail Road Co.*, 118 U.S. 394 (1886): "The defendant Corporations are persons *within* the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws."

[39] *See generally* Butler (1985) (discussing the demise of special incorporation charters); Wells (2009) 581-584.

[40] New Jersey first amended its constitution in 1875 to require all corporations to charger under general laws. New Jersey Constitution (1875), art. 5, sect. 7. *See also* "An Act Concerning Corporations," *New Jersey Session Laws*, Apr. 7, 1875, p. 174. Then, in 1888, the state legislature passed statutes allowing mergers and corporate stockholders in foreign (or non-New Jersey) companies. *New Jersey Session Laws*, Apr. 17, 1888, chap. 294, p. 441 (merger); and Apr. 17, 1888, cap. 295, p. 445 (intercorporate stockholdings).

[41] Blumberg (1986) 607.

[42] 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53.

[43] "Mergers" (n.d.).

Refining, Otis Elevator, Allis-Chalmers, and American Sugar Refining. What is more, as market competition eroded the positions of some prominent businesses, many market actors consolidated in the late 1920s, resulting in National Steel, National Dairy Products, United Aircraft, Owens-Illinois, and Caterpillar Tractor, to name a few.[44]

Going forward it was clear that lax legislation had several implications. For example, it facilitated the formation of business entities and thus stimulated economic growth and the development of a more sophisticated market economy. The expansion of industry also resulted in recognition of various types of entities and provided important opportunities for aspiring entrepreneurs; corporate forms during this period included "for-profit," "nonprofit," and "cooperatives".[45] However, promotion of industry also led states to either reduce or eliminate limitations on capital,[46] at a significant cost to public wellbeing. That is, without sufficient safeguards for public interests, rapidly expanding industry contributed to unequal distribution of wealth and deteriorating working and social conditions. In fact, in the late 1800s and early 1900s, a strong aversion to corporate structures and unregulated business activity emerged, as evidenced by the great protests of the Populist Movement, which opposed the so-called railroad "tycoons" and "robber barons".[47]

In this regard, one might recall the dissenting opinion of Justice Brandeis in the case *Ligget v. Lee*, 288, U.S. 517 (1933):

> "Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution — an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And as ownership of the shares is

[44] *See* Rappa (2007) 82 (observing the impact of industry concentration during the Second Industrial Revolution). *See generally* Blumberg (1986) (discussing the application of limited liability and general incorporation laws, also in the European context).

[45] Chaffee (2017) 354 and nt. 28

[46] *See generally* the dissenting opinion of Justice Brandeis in the case *Ligget v. Lee*, 288, U.S. 517 (1933).

[47] Derber (2013) 43 ff (especially p. 45).

> becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving 'corporate system' with the feudal system; and to lead other men of insight and experience to assert that this 'master institution of civilised life' is committing it to the rule of a plutocracy."

Thus, the above discussion illustrates how the corporation has traditionally driven the development discourse in the United States, especially from the perspective of *economic* development. However, if "opportunity makes the thief," then loose regulations also gave rise to a series of corporate scandals and social ills during the period. In fact, as will be discussed in Chapter 3 (section "genesis"), events such as the Great Depression have been attributed to excessive risk taking combined with lack of government oversight. And, from this perspective, it is no wonder that the 1930s were characterized by heavy regulation to recover from the economic crisis.

In the European context, it appears relevant that although corporations enjoyed limited liability before such became a general practice in the United States, general incorporation (first introduced in France in 1867) did not spread throughout the continent until the late 19th century. In this sense, compared to America, there was still a significant "check" on corporate power and business risk. Additionally, the physical impact of World War I on the continent compared to on United States soil is significant since it indicates absence of a context suitable for the development of a sophisticated market. Such assertion is supported by the fact that important European powers (such as the German and Austro-Hungarian empires) fell, republics were declared and newly independent nations formed; the War also left economies crippled with war debts, deep economic recession and high unemployment. In Germany, for example, hyper-inflation destroyed wealth. In Italy, these conditions gave rise to the emergence of two opposing political factions: communism and fascism. Moreover, it is noteworthy that Mussolini and the "Fascist Blackshirts" came to power in the 1920s, clashing with the communist movement and causing fear of a revolution and general political and social instability. At the same time, the United States was experiencing the crazes of the "Roaring Twenties", and the Spanish Flu killed millions across Europe. In other words, the devastation of the War and a world-wide pandemic disproportionately affected Europe and had a profound effect on history.

II. 1930s-1950s: The Wall Street Crash, World War II, and Impacts on Development

As the major global events occurring from the 1930s to the 1950s are well-known, this section will be limited to a brief review of circumstances affecting development during the period.

1929 Wall Street Crash

In October 1929, the American stock market crashed. Since the Wall Street was the epicenter of the U.S. finance industry, the crash provoked a run on the banks and widespread bankruptcies. Consequently, unemployment levels skyrocketed to around 25%. The impact was felt worldwide.

In 1929, the United States was governed by a Republican President, Herbert Hoover, whose policies reflected the belief that market forces would return the economy to course. As such, businesses were encouraged not to lay off workers or reduce wages. Instead, the President initiated higher taxes on imported goods to promote domestic consumption and deter imports. However, by 1932, it was apparent that the country's economy was not improving, and President Hoover enacted the Reconstruction Finance Corporation (RFC), a large peacetime spending program that provided excess of $1 billion in business loans. When not even the RFC was effective, the American people elected Franklin D. Roosevelt, a Democrat, in autumn of the same year. These events are significant because Republicans generally adhere to laissez-faire policies, while Democrats favor more government intervention. In fact, President Roosevelt is perhaps best known for his "New Deal" programs.

Between 1933 and 1935, the Congress enacted a series of government programs to address unemployment, poverty, and the overall economy. During the Second New Deal (1935–37), Congress passed the Social Security Act of 1935 to provide, for the first time, securities (such as unemployment insurance, public housing, and income) for people experiencing hardship.

World War II

The turmoil and social tensions briefly described at the end of the previous section had spread beyond Europe, throughout the world, and escalated such that the 1930s were characterized by the rise of authoritarian regimes and war. First there was the war in East Asia between China and Japan. There was also the Chaco War in South America (1932-1935) and the Italian

invasion of Ethiopia (1935), followed by the Spanish Civil War (1936-1939). Hitler became chancellor in 1933 and, during this period, violated the Treaty of Versailles by occupying the Rhineland in 1936 and Austria in 1938. By 1939, a world war had broken out after the Nazis (supported by a non-aggression pact with the Soviets) invaded and occupied Poland; soon after, Britain and France declared war on Germany. Finally, following the Japanese attack on Pearl Harbor in 1941, the United States changed its isolationist policies – and from September 3, 1939 until May 8, 1945, the world experienced the Second World War (World War II).

Impacts on development

Important for the following discussion, World War II marked the end of the British Empire and the emergence of the United States as a new world leader in the 1940s. This era also witnessed the rise and consolidation of the global oil industry, with operations concentrated in countries such as the Middle East, South America (namely Venezuela) and the Soviet Union. Civil aviation advanced significantly compared to the 1920s, as did ocean liners. And technological developments led to the diffusion of radio and newsreels, which improved information about global events and the spread of propaganda. For instance, the Hindenburg disaster of 1937 and the Nuremberg rallies were captured on film.

For America, World War II period was also characterized by scarcity of resources and a rationing system. Factories were converted to military production sites, causing a decrease in supply of consumer goods, for example. On the other hand, the war also brought employment for many out of work, generating or raising incomes and contributing to growth of the middle class. In this context, it is possible to note how the legal context thus favored (again) expansion of business and industry; by the end of the 1940s, giant corporations had begun to dominate American business.[48] Additionally, forced conservativism contributed to increased savings, which would have a significant impact on the economy in the postwar years.

On a humanitarian and environmental level, one must recall that the United States' bombings of Hiroshima and Nagasaki on August 6 and August 9, 1945 contributed to the end of World

[48] Although outside the scope of the present dissertation, it is also noteworthy that, after World War II, the U.S. Government perceived the Soviet Union and Communism as significant threats to democracy. In response, it established the Department of Defense, the Central Intelligence Agency and the National Security Council, and formed alliances with arms manufacturers, dealers and universities such as to give rise to the "military-industrial complex". Moreover, such adversity towards different political theories ultimately resulted in the Cold War between the Soviet Union and United States.

War II. However, they also resulted in the deaths of tens of thousands of people from burns, radiation sickness, and other injuries – even for months and years following the bombings. In fact, while the extent of the long-term damage is still unknown, increased illness, such as cancers and anemia, as well as birth complications, were reported in the following decades. Radiation from the bombs was absorbed into the soil causing colossal environmental damage and, therefore, concerns about whether it was safe to live. In any event, to the extent any organized "development movement" existed prior to the 1960s, it was clearly economics and business oriented.

III. 1960s-1970s: The Rise of the Sustainable Development Movement. Sustainability as *Environmental* Sustainability.

As concerns environmental sustainability, it is important to note that America and Europe had relatively different experiences. That is, while Europe was busy rebuilding after World War II, America was involved in an economic boom and the pursuit of expansionist policies. Thus, in terms of market context, it may be said that America was more industrialized than Europe—as illustrated by the varying degree and number of industrial accidents over the period. The following paragraphs outline some of the detrimental effects of industry between the 1940s and 1980s, which (it may be argued) contributed to the establishment of a trend to impose more stringent environmental standards on business.[49]

Disasters

In America

- **Pervasive smog: 1940s in Los Angeles; 1960s in New York:** From the early to mid-1940s, certain California cities have registered significant smog levels due to the high number of motor vehicles being driven. In 1943, approximately 2.8 million motor vehicles were driven some 24 billion miles (38.6 billion kilometers) per year in California. In Los Angeles, smog was sometimes so thick that visibility was limited to about three blocks. Air pollution became such a problem (causing breathing problems, vomiting, and smarting eyes) that, in 1945, Los Angeles established its own Bureau of

[49] *See generally* Pozzo (2013).

Smoke Control. Two years later, California passed the Air Pollution Control Act; emissions standards were mandated starting from 1959.[50] Similar conditions were also present in New York.[51]

- **1945 Edgewood Arsenal Explosion:** On May 25, 1945, the Edgewood Arsenal in Maryland (a production facility of phosphorus igniter assemblies for incendiary bombs) exploded, killing 12 and injuring more than 50 munitions workers.[52]

- **1947 The Texas City Disaster:** On April 16, 1947, a ship (the French-owned SS Grandcamp) carrying highly flammable ammonium nitrate exploded while at port in Texas City, Texas. Several buildings were destroyed (including oil and chemical storage facilities) and flying debris caused fires in the nearby town, killing hundreds of people.[53]

- **1947 Centralia Mining Disaster:** On March 25, 1947, an explosive detonation ignited coal dust in a mine near Centralia, Illinois, killing 111 people. After the explosion, Congress enacted more comprehensive safety regulations, including regular inspections.[54]

- **1947 O'Connor Plating Works Disaster:** On February 20, 1947, the O'Conner Plating Works in Los Angeles, California, exploded following the improper handling of perchloric acid, killing 17 people, injuring over 100, and causing irreparable damage to nearby buildings.

- **1948 Donora Smog Disaster:** In 1948, an abundance of hydrogen fluoride and sulfur dioxide emissions from a large zinc plant (Donora Zinc Works) mixed with fog to form a thick, yellowish, acrid smog that covered the Pennsylvania city for five days,

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[50] Kennedy and Weekest (1968).

[51] Dewey (1999); Popkin (1986); Dwyer (2017).

[52] *See generally* Walker et al. (1969).

[53] The U.S. federal government was found responsible and eventually paid $16.5 million in damages. After the Texas City Disaster, Congress enacted reforms in chemical manufacturing and transportation. On the Texas City Disaster: Stephens (1997).

[54] On the legislative history of U.S. mine safety and health: Mine Safety and Health Administration (n.d.). For a list of mining laws and regulations in the U.S.: Kahalley (2021). On the Centralia Mining Disaster: Phee (1971); Crouch (n.d.).

killing 20 people and causing respiratory problems for almost half the Donora population.[55]

- **1969 Cuyahoga River Fire:** In June 1969, a section (a part dominated by heavy industry) of the Cuyahoga River (a few miles north of Cuyahoga Valley National Park in Cleveland, Ohio) caught fire. In short, oil waste from nearby industry made the river highly flammable. So, when a train passed over the bridge, a flame ignited debris that had piled up in the river, and the river caught fire. Although the river had burned several times since the mid-1800s, the 1969 fire gained international attention.[56]

- **1960-1970s Oil spills:**

The *1962-1963 Mississippi River Oil Spill*[57]. Without going into significant detail, it is sufficient to note that, in the early 1960s, dumping of industrial waste into the Mississippi and Minnesota Rivers had caused an ecological disaster. Indeed, in 1963, residents near Lake Pepin noticed several ducks struggling on the river; they had been covered in soybean oil and were suffocating. Cleanup and rescue efforts commenced almost immediately[58], but the surviving ducks' feathers had been damaged, leaving them vulnerable to hypothermia as they were unable to fly to warmer climates during migration season. Additionally, water samples from June 1963 showed little biological activity in areas that had been healthy just months before. Long-term damage to wildlife (such as bird, mammal, fish, and turtle populations) was also reported, as oil deposits consumed oxygen and suffocated fish and insect eggs. Following the disaster, the Rosenmeier Act was passed to prohibit the storage of waste where it could enter state waters, and the Minnesota Pollution Control Agency was established in 1967.

[55] It has been estimated that 6,000 of the 14,000 people living in Donora had respiratory problems after the five-day toxic smog. On the Donora Smog Disaster: Helfand, Lazarus, and Theerman (2001); Snyder (1994).

[56] U.S. Deptartment of Interior (n.d.).

[57] Notably, in 1962, workers from Richards Oil Plant forgot to open the steam lines that heated the plant's oil pipes, causing the pipes to eventually burst and 3.5 million gallons of oil to spill into the Mississippi and Minnesota Rivers. Then, in 1963, 3.5 million gallons of soybean oil spilled into downtown Mankato after a storage tank collapsed at Honeymead Products Company. The company recovered some of the oil, but citizens drained 2.5 million gallons of it into nearby rivers.

[58] The U.S. Fish and Wildlife Management intervened in March 1963 and by April a state of emergency was declared.

The *1969 Santa Barbara Oil Spill*[59]. On January 28, 1969, an offshore drilling site exploded and 3-million gallons of crude oil spilled into the ocean along California's coast, killing thousands of birds, fish and sea mammals.

The *1978 Greenpoint Oil Spill*[60]. In September 1978, a United States Coast Guard helicopter flying over Brooklyn, New York reported an oil leak flowing from Meeker Avenue into Newton Creek. The oil leak is said to have lasted approximately 120 years, making it one of the largest spills in U.S. history.

- **1978 Love Canal:** In the late 1800s, before Nikola Tesla invented the alternating current, William T. Love had an idea to create an industrial community powered by hydroelectricity. So, when Love learned of a plan—ideated by the U.S. government in the early 1800s but never realized—to build a shipping canal connecting Lake Erie with Lake Ontario, and that the site identified for the canal's construction had the potential to produce large amounts of hydroelectric power, he quickly bought the development options on over 20,000 acres of land in Niagara County. In May 1894, Love commenced construction of the canal. However, development was soon halted due to an economic depression. Eventually, all that was left of the Love Canal project was a 16-acre (60-feet wide by 3,000 feet long) hole in the ground.

The incomplete canal was used as a swimming hole for several years before it turned into a city waste dump in the 1920s; the site was supposedly used to dump U.S. Army chemicals and waste from the Manhattan Project until 1942 when it was purchased by the Hooker Chemical Company (a subsidiary of Occidental Petroleum), which discarded tens of thousands of tons of chemical waste in the unfinished canal before finally filling it with dirt in 1953 and selling it to the Niagara Falls School Board for $1. Significantly, the deed of sale included a warning about the chemicals that had been dumped, thereby absolving the company of any future liability.

After World War II, the economy experienced a general boom, and the 1950s brought significant development to the area with the construction of nearly 100 homes. In 1955, the 99th Street Elementary School was erected right on top of the chemical dump.

[59] Mai-Duc (2015).

[60] On the Greenpoint Oil Spill: Read (2011); Lerner and Brown (2010).

Expansion continued through the '60s and '70s, adding roughly 800 homes and more schools to the area.

In 1975 and 1976, heavy rainfall caused the water table in the Niagara region to rise and the discarded chemicals leached into the groundwater and top soil. Noxious puddles formed in peoples' yards and basements, and some were found on the local school grounds. Several spontaneous combustions occurred in residents' homes due to some of the highly flammable chemicals that had seeped in.

In 1976, it was discovered that the people living in the Niagara region were much more likely to suffer from health issues such as epilepsy, asthma, and nephrosis. Miscarriage rates were also exponentially higher compared to other parts of the country. Further testing revealed traces of toxic chemical residue in the air, home sump pumps, and sewer systems—15 different organic chemicals were detected in peoples' homes, including toxic chlorinated hydrocarbons commonly found in pesticides. Furthermore, additional independent testing showed that these chemicals were leaking into the Niagara River, and each new test result seemed worse than the last. The public urged government action.

In September 1977, the Environmental Protection Agency took notice and directed the Agency for Toxic Substances and Disease Registry to test the area. 421 chemicals were found in the air, ground, and water. The situation worsened in 1978 when heavy rains opened up already corroding chemical storage barrels buried in the area, spreading even more toxic substances and exposing residents to a sort of highly toxic "chemical soup".[61]

In Europe

- **1952 The Great Smog in London:** From December 5-9, 1952, a high-pressure system (an anticyclone) blocked cold air beneath warm air, and industrial and domestic emissions remained trapped near ground level instead of being released into the atmosphere.[62] The result was a lethal smog—so thick that people could not see their

[61] On the Love Canal tragedy, *see generally* Newman (2016).

[62] Although air pollution from excessive coal burning (known as "London fog") was an issue in London as early as the 13th century, air quality gradually worsened as the city expanded. Indeed, the word "smog" was coined in the 20th—a merging of the words "fog" and "smoke" to describe the dark heavy clouds created from water vapor sticking to particles released by factories. *See* Polivka (2018).

feet—that caused affixion (choking to death), a spike in pneumonia and bronchitis, and ultimately the passing of the Clean Air Act in 1956.[63]

- **1957 Windscale fire, UK:** In October 1957, the uranium cartridges next to a graphite control block ruptured in the Windscale nuclear reactor facility and plutonium-production plant in Cumberland County, United Kingdom, releasing radioactivity and causing a major fire. The fire caused sizable amounts of radioactive iodine to be released into the atmosphere, which ignited plutonium piles and contaminated surrounding dairy farms.[64]

- **1978 Amoco Cadiz Tanger Spill, France:** In 1978, the signatories of the International Convention for the Prevention of Pollution from Ships (MARPOL) met to discuss expanding safety requirements for tankers, an Amoco tanker spilled around two million barrels (223,00 metric tons) of crude oil and ship fuel off the coast of France. The spill polluted approximately 200 miles of coastline. Although it is unclear whether the spill impacted its ratification, it is certainly interesting that by 1982 enough countries had ratified the MARPOL that new international rules for tankers went into force a year later.[65]

- **1976 Seveso disaster, Italy:** On July 10, 1976, the ICMESA chemical plant (a subsidiary of Swiss cosmetics manufacturer Givaudan) exploded in Meda, Italy, creating a dioxin cloud that covered approximately 18-km^2. Exposed populations experienced nausea, headaches, and eye irritation. 19 children were hospitalized for skin lesions, and nearly 200 cases of chloracne were reported. At least two thousand people fell ill, and around 80,000 animals had to be slaughtered to prevent the poison from entering the food chain. The accident prompted Europe to adopt the Seveso Directive[66] in 1982, which regulates the manufacture and storage of hazardous materials.[67]

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[63] Martinez (1952); Davis, Bell, and Fletcher (2002).

[64] Munro (1957).

[65] International Convention for the Prevention of Pollution from Ships (MARPOL).

[66] The Seveso Directive. In the legal doctrine, *see generally* Cutrera and Pozzo (2006); Pozzo (2008); European Commission n.d.; Eskenazi et al. (2018); Jacometti (2006); Pozzo (2009b); Pozzo (2009c).

[67] On the environmental and health effects of the Seveso Disaster, *see generally* Eskenazi et al. (2018).

- **1978 SLOI Fire, Trento, Italy:** On July 14, 1978, a factory where 200 or 300 quintals of sodium were stacked in metal drums ignited. The fire caused a massive sodium cloud and several explosions due to the sodium having come in contact with water (which had run off the roof and onto a cracked drum). The fire is said to have been so major that the entire population of Trento risked annihilation[68].

  Moreover, while in operation, the pollution emitted from the factory is said to have poisoned the city, killing numerous workers, and making many others ill for over fifty years. In fact, already in 1941 (two years after its establishment) it was discovered that silkworms, rabbits, and chicks were dying almost overnight in the area; the apple and peach blossoms were falling; and, the lettuce was "crumpling". And as early as 1942, the Court of Trento required SLOI to pay damages to the farmers who had formed a consortium; this case marked the first time a court had condemned a factory, and what is more significant is that the factory was essential to the war effort.

  The factory was ultimately closed four days later, on July 18, 1978, causing mass unemployment and violent protests against the closure. However, despite projects since the '90s to reclaim the land, an ecological bomb is still buried in North Trento and there are claims the land is unsafe for future generations.[69]

Internationally

What was happening globally also shaped policy in the Western world. Global events would later become increasingly important as they illustrated a pattern of exploitation of underdeveloped societies by the so-called developed countries.

- **1956 Japan:** In the early 1950s, the inhabitants of Minamata, Japan began observing unusual animal behavior: cats would foam at the mouth, dance around wildly, and throw themselves into the sea; birds would crash land; fish would die unexpectedly. Then humans began to suffer from slurring speech, stumbling, and having trouble with ordinary tasks (e.g., buttoning buttons). In 1959, a disease called Minamata Disease emerged. It was determined that local chemical companies were dumping mercury into the sea and poisoning the people (and animals) who ate the local seafood. The disease

[68] Annihilation because the fire could have potentially spread to another area where additional deposits containing large quantities of sodium were located. Thus, as the flames spread, officials were afraid a terrible chain reaction would be triggered.

[69] Sardi (2022). On the SLOI, *see* Sardi (2006).

also caused birth defects, paralysis and other maladies. In 1971 and 1973, courts awarded victims millions of dollars in damages.[70] Following Japan's experience, many nations set new limits on industrial pollutants, including through the Minamata Convention on Mercury[71].

- **1942 Honkeiko colliery disaster:** On April 26, 1942, a coal mine in Benxi, Linaoning province, China exploded killing over a thousand Chinese miners. The coal mine, originally a joint Chinese-Japanese enterprise, was controlled by the Japanese who used violence to force Chinese laborers (mostly war prisoners) to work the mine shafts. The explosion was caused by gas and coal dust, causing a major fire; it took 10 days to clear the shafts of corpses. The mine was operated until August 1945.[72]

- **1957 Kyshtym disaster:** On September 29, 1957, the Mayak plutonium production plant (located in Ozyorsk, Chelyabinsk Oblast, Russia) exploded, and nuclear waste contaminated thousands of square kilometers of territory.[73]

- **1958 Niger Delta Oil Pollution:** In 1958, the Niger Delta area became a site for commercial oil production. And since then, an estimated 9 to 13 million barrels of oil have spilled[74] into the water, making it one of the most polluted areas in the world. With the government as one of the major actors in oil exploitation operations, there has been civil unrest due to government wealth distribution practices. There have also been reported kidnappings and killings of oil workers, blowing up pipelines, and stealing oil. The pollution has caused extensive damage to fisheries, as well as water and soil quality.[75]

- **1967 Torrey Canyon Oil Disaster:** In March 1967, the supertanker SS Torrey Canyon collided with Pollard's Rock off the south-west coast of the United Kingdom, spilling approximately 25 to 36 million gallons of crude oil. The Royal Navy attempted

[70] On the history of Minamata disease and the proceedings: Hachiya (2006). *See also* Mosa and Duffin (2017).

[71] Minamata Convention on Mercury.

[72] *See generally* Pletcher (2020); Neville (1978).

[73] Monroe (1992); Mironova and et al. (2007) 165-183.

[74] Kadafa (2012).

[75] On the Environmental impacts of oil exploration and exploitation in the Niger Delta of Nigeria: Kadafa (2012). It is further significant that, in 2008, four Nigerian farmers sued Shell in a Dutch court, but most claims were dismissed. According to Shell, most of the spills are caused by sabotage stemming from the country's internal conflict; only a smaller percentage are caused by operations failures. Sekularach and Deutsch (2013).

to clean up the spill by using mixtures of solvents and detergents. However, when the attempts failed, fire was set to the vessel and surrounding oil before finally bombing the ship. The idea was to limit the extent of the oil disaster and prevent oil from contaminating the shore. Instead, efforts worsened the situation and caused significant environmental damage to hundreds of miles of coastline in Britain, France, Guernsey and Spain. The disaster prompted significant reform in maritime law and oil spill responses.[76]

- **1970 Ontario Minamata disease, Canada:** In 1970, a neurological syndrome (Minamata disease) caused by severe mercury poisoning severely affected two First Nation communities in Northwestern and Southern Ontario, respectively. The first community developed the disease after consuming local fish that had been contaminated with mercury. The second community, instead, was poisoned following the illegal disposal of industrial waste.[77]

Certain responses

Subsequently, as the negative effects of industry became evident, it may be assumed that political constituents demanded legislative change and greater limitations imposed on business activities. Indeed, the following laws were passed.

In America

The Federal Water Pollution Control Act of 1948; the Air Pollution Control Act of 1955; the Resource Conservation and Recovery Act of 1959; the Clean Air Act of 1963; the National Emissions Standards Act of 1965; the Air Quality Act of 1967; the National Environmental Policy Act of 1969 (which led to the creation of the Environmental Protection Agency of 1972); the Clean Air Act of 1970; the Federal Water Pollution Control Act Amendments of 1972 (now referred to as the Clean Water Act); the Endangered Species Act of 1973; the Safe Drinking Water Act of 1974; the Toxic Substances Control Act of 1976.

[76] *See generally* Nanda (1967); Law (2011); Wells (2017).

[77] The disease was named after the case of severe mercury poisoning in the fishing community of Minamata, Japan. On the Canadian case, *see generally* "Ontario Minamata Disease" (n.d.). *See also* Harada et al. (2005). *See also* Mosa and Duffin (2017).

In Europe

Directive 67/548/EEC relating to the classification, packaging, and labelling of dangerous substances; Directive 75/439/EEC on the disposal of waste oils; Directive 75/440/EEC concerning the quality of drinking water in the Member States. Prior to such directives, however, individual Member States had already began taking measures to protect the natural environment.[78] For instance, France[79], Germany[80], the UK[81] and Italy[82] enacted forms of clean air and water laws starting from the early '60s. Further, Europe witnessed the foundation of the Club of Rome and experienced the UNESCO declarations on cultural heritage in 1968. The First Action Programme of the EC was adopted in 1972 (based on the "polluter pays" principle),[83] and the Community began establishing a European body of environmental legislation with the adoption of, among others, the Waste Framework Directive (1975), the Bathing Water Directive (1976) and the Birds Directive (1979).

[78] On Air pollution in Europe: *See generally* Anderson (2009) (providing a study from 2000 to 2017); Brimblecombe (1998); Mosley (2014); Adinolfi (1968).

[79] E.g., French *Loi* No. 61-842 of 2 August 1961 on the fight against atmospheric pollutions and odors, amending the law of 19 December 1917 (which prohibited the dumping of waste into rivers) and No. 64-1245 of 16 December 1964 on the regime and distribution of water and the fight against water pollution.

[80] E.g., Technical Instructions on Air Quality Control (TA Air), 1964; Federal Immission Control Act (BlmSchG), 1974.

[81] E.g., the Clean Air Act 1968.

[82] E.g., Law No. 366/1941 on urban waste disposal; Law No. 1860/1962 regarding protection from ionized radiation; Law No. 615/1966 on air pollution control and prevention, enacted in response to pollution caused by thermal and industrial plants and factories, as well as by motor vehicles; Law No. 319/1976 on water pollution control; Law No. 833/1978 providing environmental protection connected with the National Health Service. On Environmental Law in Italy, *inter alia*: Grassi et al. (2019); Maschietto and Maggiore (2021). *See also* Andreotti et al. (2020). *See also* Pozzo (2021c)

[83] On Environmental Law in Europe: Bell and et al. (2013); van Zerben and Rowell (2020). On environmental law from a comparative perspective: Wiener (2001); Richardson and Bakker (2013); Germani (2004); Goodman and Connelly (2018).

Internationally: The Stockholm Conference (1972)

In 1972,[84] the United Nations held the Stockholm Conference, which resulted in the Stockholm Declaration and the establishment of the United Nations Environmental Programme (UNEP).[85]

It is noteworthy that the Stockholm Declaration establishes a series of fundamental principles that are recalled in all subsequent international charters.[86] Principles 1 through 3 state that, on the one hand, man has a fundamental right to freedom and a quality existence, and on the other, he has a solemn duty to protect and improve the environment. In this context, the sustainability discourse has started to resemble what would later be read into constitutional charters. For example, following the unification of the two Germanies, the debate about our responsibility toward future generations became written into the constitution. Likewise, many of these principles appear to provide an argumentative basis in climate change cases pending before American courts.[87]

Principle 3 on renewable resources has become the reference point for all international policies[88] on renewable energy[89], whereas Principle 4 on conservation of wildlife (which must play an important role in the legislative and economic processes of the States) gave a very important assist to what will be the EU approach to biodiversity protection, nature conservation and so on.[90]

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[84] The 1972 United Nations Conference on the Environment in Stockholm was the first world conference to set out a series of principles for sound environmental management. At this event, several resolutions on environmental issues were made, including the Stockholm Declaration and Action Plan for the Human Environment. Importantly, the Stockholm Declaration marked the start of a dialogue between industrialized and developing countries on environmental issues, whereas the Action Plan contained over 100 recommendations of how to manage such identified issues. The Stockholm Conference is also credited for having established the United Nations Environment Programme (UNEP). *See generally* United Nations (1973).

[85] The first World Climate Conference was also held in Geneva, Switzerland in February 1979. World Climate Conference and World Meteorological Organization (1979); Kellogg (1979).

[86] Pozzo (2021b).

[87] Barbara Pozzo (2021a). *See* Setzer and Higham (2021).

[88] Note the United Nations Paris Agreement (2016), the National Environmental Policy Act (P.L. 91-190), the Energy Independence and Security Act of 2007 (P.L. 110-140), the Energy Policy Act of 2005 (P.L. 109-58) and the 2019 Green New Deal, as well as Directive 2018/2001/EU (including the proposed revision of the directive in July 2021 as part of the package to deliver on the European Green Deal), Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

[89] European Parliament (n.d.) "Renewable Energy".

[90] Pozzo (2021b).

After that, economic and social development (Principle 8) is framed as indispensable without, however, losing sight of the need to prevent serious and irreversible pollution (Principles 6 and 7).[91]

The Stockholm Declaration

The Stockholm Declaration is additionally important because it evidences that the foundations are slowly being laid for the principle of shared responsibility found in all the great environmental treaties of more recent times. In fact, it states that the international community (all the world's citizens) must have regard and are responsible for developing countries, that there must be cooperation, and that these responsibilities will most likely have to be managed in a certain manner by the more industrialized countries.[92]

The United Nations Environmental Programme (UNEP)

Among the results of the Conference, UNEP was established with the aim of coordinating and promoting UN initiatives related to environmental issues. And, from this point forward, a series of further initiatives are commenced. The document is significant, first, because the concept of sustainable development appears for the first time. Second, because it is a document from the International Union for the Conservation of Nature. On this second aspect, the fact that the document is endorsed by the International Union for the Conservation of Nature is significant because, in 1980, the Union highlights the futility and uselessness of this contrast between the concept of development on the one hand and conservation on the other, to underline that a development model does not have to be purely quantitative; instead the notion of qualitative development can serve as a reference point and provide for an intelligent and, above all, limited use of resources. However, it will not be until 1987 (with the Brundland Report) that sustainable development will be understood as "that which meets the needs of the present without compromising the ability of future generations to meet their own needs." Indeed, this notion becomes a sort of mantra applied like a magic formula to all the International and EU treaties. Nonetheless, it is difficult to move from the formula to outlining the tools that make this formula effective. The following chapters will discuss and attempt to highlight some of the

[91] Pozzo (2021b).

[92] Pozzo (2021b).

legal challenges of ensuring development will meet the needs of future generations without compromising the ability of future generations to meet their own needs.[93]

Thus, in response to the public demand for more stringent environmental policies and statutory commands on polluting activities, lawmakers (by identifying classes and categories of polluting or environmentally destructive activities) imposed more stringent standards on companies whose business activity threatened human health and the environment[94] and the international community began to mobilize.

IV. 1980s-2000s: Sustainability as *economic and social* sustainability. The 'fork in the road' as America and Europe choose different paths.

Essentially, if the legal formants[95] after World War II depict a situation in which the citizens of industrialized countries had become increasingly concerned about the hazards to the natural environment and social capital caused by human activity, then the cryptotypes of the same period dictated a divergent evolution of the development discourse (at the legislative level) on the two continents. More specifically, it is possible to observe that – for whatever reason, but likely due to the varying historical experiences and therefore different cultural outlooks of American and European policy makers – by the 1980s and 1990s, the effects of Western politics of the 1960s and 1970s had created very different legislative reactions in the United States and Europe: one turned to deregulation and relied on market forces to guide industry, whereas the other opted for more direct intervention and the formal establishment of sustainable development principles in international treaties and charters. Nonetheless, it appears relevant that – no matter the preferred legal instrument by lawmakers – policies and practices eventually converged by the early-2000s.

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[93] Pozzo (2021b).

[94] On pollution in the US, *see generally* Davis and Mazurek (1998); Hurly (1988); Lerner (2010). *See also* Yeager (1991); Lazarus (2001). On water pollution in the US from a historical perspective, *see generally* Colten (2005); Andreen (2003). On air pollution regulation in the United States *see*, *inter alia*, Potoski and Woods (2002). For a history of air pollution in the United States *see, inter alia,* Stern (1982).

[95] On legal formants and cryptotypes: Sacco (1991a); Sacco (1991b).

The American experience

The extent to which government should be involved in business is a classic debate that dates to at least the drafting of the Commerce Clause[96] of the United States Constitution. And regulation varies according to the current Administration and its convictions, influenced by the effects of policy from the previous Administration. So, if the 1960s and 1970s were characterized by relatively strict regulation[97], inflation, unemployment, the 1973 Oil Crisis and worldwide recession, then deregulation in the 1980s was a logical consequence of the crisis created by the "big government" politics of the previous decade. In the words of President Reagan, "In the present crisis, government is not the solution to our problem; government is the problem."[98] Accordingly, deregulation was practiced to stimulate economic growth and generate wealth. However, this created another sort of crisis: (1) large-scale corporate scandal and (2) globalization—both of which contributed to (3) the rise of the corporate social responsibility (CSR) movement and (4) the global justice movement.

(1) Corporate Scandals

With regard to the former, it is relatively undisputed that this phase of the development discourse was fueled by a series of scandals which undermined public trust in government and corporations. And every wave of scandal seems to have been met by an opposing wave of legislation. For example, in very general terms, bribery had become a serious issue in the late 1970s and early 1980s, as "more than 450 large corporations based in the United States, mostly Fortune 500 companies, ultimately disclosed to the Security and Exchange Commission…illegal or questionable payments abroad, totaling more than $1 billion and paid either as direct bribes to foreign government officials or through corporate 'sales agents' or other intermediaries…Thirty-two firms had each given bribes totaling more than $1 million over the years, and many individual corporations made bribes totaling $10 million or more."[99]

[96] U.S. Cost., Art. 1, §8, cl. 3. On the interpretation, *see generally* "Commerce Clause" (n.d.); Barnett and Koppelman (n.d.).

[97] Recall the Clean Air Act of 1963; the National Emissions Standards Act of 1965; the Air Quality Act of 1967; the National Environmental Policy Act of 1969 (which led to the creation of the Environmental Protection Agency of 1972); the Clean Air Act of 1970; the Federal Water Pollution Control Act Amendments of 1972 (now referred to as the Clean Water Act); the Endangered Species Act of 1973; the Safe Drinking Water Act of 1974; and the Toxic Substances Control Act of 1976, mentioned above.

[98] The President's speech may be viewed at: https://www.youtube.com/watch?v=6ixNPplo-SU

[99] Weeber (2012); Weeber (2013). *See also* Clinard (1990); Clinard and Jeager (1980).

Thus, the response was the Foreign Corrupt Practices Act (FCPA) of 1977 and the Sentencing Reform Act of 1984.

The 1980s and 1990s witnessed scandals related to financial mismanagement and fraud. For instance, following the Garn-St. Germain Depository Institutions Act of 1982 (one of the products of the deregulation policies of the Reagan Administration[100] that essentially allowed savings and loan associations to invest funds more freely, entitling them to make unsecure or risky loans, including to association managers), thousands of commercial & savings and thrift banks failed between 1980 and 1995. The result was known as the Savings and Loan Crisis.[101] Similarly, the Keating Five was also the by-product of a lack of sufficient regulation in the 1980s and early 1990s. In sum, in 1984 Charles Keating acquired Lincoln Savings and Loan (based in Irvine, California). By 1988, the bank's assets increased from about $1 billion to more than $5 billion. However, much of Lincoln's assets were created through deceptive accounting practices, and five U.S. Senators were accused of having received substantial political contributions in exchange for improperly intervening in regulatory investigations of Keating by the Federal Home Loan Bank Board.[102] Soon after, Congress extended the Sentencing Reform Act of 1984 via the 1991 Federal Sentencing Guidelines for Organizations (FSGO).

Then there were unfair commercial practices and deceptive advertising. In this context, it is important to note that, in the United States, unfair competition is governed by state and federal statutes, as well as by case law.[103] The Federal Trade Commission Act (FTC Act) and the Lanham Act are two fundamental federal laws, and the Uniform Deceptive Trade Practices Act (UDTPA) provides a general overview of unfair business practices.[104] Thus, urged by the

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[100] In a speech, President Reagan famously stated, "In the present crisis, government is not the solution to our problem; government is the problem" (President Reagan n.d.). Although not discussed here, it is noteworthy that by the '70s, inflation and unemployment rates had increased significantly in both America (Schwenk 2003) and Europe (Blanchard 2005), reinforcing ideas about the limitations of growth (du Pisani 2006b). And the situation was further complicated by the 1973 Oil Crisis and the worldwide recession that followed. Accordingly, deregulation was practiced in the United States with the aim to stimulate economic growth and generate wealth. The Depository Institutions Deregulation Committee and Monetary Control Act of 1980 (which, enacted under the Carter Administration, removed many restrictions on thrifts and credit unions), as well as the Tax Reform Act of 1986 may also have contributed to the crisis.

[101] *See generally* Federal Deposit Insurance Corporation (n.d.); Barth, Trimbath, and Yago (2004).

[102] Thompson (2017).

[103] On U.S. unfair competition law, *see generally* "Unfair Competition" (n.d.); 15 U.S. Code § 45.

[104] *See* "Deceptive Trade Practice Laws" (n.d.) (providing a list of deceptive trade practice laws by state).

modern consumer protection movement (which began in the 1960s as evidenced, for example, by President Kennedy's "Consumer Bill of Rights"[105] and the efforts of Ralph Nader and other consumer advocates to highlight the existence of unsafe products and the need for greater government regulation),[106] the 1970s experienced greater consumer protection[107] by the Federal Trade Commission[108] and states' acceptance of Restatement (Second) of Torts, Section 402B, provided consumers with recovery mechanisms for misrepresentation.[109] However, consistent with deregulation efforts during the Reagan Administration, advertising was deregulated at the start of the 1980s[110] and companies were allowed to market more freely. This relaxing of advertising rules was met with the elaboration of new theories of deceptive and unfair advertising, and the issue by the Federal Trade Commission of a Policy Statement[111] on Deception in 1983. Greenwashing[112] also became a phenomenon during this period. As concerns the fashion industry, it is interesting to observe how "Made in USA" claims were treated under U.S. consumer protection law. More specifically, in 1995 the FTC conducted a comprehensive review of consumers' perceptions of "Made in USA" advertising claims[113] and ultimately issued an order to stay administrative proceedings against New Balance Athletic Shoes, Inc[114] (that same year) and against Hyde Athletic Industries, Inc[115] (in 1996). Both companies eventually settled claims.[116] Two years later, in April 1998, Marc Kasky sued Nike in California for unfair and deceptive practices, claiming Nike had violated California's Unfair

[105] *See generally* "Consumer Bill of Rights Law and Legal Definition" (n.d.).

[106] In 1969, Ralph Nader and his so-called "Nader Raiders" published a report criticizing the Commission for failure to pursue serious consumer fraud. Cox et al. (1970). The American Bar Association also published a report which generally supported Nader's findings and urged Congress to pass laws giving the Commission greater consumer protection powers. *See* Rosch (2012); Posner (1969).

[107] E.g., the Fair Credit Reporting Act, the Consumer Product Safety Act, the Equal Credit Opportunity Act, the Fair Credit Billing Act, the Magnuson-Moss Warranty Act, and the Fair Debt Collection Practices Act.

[108] Scammon and Semenik (1982).

[109] *See*, e.g., Baroldy v. Ortho Pharm. Corp. 760 P.2d 574, 577 (Ariz. Ct. App. 1988); Westlye v. Look Sports, Inc., 22 Cal. Rptr. 2d 781, 801-02 (1993); Ziegler v. Kawasaki Heavy Indus., 539 A.2d 701, 704 (Md. Ct. Spec. App. 1988).

[110] *See* Gershon (2017). *See also* Boddewyn (1982).

[111] Federal Trade Commission (1983).

[112] Bowen (2014).

[113] *Hyde Athletic Industries Inc.*

[114] *New Balance Athletic Shoes, Inc.*

[115] *In the Matter of Hyde Athletic Industries, Inc*.

[116] Federal Trade Commission (1996).

Competition Law and False Advertising Law by making "false statements and/or material omissions of fact" about the working environments where its products are manufactured "in order to maintain and/or increase its sales." Nike eventually won the case on appeal to the U.S. Supreme Court (USSC)[117]. In any case, the FTC issued its so-called "Green Guides" in 1992, and that these Guides were subsequently revised in 1996, 1998, and 2012.

The 2000s were marked by "creative accounting" and financial failures due to the combination of excessive risk-taking and lack of effective controls. Enron (2001), WorldCom (2002), Tyco (2002), HealthSouth (2003), Freddie Mac (2003), Lehman Brothers (2008), Bernie Madoff (2008) are prime examples of the problems that arose due to a lack of regulation in the 2000s. The Federal Government responded to the Enron scandal with the Sarbanes-Oxley (SOX) Act of 2002, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was enacted in response to the subsequent 2008-2009 financial crisis.

(2) *Globalization*

As stated above, deregulation also contributed to issues traditionally associated with globalization and, more specifically, the outsourcing of labor to developing countries. Indeed, by the 1980s, much production had been outsourced overseas where labor was cheaper and foreign governments imposed fewer restrictions on businesses.

While there is no single source of such phenomenon (it is possible to note advances in transportation, the spread of technology to developing regions, increase in minimum wage in developed countries, the abandoning of protectionist policies in favor of free trade),[118] in the context of this contribution it is important to note that globalization meant diminished U.S. domestic textile and apparel jobs. "In 1973, for example, there were more than 2.4 million textile and apparel workers employed in the United States; by 1996, that figure had dropped to 1.5 million…Between 1973 and 1996, nearly a million jobs were lost in the textile and apparel industries combined—a decline of nearly 40 percent."[119] Thus, in the 1990s, many industries,

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[117] Nike, Inc., et al. v. Kasky, 539 U.S. 654 (2003).

[118] *See generally* Bhagwati (2002a).

[119] Mittelhauser (1997) 24. *See also* ILO (2000) ("Employment in the production of textiles, clothing and footwear remained stable at approximately 30 million jobs during the 1990s, after suffering a global decline of 16% during the 1980s").

but in particular the fashion industry experienced a shift from manufacturing to focus on retailing and marketing.[120]

Outsourcing also had an extensive impact on the economies and market structure of developing nations. Notably, it meant the establishment of a (dependent) relationship that would later be termed the "race to the bottom" as developing countries competed for foreign direct investment (FDI) by relaxing legislation that might deter multinational companies from incorporating or generally doing business abroad. It meant that poor countries would pay the price of Western industry in terms of environmental damage[121] and costs to human capital.

Here it is sufficient to note the 1984 Bhopal Gas Leak Disaster, where, on December 3, 1984, around 36 tons of deadly methyl isocyanate gas leaked from a pesticide plant run by Union Carbide (a U.S. company) in Bhopal, India, killing at least 4,000 people and poisoning around half a million more. Survivors suffered numerous health ailments, including blindness, chronic respiratory trouble, and birth defects. And notwithstanding a settlement of $470 million, victims continue to fight for compensation (claiming damages under the settlement are inadequate).[122] The 1993 Kader Toy Factory Fire was also impactful. On May 10, 1993, three buildings of the Kader Industrial Co. Ltd. factory in Nakhon Pathom, Thailand caught fire and collapsed from poor structural integrity. Due to alarm failures, nearly 200 people were killed and over 500 were seriously injured. The factory manufactured toys for companies such as Disney, Tyco, Toys-R-Us and other leading brands—primarily for export to the United States.[123] One might additionally recall the Nike sweatshop scandal of the 1990s that involved consumer protests, boycotts and heavy media attention after a report detailing the low wages and poor working conditions in Nike's Indonesian factories. This scandal apparently sparked an investigation into the working conditions in the fashion industry as, in 1994, the United States Government Accountability Office issued a 20-page report[124] revealing there were still

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[120] Returning briefly to the deregulation of the advertising industry, such shift explains the problems that arose with regard to "Made in USA" claims and the subsequent review of advertising claims.

[121] In this sense, it is sufficient to recall the industrial accidents of the 1960s and 1970s, which would be repeated in the developing world from the 1990s onward.

[122] Withnall (2019). It is additionally significant that New Delhi's attempts to extradite the company's CEO from the United States for criminal prosecution failed.

[123] On regulatory reform after the Kader Toy Factory fire, *see* Haines (2003); Haines (2005). *See also* Haines (2009) (discussing how the incident shaped legislation in Australia); Bittle and Snider (2006) (discussing the accident's impact in Canadian law).

[124] U.S. GOVERNMENT ACCOUNTABILITY OFFICE (1994).

thousands of sweatshops in the United States. More importantly, however, the report focuses on the legal standards of developed country workplaces and triggered a debate about whether such standards can or should be applied to the workplaces of the developing world.

Thus, and perhaps at least partially also due to the democratization of internet access[125], globalization meant more awareness of business practices abroad and the revelation of an evident lack of accountability by companies for (even potential) damages.

(3) *Rise of the corporate social responsibility (CSR) movement*

Add the above to events such as the 1993 Erin Brockovich case[126] or the Master Settlement Agreement (MSA)[127] of 1998 between dozens of attorneys general with the four largest American tobacco companies and it becomes clear why the 1980s and 1990s were characterized by social tensions. In this context, it is significant that new theories on the corporate interest became more popular, leading to the acceptance of an alternative model of corporate governance based on the notion that businesses must be accountable to stakeholders and not just shareholders.

Without going into much detail, it is important to note that the CSR movement emerged in America well before it became mainstream or institutionalized.[128] For instance, one might refer to the writings of C. Barnard, *The Functions of the Executive* (1938); J. M. Clark, *Social Control of Business* (1939); and T. Kreps, *Measures of the Social Performance of Business* (1940). Then – marking the emergence of CSR in its modern form – there was Howard W. Bowen, *Social Responsibilities of the Businessman* (1953), K. Davies, *Can Business Afford to*

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[125] On the history of the Internet, *see generally* Leiner et al. (2009); Sherman (2003).

[126] *Anderson, et al. v. Pacific Gas & Electric,* brought by Erin Brockovich against Pacific Gas & Electric Company (PG&E) for allegedly contaminating groundwater in Hinkley, California. The case was ultimately settled for $333 million in 1996 (Clifford 1996) but nonetheless received international attention when the story was made into a movie starring Julia Roberts.

[127] The Master Settlement Agreement (MSA) was an agreement signed by 52 state and territory attorneys general with the four largest tobacco companies in the U.S. to settle dozens of state lawsuits brought to recover billions of dollars in health care costs associated with treating smoking-related illnesses (Bonta n.d.; "Summary of Key Points in the Master Settlement Agreement" n.d.; "The Master Settlement Agreement" n.d.).

[128] Social and ethical problems of business and economics date to the establishment of the modern capitalist economy (c.a. late-16th to early 17th centuries) (Lipari and Costa 2006), and some authors even trace the origins of commercial societies to Roman Law (Arner 2016). With reference to social responsibility, *see* Avi-Yonah (2005). However, it does not seem appropriate to compare the forms of "societies" typical to Roman Law with those present under a capitalist economic and legal structure, given the profound difference both in terms of their market context as well as the legal and organizational tools available.

Ignore Social Responsibilities? (1960) (referring to "businessmen's decisions and actions taken for reasons at least partially beyond the firm's direct economic or technical interest"); W. C. Frederick, *The growing concern over Business Responsibility* (1960), and Clarence C. Walton, *Corporate Social Responsibilities* (1967), among others. And it is impossible to forget the debate between Milton Friedman (shareholder theory) and Edward Freeman (stakeholder theory) on corporate governance and the interests of companies and their managers.[129] However, as concerns the scope of this contribution, it is sufficient to recall that around the same time as the disasters of the 1980s (and especially after the financial scandals of the 2000s), authorities began more seriously reconsidering[130] the extreme outcomes produced by a dogmatic adherence to the "pure" shareholder primacy theory of corporate governance. Although only part of the business law doctrine[131] currently supports such a stance, what is important here is that people no longer considered stakeholder interests irrelevant.

In the doctrine, this shift is marked by two contrasting positions, albeit both admit the relevance of interests other than those of shareholders. The first position is based on agency theory and the contractual approach of the joint-stock company, but admits that a company's directors must consider stakeholder interests when such serves the long-term interests of shareholders. This theory is referred to as "enlightened shareholder value". A second moves away from the classical perspective of agency theory and advocates the need to reframe the relationships between the various corporate stakeholders. This approach may be described as neo-institutionalist. In any case, the historical analysis of American business law doctrine[132] indicates there has been a gradual shift[133] in opinion, from the view that directors are agents of shareholders to one in which the company is conceived as a social entity, and therefore directors

[129] For a detailed analysis of the historical evolution of business law doctrine as it relates to corporate social responsibility in a comparative perspective: Testa (2019).

[130] Buonocore (2004) (observing that the financial scandals of the beginning of the third millennium raise the question of how to organize a capitalist economy which respects the criteria of transparency, correctness and loyalty in the relationships between the various subjects involved).

[131] Testa (2019) 51-60.

[132] For a more detailed analysis of the doctrine and the evolution of theories of corporate interest (also in a comparative perspective): Testa (2019).

[133] Smith and Gordon (1998) (revealing "the shareholder primacy norm is nearly irrelevant with respect to conflicts of interest between shareholders and nonshareholders... ").

enjoy more discretion to consider interests other than those of the shareholders, albeit with the aim of creating at least long-term value for shareholders.[134]

The case law also supports this change in attitude, and especially the interest to hold corporations accountable for offenses committed abroad. For instance, starting in 1980 with the landmark decision *Filartiga v. Pena-Irala*[135], the American courts began interpreting the Alien Tort Statute to hold companies responsible for their behavior overseas. *Kadic v. Karadzic*[136] and *Doe v. Unocal Corp.*[137] are cases involving corporate violations of human rights. These proceedings are then followed by *Doe v. Unocal*[138], and *Kiobel v. Royal Dutch Petrolium Co.*[139], to name a few.

As for normative data, it is significant that the Sentencing Reform Act of 1984 was adopted to prevent and discourage corporate criminal conduct.[140] That same year, Ohio adopted a non-shareholder constituency statute, setting a trend over the years for state legislatures to allow increasingly more room for the consideration of non-shareholder interests.[141] In 2002, Congress enacted the Sarbanes-Oxley Act[142] to protect shareholders and public interests from accounting and financial fraud (in response to the financial scandals that occurred at the turn of the 2000s). This Act also partially undermines the notion of market efficiency as the preferred instrument for eliminating anti-competitive entities; instead, a "good company" is one that adopts industry best practices also in terms of stakeholder interests. Additionally, in 2010, the Dodd-Frank Act was passed, and in 2012 laws were enacted to enforce Section 1502 of the U.S. Securities and Exchange Commission (SEC) and require companies to disclose the results of supply chain due diligence in sectors potentially involving conflict minerals. More recently, in 2016,

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[134] Bainbridge (2006).

[135] 630 F.2d 876 (2d Cir. 1980).

[136] 70 F.3d 232 (2d Cir. 1995).

[137] 963 F. Supp. 880 (C.D.Cal. 1997).

[138] 395 F.3d 932 (9th Cir. 2002).

[139] 569 U.S. 108 (2013).

[140] *See* 18 U.S.C. § 3553(a)(2)(B) (1994) (establishing that decisions should "afford adequate deterrence to criminal conduct").

[141] These laws are divided into permissive statutes and mandatory statutes. The former allow directors to take the interests of stakeholders into account when making strategic decisions, while the latter make it mandatory to take stakeholder interests into account. Bainbridge (1992).

[142] Section 406 of the Act requires the adoption of a code of ethics for top management.

Congress reformed Section 307 of the Tariff Act of 1930[143] to prohibit companies from importing products made by forced labor, even if domestic supply cannot meet demand.

(4) *Social justice movement and protests*

From 1970 to 1980, consumers voiced discontent with business practice through at least 90 boycotts.[144] The 14-year (1973-1987) union boycott against Coors Brewing Company for discrimination practices, the 1977 world-wide boycotts against Nestlé following harm caused by its instant baby formula, or the picket lines outside Dow Chemical following the 1979 Napalm bombing in Vietnam are just a few examples. After years of a sort of "tug-of-war" between public and corporate interests, the 1990s emerged as the decade of the global justice movement (or anti-globalization movement). Indeed, protesters advocated against the growing economic disparities and general inequality between rich and poor. According to such advocates, already wealthy investors and the elite were growing even richer at the expense of average people and the world's poor. It was a period in which free trade was criticized to the extent that unregulated financial markets exploited resources and human capital at unsustainable rates. In very simple terms, protestors voiced strong discontent with capitalism and the negative impact of large corporations and globalization, especially as they affected third-world countries and contributed to global poverty. The social justice movement demanded more fair trade, and this led to opposition of institutions such as the International Monetary Fund and the World Trade Organization. The 1999 Seattle WTO Protests are symbolic of the uproar. Similarly, The Carnival Against Capitalism in London coincided with the Köln Summit (a meeting amongst G8 members in Koln, Germany on June 18, 1999) to establish an agenda to create the global economy, and analogous demonstrations took place in other cities around the world.

However, it was also a period characterized by the resurgence of neoliberalism (which essentially promotes free trade between nations, increased market competition, efficient use of resources and profit maximization). It then becomes significant that neoliberal politics advocate the relaxation of tariffs and regulations in favor of self-regulation. Deregulation is also usually accompanied by reduction in public expenditures for social services and replaced by privatization of public enterprises. These initiatives are motivated by the ideal that market

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[143] 19 U.S.C. § 307 (2016).

[144] Friedman (1985).

demands will guide corporate conduct to meet public interests. And this appears to have been the approach adopted by the United States government in the 1990s.

In this sense, the 1990s were a period of great tension between public and corporate interests. On the one hand, there's focus on the domestic legal environment, and on the other, efforts are being made to prevent corruption and misconduct abroad. The above-mentioned anti-sweatshop movement was just one of the social movements that came out of the 1990s, but it is nevertheless illustrative of the market environment in the late 20th century. Equally important are some of the byproducts of the '90s, including the establishment of the Ethics Officer Association (EOA) in 1992, Transparency International in 1993, the launch of The Corruption Perceptions Index in 1995, and the creation of the Fair Labor Association and the drafting of Global Sullivan Principles in 1999 (both of which aim to engage corporations in fight for human rights and social justice).

Therefore, the important takeaway from this period is that more and more businesses began adopting a code of ethics or code of conduct in the context of a broader corporate social responsibility program. Codes of ethics started catching on, and they became an ever-powerful corporate governance tool, especially given the growing general sentiment that corporations have a responsibility to stakeholders (and not just shareholders). Indeed, in an era that experienced the rise of the so-called "conscious consumer", these voluntary codes communicated corporate commitments to the issues consumers care about, thereby promoting a positive corporate image and sometimes protecting share capital against public criticisms. However, these are topics that will be discussed in greater detail in Chapters 2 and 3.

The European experience

If each country's unique history plays an important role in its policy decisions, then it is imaginable that—at least formally—America became a leader on environmental law and responsible business practices because, while Europe was busy physically rebuilding the continent after the devastation caused by World War II, America focused on economic growth and advancing its industry from an earlier period. Thus, due to its relative remoteness during the War, America experienced the negative effects of business and 20th century development prior to Europe. Indeed, if U.S. Congress enacted federal laws aimed at mitigating harm caused

by rapidly expanding industry already in 1948,[145] in Europe, these issues were addressed by the EU at a later date.[146]

However, it would be naïve to think that Europe was at a developmental standstill or that its leaders were ignorant to the ecological disasters and humanitarian issues of the period. On the contrary, it is possible to note that Europe was concerned with many of the same issues as American legislators, just some years later. The significant difference, instead, lies in the fact that, unlike America, Europe would become increasingly involved in the international discourse on sustainability issues. In this sense, America and Europe appeared to have switched roles. That is, if before America was a leader on environmental and sustainability law, this hat would be worn by Europe starting from the early 1990s.

Therefore, the following paragraphs will begin with (1) a brief recount of some of the relevant international gatherings of the period, followed by a synthetic analysis of certain (2) European legislative developments. This second section will highlight the lag time between enactment of certain rules in America compared to adoption of similar European norms, as well as how Europe incorporated sustainability issues in its international treaties.

(1) International gatherings

Before discussing how European policy makers received and reacted to international events, as well as the growing concern that then-current *status quo* was incapable of guaranteeing a prosperous future for generations, it would appear opportune to first provide a brief summary of some of the relevant facts—especially to the extent that they are useful to put America's shift in policy into perspective.

As mentioned above, 1992 marks the year in which the United States started to take a back seat in the sustainable development discourse. That is, after the Berlin Wall collapsed in 1989 and the Soviet Union dissolved, from 3 to 14 June 1992, the United Nations held the United Nations Conference of the Earth Summit in Rio de Janeiro, Brazil.

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[145] Federal laws on air and water pollution were enacted primarily from 1948 to 1974; on hazardous waste in 1976 with the Toxic Substances Control Act (although measures were taken indirectly from 1972 with the creation of the Environmental Protection Agency); on bribery and corruption from 1977 to 1984; on financial mismanagement and fraud from the 1980s; deceptive advertising 1980s-1990s and creative accounting 2000s.

[146] To put it into perspective, 1948 (the year of the U.S. Federal Water Pollution Control Act) was the same year the Italian Constitution entered into force, a year before the Constitution of the Federal Republic of Germany was adopted, and ten years before France would establish its constitution.

The Earth Summit (1992)

This was the first major conference in which 172 states, 108 heads of government—except, notably, United States President Bush, Sr.—and tens of thousands of people gathered with an impressive mass media coverage. It took two years of intense negotiations to prepare and was the first major conference following the collapse of the Soviet Union in which the environmental problems of the planet and their links with the problems of social and economic development were discussed. [147]

Besides this fundamental media importance of spreading environmental concern, Rio de Janeiro is important because more than 150 countries signed two international conventions: one on climate change, and the other on the protection of biological diversity [148] (approved by all the attending heads of government). More importantly, however, the Earth Summit represents a commitment by national governments to environmental protection and sustainable development through a declaration of (non-binding) principles on the management, conservation, and sustainable development of forests (the Rio Declaration), as set out in Agenda 21 (a comprehensive and articulated program of action that constitutes a sort of manual for the sustainable development of the planet from 1992 until the 21st century). In other words, the discussions that occurred at the Earth Summit produced certain documents that, although non-binding, set forth an important process for sustainable development. [149]

The Rio Declaration

[147] Pozzo (2021b).

[148] As concerns the international conventions signed in the context of the Rio Declaration, the international convention on biological diversity (although certainly important) is not as important as the Framework Convention on Climate Change. Indeed, this discussion on climate change will eventually concern the international community most closely as it calls into question lifestyle habits, modes of production and consumption patterns. At the same time, notwithstanding its broad scope and relevance for the entire planet it is a convention of principles, and therefore not binding; it will not be until the Kyoto Protocol that heads of state begin to dictate very precise guidelines in terms of tools and standards that must be applied. Still, the Rio Declaration marks a beginning that, in some way, then gives rise to many sector standards. Indeed, after Rio national governments begin adopting policies on climate, renewable energy, energy efficiency, emission reduction, and so on. Thus, despite it is a Convention of great principles, it really encouraged many concrete actions (Pozzo 2021b).

[149] Pozzo (2021b).

Of the 27 General Principles established in the Rio Declaration[150], the most relevant for this contribution include Principles 1 ("Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.") and 4 ("In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.") as they illustrate the centrality of the human being but, at the same time, state that this development must be carried out in harmony with nature. However, another important aspect of the Rio Declaration is that environmental protection is an integral part of the process of the framework for sustainable development. Therefore, on the one hand, the discourse on economic development (and therefore on economic wellbeing) cannot be separated from a well-being that derives from the safeguarding of nature. This is also because humans cannot live well in an environment that is rich in the economic sense, but highly polluted and that endangers public health. Principle 5 – "All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world." Thus, Principle 5 establishes that sustainable development also implies a strongly social dimension given that sustainable development implies that everyone has a minimum of access to those forms of wealth and therefore a dignified life and the eradication of poverty. This then leads to the discussion on common but differentiated responsibilities (Principle 7 – "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."). In this context, it is important to note that "common but differentiated" responsibilities mean *all* countries (developed and developing, with the latter still in a state of total underdevelopment) must be involved in the process, and all must bear a portion of the responsibility. However, the responsibilities must be differentiated by country and according to individual capacity. This last aspect is considered moral in consideration of the fact that industrialized countries have traditionally exploited natural resources much more than countries that are still in an earlier stage of development are doing. That is, industrialized countries should bear more of the burden

[150] Rio Declaration on Environment and Development (1992).

of sustainable development since they played a greater role in depletion of Earth's resources. Such confirmation is indirectly addressed in Principle 8 ("To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.") to the extent that most consumption occurs in the developed world. Principle 9 – ("States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.") makes it clear that the sustainability discourse must go hand in hand with education and training, in schools and universities as well as in the workplace. Sustainable development can only be achieved through conviction from below (a bottom-up approach) and not through imposition from above (a top-down approach). Furthermore, for the sake of completeness, Principles 12, 16 and 20 are worth mentioning. Indeed, Principle 12 ("States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.") highlights how environmental measures should be used to impose trade restrictions, but not without considering all other relevant aspects. Principle 16 ("National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.") is about internalizing environmental costs and using economic instruments. Finally, Principle 20 ("Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.") clearly states that women have a fundamental role in the management of environmental development. Indeed, there are very interesting studies[151] by FAO that highlight how—in countries such as Africa,

[151] *See* "FAO and UN Women Supporting Women on Climate Smart Agriculture and Inclusive Value Chains in South Africa" (2021); UN Women (2012).

India and South America—women are actually repositories of knowledge and know-how on agriculture, on the exploitation of gardens, on the use of nature in a sustainable way, which are essential for this step forward.[152]

Agenda 21

Agenda 21 is aimed at creating a "program of action" and therefore an instrument for various states to begin implementing a whole series of shared initiatives (involving local authorities, involving businesses, involving citizens) so that all players are part of a process that moves in the same direction. It is an 800-page document outlining the international community's "program of action" on environment and development for the 21st century, a program of action that attempts to transmit to all countries a sense of responsibility for sustainability efforts, and therefore encourage the adoption of alternative ways of life and a different standard of living. It starts from the premise that human societies cannot continue with the status quo (widening the economic gap between the various nations and increasing inequality, poverty, hunger, disease, and illiteracy within the nations themselves) that contributes to the perpetual degradation of the ecosystems that support life on the planet. Simply put, Agenda 21 advocates the necessity to change course by improving living standards for all and protecting and managing the environment better for a healthier and more serene future for all humanity. The remainder of the document is divided into 4 parts (social and economic dimensions: poverty, health, environment, demographics, production, etc.; resource conservation and management: atmosphere, forests, deserts, mountains, water, chemicals, waste, etc.; strengthening the role of the most significant groups: women, youth, NGOs, farmers, unions; Methods of implementation: finances, institutions), consisting of 40 chapters in all.[153]

In terms of what can be done concretely at the local level (an aspect that is particularly important for jurists in general, and comparatists in particular because when one thinks globally, it must also be clear that actions must be taken locally), the opening section of the Agenda reads something to the effect of "each local authority must open a dialogue with its citizens, local associations and private businesses and adopt a local action plan. Through consultation and consensus building, local authorities can learn from the local community and businesses and can acquire the information needed to formulate the best strategies. The

[152] Pozzo (2021b).

[153] Pozzo (2021b).

consultation process can increase households' environmental awareness. Programs, policies, and laws assumed by local government could be evaluated and modified based on the new local plans thus adopted. These strategies can also be used to support local, regional, and international funding proposals."[154]

"Rio + 20" (2012)

Then, in 2012, there was a new world conference on sustainable development[155] (the "Rio + 20") in which the agenda is to implement measures to guide the transition towards the Green Economy. Although the debate on the green economy will not be discussed here, it is in any event important to note that the model adopted in Europe analyzes, in addition to the benefits of a given production regime (which promotes an increase in GDP), the impacts and damages that this regime has on environmental resources. In a nutshell, there is this idea that the current economy (based on neoliberal and capitalist principles) is no longer sustainable and there is a growing need to transition towards an economy that considers the environmental costs of doing business. And this idea comes precisely from the fact that if one analyzes the historical evolution of capitalism and capital-driven markets from after World War II onwards, it is possible to observe that – on a global scale – neoclassical theories are no longer sustainable to the extent that at best they do not consider environmental costs of development in the production process. On the contrary, it is more common for these businesses (which practices are based on such neoliberal economic theories of development) to destroy or impoverish the environments in which they operate. Therefore, by not considering the value of those environmental resources in the determination of business costs, this system has led to an economic development that was not environmentally sustainable.[156]

[154] Pozzo (2021b).

[155] One must recall that the former conferences were first in '72, then '92, then '02, then 2012.

[156] Pozzo (2021b).

(2) *European legislative developments – sustainable development as a European objective*

Aside from various EU directives (discussed below and which, it must be observed, require additional intervention by national legislators), either right at the same time or almost immediately following the above international gatherings, it is interesting to note that the EU established a series of common objectives in the treaties that guide the union of member states.

The Treaty on European Union

The Treaty on European Union (first with the Maastricht Treaty in 1992, and then more effectively with the Amsterdam Treaty in 1997) generally includes environmental protection amongst its objectives, establishing in the Preamble that the EU is "*determined* to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields." (emphasis added). Art. 2 sets out that "The Union is founded on the values of respect for human dignity," and, at Articles 3(3) and 3(5) respectively, establishes "[the Union] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment" and "It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law." Moreover, with the Treaty of Amsterdam (1997), sustainable development is finally qualified as a legal principle (and no longer merely a slogan).[157] And it is a legal principle that constitutes the foundation of the Community's political decisions, not merely a guiding ethical principle.

[157] *See generally* de Sadeleer (2002) (tracing the evolution of environmental principles and, in particular, the origins of the polluter pays principle, the preventive principle and the precautionary principle, and their legal effect).

The EU Environmental Action Programme

Also in 1993, the Fifth EU Environmental Action Programme (coincidentally, for a durable and sustainable development)[158] comes into force, which is basically a manifesto (or a guide) to what the Commission intends to do in the period under consideration. So, when the Commission puts a framework program in the hands of all the stakeholders (states, local communities, entrepreneurs, citizens) it tells us what it intends to do. And it just so happens that the Fifth Action Program is really about sustainable development.[159]

The Treaty of Nice

In 2000, the EU adopted the European Union Charter of Fundamental Rights (or the "Treaty of Nice"), with a specific article dedicated to environmental protection: Art. 37 ("A high level of environmental protection and the improvement of its quality must be integrated into the policies of the Union and guaranteed in accordance with the principle of sustainable development.").

Thus, these various treaties are important because they provide the legal basis for a series of European directives aimed at advancing sustainable development.[160]

Certain EU Directives and Regulations

On environment

The following normative data distinguish between categories of legislation and highlight the years in which various topics emerged on the public agenda. Although roughly 20 years after America (also because Europe was still merely an Economic Community when America was paving the way in environmental law), European action is clearly taken regarding ecological issues. For instance, directives on air and water pollution were enacted primarily from 1975 to 2008. Notably, Directive 75/440/EEC was adopted to regulate the quality of drinking water in the Member States. However, more significant efforts were made in the '90s with Directive

[158] *See generally* "Towards Sustainability" (n.d.).

[159] Pozzo (2021b).

[160] *See generally* Pozzo (2002).

91/271/EEC (concerning urban wastewater treatment) and Directive 91/676/EC (concerning the protection of waters against pollution caused by nitrates from agricultural sources). Interestingly, these initiatives coincide with the time in which Europe begins taking a more active role in the international sustainability discourse. Then, following the gatherings mentioned above, in the early 2000s, the Commission adopted Directive 2000/60/EC (which establishes a framework for Community action in the field of water policy); Directive 2000/69/EC (relating to limit values for benzene and carbon monoxide in ambient air); Directive 2000/76/EC (on the incineration of waste); Regulation 2037/2000/EC (on substances that deplete the ozone layer); Directive 2001/80/EC (on the limitation of emissions of certain pollutants into the air from large combustion plants); and Directive 2001/81/EC (on national emission ceilings for certain atmospheric pollutants). By the end of the decade, the Commission had additionally adopted Directive 2008/56/EC (the "Marine Strategy Framework Directive") to establish a framework for community action in the field of marine environmental policy; Directive 2008/105/EC to fix environmental quality standards in the field of water policy (amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC, and amending Directive 2000/60/EC of the European Parliament and of the Council); and Directive 2008/50/EC (on ambient air quality and cleaner air for Europe). In terms of comprehensive environmental protection, in 1992, Council Directive 92/43/EEC (the "Habitats Directive") went into effect, with similar ambitions as those set out in the U.S. Endangered Species Act of 1973.[161] Three years later, there was also Directive 79/409/EEC (the "Birds Directive", subsequently amended to become Directive 2009/147/EEC).

Single member states also had national norms in place. For instance, in the UK there was the Environmental Protection Act 1990; the Clean Air Act 1993; the Environment Act 1995; the Waste Minimalisation Act 1998; and the Pollution Prevention and Control Act 1999. In France, there was the French *Loi sur l'eau* (Water Law) No. 92-3 of 3 January 1992; the Loi No. 95-101 *relative au renforcement de la protection de l'environnement* (Strengthening of Environmental Protection Law) of 2 February 1995 ("Loi Barnier"), and the *Loi sur l'eau et les milieux aquatiques* (Water and Aquatic Environmental Law) of 30 December 2006.

As concerns hazardous waste/materials (and coinciding with the major disasters that had occurred globally, namely Bhopal and Chernobyl), European directives largely span from 1980

[161] *See generally* Piccolo (2020).

to 2006. Efforts were primarily made to regulate the use of chemicals. Indeed, Directive 80/876/EEC was adopted to regulate straight ammonium nitrate fertilizers of high nitrogen content. Directive 82/176/EEC set values and quality objectives for mercury discharges by the chloralkali electrolysis industry, while Directive 83/513/EEC, Directive 84/491/EEC, and Directive 86/280/EEC did the same thing but for discharges of cadmium, hexachlorocyclohexane and certain dangerous substances (included in List I of the Annex to Directive 76/464/EEC) respectively. Directive 91/689/EEC deals with hazardous waste, and Directive 96/82/EC with the control of major-accident hazards involving dangerous substances. Additionally, Directive 2004/35/EC sets out standards for national laws on environmental liability regarding the prevention and remedying of environmental damage and Regulation 1907/2006/EC concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) established a European Chemicals Agency to improve human health and the environment by restricting the use of certain types of chemicals.

On bribery and corruption

On bribery and corruption, whereas the U.S. adopted federal legislation on corrupt practices in 1977, the European Commission adopted the first European anti-corruption standards and conventions in the 1990s. While the reasons for legislative reform may vary by country, it is widely known that – at least in Italy – the '90s were a period of "Mani Pulite" reforms on corruption. At the European level, this interest in combating corruption is evidenced, for instance, by the fact that Art. 83 TFEU recognizes corruption as a "euro-crime", and the 1997 Convention on fighting corruption involving officials of the EU or officials of Member States. More recently, the 2003 Framework Decision[162] on combating corruption in the private sector prohibits both active and passive bribery, and EU Directives 2015/849 and 2018/843 were adopted to fight against money laundering.

In this sense, national legislation in the Euro-zone appears inspired by U.S. law. The UK Bribery Act 2010 and Criminal Finances Act 2017 provide paramount examples of broad anti-bribery and corruption legislation with extraterritorial reach. In France, most of the French anti-corruption provisions relevant to businesses are laid down in the French Criminal Code, which provides comprehensive legislation similar to the UK Bribery Act. In fact, French anti-

[162] Framework Decision 2003/568/JHA.

corruption law applies to public and private sectors alike (whether operating domestically or abroad), both the offeror and the recipient, as well as the corporation and executive management. Several important changes were also introduced in December 2016, including the requirement for certain companies to adopt a compliance program starting (effective May 2017); noncompliance with such programs is subject to sanctions, although the law does not provide for a compliance defense. The recent 2016 reform (French Loi n. 2016-1691 of 9 December 2016) also introduced increased protection for whistleblowers and a *convention judiciaire d'interêt public* (which is similar or equivalent to a deferred prosecution agreement as it exists in the US legal system). Similarly, in Germany, the *Gesetz zur Bekämpfung der Korruption* (new German law against corruption) entered into force on November 26, 2015. The new law extends the scope of existing German anti-corruption laws and applies to cases in which corrupt practices lead (merely) to a violation of the duties of private sector employees vis-à-vis their employers.[163] In Italy, bribery of domestic and foreign officials is a punishable offense pursuant to articles 318-322 and 346-bis of the Italian Criminal Code, which provide for various forms[164] of bribery. In recent years (i.e., with Law n. 300/2000, Law n. 190/2012, and Law n. 3/2019), the Italian anti-corruption system has undergone significant reform by introducing new forms of bribery offenses, increasing the punishments for existing offenses, and broadening the definition of corruption-related crimes (to extend punishment also to merely "involved" parties). As concerns business entities, Art. 25 of Legislative Decree No. 231/2001 establishes that entities/corporations can also be prosecuted for bribery offenses committed by managers or employees in the interest or for the benefit of the corporation. It is also worth mentioning that Art. 7 of the Legislative Decree establishes that the corporation can avoid liability for offenses committed by its employees by implementing an effective "compliance program" designed to prevent such type of offense. However, according to Art. 6, to avoid liability for offenses committed by senior managers, it is necessary to prove the perpetrator acted in "fraudulent breach" of corporate compliance controls. Moreover, it is significant that from 2002, bribery of private corporate officers became a punishable offense pursuant to Art. 2635 It. c.c. (subsequently amended by Legislative Decree No. 38/2017,

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[163] Previously, corrupt behavior in the private sector was only punishable in cases which involved "unfair preferences in the competitive purchase of goods or commercial services."

[164] Including "proper bribery", "bribery for the performance of the function", "bribery in judicial acts", "unlawful inducement to give promise or anything of value", "trafficking of unlawful influences" and "instigation to bribery".

implementing EU Framework Decision 2003/568/JHA on combating corruption in the private sector).

On financial mismanagement

Regarding financial mismanagement and fraud and without going into great detail (as the topic is beyond the scope of this contribution), it would appear that the first traces of legislation aimed at combating financial mismanagement may be identified in Directive 83/349/EEC (based on the Art. 54 (3) (g) of the Treaty) on consolidated accounts and Directive 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions; these parameters were later extended with Directive 91/674/EC on the annual accounts and consolidated accounts of insurance undertakings. However, fraud and corruption only emerged on the EU agenda in 1988 when the "Anti-Fraud Coordination Unit" (UCLAF) task force was created. Subsequently, the Convention on the protection of the European Communities' financial interests was introduced in 1995, and the European Anti-Fraud Office (OLAF) was established in 1999. There have also been single legislative acts (starting from 2004) limited to ensuring the EU Budget is spent correctly.[165] The Anti-Money Laundering Directives are also important. The first (1AMLD) dates to 1991, and the most recent (6AMLD) went into effect in 2020 (with an obligation for entities to implement the directive by June 2021).

Interestingly, problems with so-called "creative accounting" and financial scandals appear to have been common to Europe and the United States from c.a. 1985. Noteworthy German cases include Co op AG (1988), Metallgesellschaft (1993), Südmilch AG (1993), Jürgen Schneider (1994), Balsam (1994) Bremer Vulkan Verbund AG (1996), Philipp Holzmann AG (2002), and ComRoad AG (2002). Parmalat (2003) was probably the most prominent Italian case, although there have also been reports of "creative gains" in football club companies: Freedomland (2000), Giacomelli (2003), Finmatica (2004). In the UK, Bank of Credit and Commerce International (1991), the Mirror Group (1991), Polly Peck International (1990), and Versailles (2000).[166] Hence, the European Commission adopted Regulation 1606/2002/EC on the application of international accounting standards, as well as Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on

[165] *See generally* (European Parliament n.d. "Combatting Fraud"; Juszczak and Sason 2017).

[166] On accounting scandals, also in a comparative perspective, *see generally* Jones (2011). *See also* Jones (2011); Jones and Jonas (2011).

those securities and Directive 2003/4/EC on public access to environmental information (repealing Council Directive 90/313/EEC).

Linked to accounting and financial reporting issues (to the extent they are instrumental in protecting consumers and public interests), the EU has adopted three primary directives to tackle unfair commercial practices: Directive 93/13/EEC on unfair contract terms in consumer contracts, the Unfair Commercial Practices Directive 2005/29/EC, and the Enforcement and Modernisation Directive 2019/2161.

Some reflections – translating broad principles into detailed rules

As far as the sustainability discourse is concerned, it is significant that by the mid-to-late 1990s (i.e., by the Fourth Framework Programme), European policy makers began to frame development as a Europe-wide problem. And this urgency is especially marked in the Sixth and Seventh Framework Programmes.

The Sixth and Seventh Framework Programmes

It is possible to note that one of the goals of the Sixth Environmental Action Programme (which covers the period 2002-2010) is precisely to create a market that better suits the environment, and therefore to encourage the business community to collaborate to realize more sustainable practices. To achieve this goal, the EU began introducing reward programs for companies with the best environmental performance. It also promoted an evolution towards greener products and processes and encouraged the adoption of eco-labels that allow consumers to compare similar products on the basis of environmental performance. In other words, heads of government and decision makers began conceiving environmental law differently. Top-down instruments were no longer viewed as the most effective way of achieving sustainability. Rather, more attention was given to the bottom-up (consumers' behaviors, companies' behaviors). It is a time when issues such as consumer information, eco-labelling and eco-labels begin to take on great importance, so that the consumer can be guided towards the choice of more sustainable and greener products. On the other hand, policies that reward companies that use greener processes, regardless of the regulatory framework, are being discontinued. Consider that this leads to particular attention to the world, for example, of advertising as well

as of information in general, and it is almost at the same time that all those from "anti-goths" to greenwashing start to move.[167]

Thus, in Europe, the sustainable development discourse is one that starts from very noble principles. It has origins in widely respected international principles, but then (in clusters) descends into detailed rules that involve also minute things such as advertising. It is at this time, moreover, that Europe begins to adopt a series of precise, technical regulations that are truly disruptive for certain sectors.

Regulation 1907/2006 (REACH)

The REACH Regulation (n. 1907/2006) regarding the Registration, Evaluation, Authorization and Restriction of Chemicals is just one example. Importantly, it is based on an authorization procedure (which is seen as the most effective tool to promote green chemistry and sustainable innovation) to facilitate the gradual elimination of hazardous chemicals and their replacement with safer alternatives. In this sense, it is a very important regulation both because of its impact on European companies and worldwide (since Europe is a significant market for many non-European countries). That is, if a company wants to export chemicals to Europe, it must comply with REACH rules. Indeed, countries such as Korea and Japan have implemented REACH in their respective domestic legal systems. In this context it is possible to observe that the sustainability discourse goes hand-in-hand with the dissemination of high-level environmental models—via the European market, evidencing that the market, if regulated effectively and efficiently, can be a vehicle for circulation of a high quality environmental legal model to other parts of the world not only near us but also in places far away.[168]

Directive 35/2005 (on liability for environmental damage)

The same reasoning applies to the Directive 35/2005 on liability for environmental damage. More specifically, this Directive introduces a whole series of new concepts regarding environmental damage and the determination of those responsible. It establishes the criterion(s)

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[167] Pozzo (2021b). *See generally* Pozzo (2020) (providing a thorough recount of the subject in the European context); McAree and Davidian (2016) (giving a concise overview in the American framework). *See also* von Bergen (2020) (relating to the legal context of B-Corporations).

[168] Pozzo (2021b).

of liability, indicates the procedures for compensating environmental damage and provides the procedure for remediation. Although the discussion on liability for environmental damage has been going on for years,[169] in 2005, the European legal framework "took the leap" to cause companies to internalize environmental damage, a decision that was apparently motivated by the fact that, on 1 May 2004, ten new member countries joined the EU.[170]

As regards the principle of sustainable development in the Treaty, this follows its own evolution. Specifically, with the Lisbon Treaty (2007) it is specified that the Union must "foster the sustainable development of developing countries in economic, social and environmental terms, with the primary aim of eradicating poverty" as well as "contribute to the development of international measures to preserve and improve the quality of the environment and the sustainable management of the world's natural resources, with a view to ensuring sustainable development." But this is a new way of using the EU's external relations to convey an important model of environmental protection, evidencing a new role that the EU has taken on in this particular context (that is, replacing America in the sustainability discourse and especially as concerns environmental law).[171]

Towards "internalization" of environmental costs of production by businesses

It is here, then, that the idea of internalization of environmental costs comes to the fore once again: The costs arising from the degradation of ecosystems in production processes must be "internalized" in the costs of business. What is more, the notion that environmental costs must be internalized by businesses is one that is now pursued in all contexts. As examples, it is possible to note the above-mentioned 2005 directive on environmental responsibility and the REACH regulation. Indeed, if the former is clearly an instrument that causes companies to internalize environmental costs, the latter requires that businesses assess and, where necessary, internalize the costs of industry that potentially affect society and the laborers who come in contact with the same; if a company wants to exploit chemicals, the economic burden of such exploitation must fall on the business and not the environment or stakeholders. Again, it is

[169] The Green Paper was in 1993. The white paper was from 2000. The proposal was in '02, and it couldn't be concluded. And then at some point, in a particular political context, it led to an acceleration and a decision to this draft directive precisely because they wanted the Europe of 24 to be a Europe with a single rule on environmental liability.

[170] Pozzo (2021b).

[171] Pozzo (2021b).

important to recall that the discourse on the internalization of social costs is not new—it stems from a debate on the economic analysis of law that dates to at least the 1960s when Ronald Coase posed the problem in no uncertain terms. And here it is worth recalling how the United States and Europe have developed remarkable models of legislation on environmental responsibility: In the United States with CERCLA (Comprehensive Environmental Responses and Compensation Liability Act) and Europe with Directive 2004/35. But, in general, this is a context where liability is in some sense reinterpreted by legislators (and also by courts) to ensure that the discourse on internalization of environmental costs and corporate social costs are taken into account.[172]

So, the million-dollar question thus becomes which are the most effective legal tools that allow society to balance the needs of today and those of tomorrow. That is, if today's society must ensure that future generations will have at least as many opportunities as current generations have had, which are the measures that must be adopted to reach this magical point of equilibrium between the "present" and the "future". And it is in this context that it is possible to note the differences between anthropocentrism, ecocentrism, subjective rights[173] to the environment, and whatnot.[174] Even from a theoretical perspective, the definition has raised questions and skepticism beyond its strong stimulus content. Diatribe between the supporters of an anthropocentric criterion, who aim at achieving intergenerational equity, and the supporters of an ecocentric criterion, who would like more legal guarantees for what is called "subjective right of the environment".[175] This also leads to the vagueness of the legal content of this concept. It seems quite difficult to make a concrete assessment of the impact that current policies may have on future generations. Hence the importance also of all the communications and soft law measures that have followed in recent years.[176]

[172] Pozzo (2021b).

[173] *See* Boyd (2011) (providing a general overview of the issue from a comparative international perspective).

[174] *See generally* Kortenkamp and Moore (2001); Schuller (2021); McKinnon and Fiala (2007); Wapner and Matthew (2009).

[175] *See* Jacometti (2021). *See also* Jacometti (2021a); Pozzo (2021b)

[176] Pozzo (2021b).

V. Subsequent developments and some conclusions.

Once it became rather apparent (and widely accepted, at least in Europe) that the then-current economic theories were no longer appropriate for *sustainable* development and economic growth, the question became "what are we going to do about it?". And here it is possible to note a few significant turning points.

The first is the Seventh Environmental Action Programme, which focuses on "Living well within the limits of our planet" and covers years 2013 through 2020. In very simple terms, at an international/European level, policy (and therefore the normative text adopted by the Commission) aims to protect the environment, health, and the efficient use of resources to achieve the most sustainable growth possible.[177]

So, if by the 2000s the principle of sustainable development certainly has an economic, social and environmental value, then it is also clear that these three dimensions must be considered together. And this notion is then reverberated, or at least dialogued, also with what was being done at the United Nations level. In fact, on September 25, 2015, at the 70th United Nations General Assembly, world leaders adopted a new global framework for sustainable development: The 2030 Agenda for Sustainable Development (focusing on the Sustainable Development Goals, or SDGs).[178]

However, what is perhaps most noteworthy is the reciprocity between the European sustainable development discourse and the one occurring at the UN level. That is, the 2015 SDGs were both influenced by European evolution and have, in turn, influenced European evolution. It is therefore also significant that despite the UN's authority and general prestige, its SDGs are not binding in the European context: these SDGs are pursued in the European context through legislative initiatives (or "plans of action") that relate to climate change, emissions, the obligation to introduce a certain percentage of renewable resources in the production of electricity, energy inefficiency in homes and so on. Then, these actions turn into Agenda 2030, where the three dimensions of sustainable development (economic, social, and environmental) are integrated in a balanced way, and which is then reflected for the first time in an international consensus that peace, security, justice for all and social inclusion are not only goals to be pursued individually, but also are mutually reinforcing. In this context, it is significant that the

[177] Pozzo (2021b).

[178] The Sustainable Development Goals consist of 17 goals which pursuit represents a positive evolution in terms of the social sphere, the economic and the environmental dimension ("Sustainable Development Goals" n.d.).

European response to the 2030 Agenda consists in two axes of action: full integration of the SDGs into the European strategic framework and the Commission's current priorities and expanding the longer-term vision and priority of sectoral policies beyond 2020. As concerns Italy in particular, it is significant that such elaboration of great principles has taken on its own dimension of concretization: on the one hand, there is the Commission communication (on the sustainable future of Europe) with specific sustainability steps; on the other, there is also the unique vision in Italy to take these initiatives further and make them long-term, with priorities that go *beyond* 2030 and also to 2050.[179]

What is more, whereas the United States was the leader on the environmental front in the 20th century, by the 21st century the shoe appears to have changed feet: from around the 1990s Europe became the leader on sustainability in the legal sense, while the discourse is guided and furthered in the U.S. by the market and a series of important bottom-up initiatives.[180]

So, what has the EU done to make the Sustainable Development Goals part of its legislation (note that Current EU policies include all 17 goals)? To start, it has ensured that the new Common Agricultural Policy (CAP) includes three goals that continue to be particularly relevant and prioritized (i.e., the objectives of (1) ensuring efficient food production; (2) guaranteeing sustainable management of natural resources and acting for the climate; (3) contributing to balanced territorial development), evidencing a clear shift from policy principles to industry standards. Not to mention the normative policies in the climate sector, which are the most comprehensive in the world and unravel in three macro-areas: energy saving, emission reduction, encouragement of energy production from renewable sources. However, these are only with respect to measures aimed at climate change mitigation. Alongside the climate change mitigation policies, there are also more complex policies with respect to climate change adaptation. And the regulations on adaptation to climate change—even if they are generic and, in some ways, vague at the international level—then turn at the local level into policies for the exploitation of the mountains, indications on how tourism should be developed, attention to local resources from the point of view of their exploitation, and so on. So, once again, it is possible to notice a trend of broad policies that unravel from great principles (which are sometimes not very concrete and very often vague) that are then

[179] Pozzo (2021b).

[180] Pozzo (2021b).

introjected into policies at a national level, and then again at a local level until they are transformed into very technical and precise rules.

Furthermore, the discourse on sustainable development would not be complete without considering the almost concurrent and additional package of measures (COM/2015/0614 final) on the transition to a circular economy: a more circular economy, in which the value of products, materials and resources is maintained as long as possible to avoid the production of waste. This transition offers Europe an opportunity to transform the economy and generate new sustainable competitive advantages, beginning already at the earliest stages of a product's life cycle. But this kind of principle (which again is very general, very vague) is translated in detail into a whole series of policies that are instead very punctual (e.g., the release of carbon dioxide emissions, the efficient use of resources)—which is no simple task because these policies must be implemented in such a way so as not to sacrifice the current competitive advantage already enjoyed. That is, policies must be designed to maintain a competitive economy and, at the same time, ensure that the policies on products consider both the design phase and the production processes that affect the supply of resources, the use of individual products, the generation of waste during the entire life cycle of the product. That is, ensure that these cause the least amount of waste, especially at the end of their use. And this, in turn, means that the economic actors are no longer just large companies and multinationals. Instead, the economic actors are also the consumers, and as such are the subject of very specific legislation (such as policies on disclosures and communication of information, and especially that which is considered "green information").

Therefore, as concerns drivers, European legislation appears to be primarily driven by international principles and global events; with national governments competent for domestic issues. That is, in the 1980s, Europe seemed acutely aware of the fact that its citizens were amid a serious environmental alarm. After all, this is a period marked by the 1984 Bhopal and the 1986 Chernobyl Disasters, where on April 26, 1986, Reactor 4 of Ukraine's Chernobyl[181] power plant exploded, and a cloud of radioactivity spewed over Europe and the Soviet Union.[182] Thus, and perhaps due to the relative territorial proximity of Chernobyl compared

[181] On the Chernobyl disaster, *see generally* Malone (1987); International nuclear safety advisory group (1986); Saenko et al. (2011); Cardis and Hatch (2011).

[182] The explosion killed 31 people, and approximately 4,000 people (mostly children) developed thyroid cancer. However, the long-term effects are still unknown (WHO 2005).

to Bhopol, the 1986 disaster seems to have prompted more significant change at a EU level.[183] Indeed, 1987 was the "European year of the Environment"[184] and the year that the Single European Act would come into force as the first treaty that included provisions on environmental protection. This notion is further supported by the number of directives on environmental protection signed into force from the 1980s through the 2000s (i.e., nearly 50 directives on environmental law in 30 years, from 1980 to 2010[185]) compared to the number and frequency of initiatives to combat issues such as bribery and corruption and financial mismanagement and fraud.[186]

Accordingly, the 1960s-1990s is undeniably an important period in history, not just for European and United States domestic legislation, but also for the international community. This is a period in which the world experienced significant ecological and industrial disasters. It is a period of mass mobilization and the spreading of important sustainability ideas, as evidenced by the legislative responses of governments. It is a period in which several key publications of the '60s and '70s highlighted man's (negative) impact on the environment[187] and the social problems[188] created by the intense pursuit of growth. It is a period in which the negative externalities of 20th century development prompted a general reconsideration of the concept of "progress"—and not just in terms of the environmental costs, but also in terms of social justice and equality. These years were marked by accidents such as the 1984 Bhopal disaster and the 1993 Kader Toy Factory fire. And, thanks to the democratization of Internet, news spread with the click of a button.

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[183] Pozzo (2021b).

[184] *See* Directoriate-General for Environment (1990).

[185] On EU environmental law until March 2010: Armstrong et al. (2011) (providing a list of relevant directives at pages 377-388).

[186] At the same time, it may also be argued that environmental issues (rather than bribery, corruption and financial mismanagement) have tended to be addressed at the European level in virtu of the principles of conferral and subsidiarity, which limit EU intervention to those sectors which (1) member states have conferred law-making competency to the Union, (2) are not already governed by national law, and (3) European Union legislation provides a better and more efficient rule of law than if the issue were to be regulated by individual member states.

[187] E.g., Carson (1962); Ehrlich (1968); The Ecologist (1972); Meadows (1972); Schumacher (1973).

[188] E.g., Seers (1969) (arguing that economic growth was the cause of social difficulties); Hirsch (1976) (purporting that the pursuit of growth acts to perpetuate inequalities).

If the 1990s marked the birth of the World Wide Web and Google,[189] then it is also a period of increased awareness of business practices abroad and the realization that there was an evident tendency for companies of developed countries to exploit the resources and populations of developing nations. And it was increasingly apparent that Western economic policies[190] were at least partially responsible for events occurring abroad. Here it is sufficient to recall facts such as the development economics from the 1960s through the 1980s by the World Bank[191] in developing countries and the writings[192] of development economist Amartya Sen. In a nutshell, the 1990s was the decade in which the Internet helped awaken the citizens of first world countries to the issues caused by globalization (such as environmental concerns and human rights abuses around the world).

Hence, the era is also characterized by a general need to regain public trust in the market and its institutions, with legislation aimed at improving transparency and deterring unethical business practices. And, when considered comprehensively, these laws illustrate a trend to promote an organizational culture of compliance and ethical behavior. As stated above, some important legislative initiatives include the Foreign Corrupt Practices Act (FCPA) of 1977 to prohibit U.S. citizens and entities from bribing foreign government officials to benefit their business interests; the Sentencing Reform Act of 1984, aimed at preventing and deterring criminal corporate conduct by encouraging companies to adopt a code of ethics;[193] the 1991 Federal Sentencing Guidelines for Organizations (FSGO),[194] which, as an extension of the Sentencing Reform Act of 1984, describe the elements of a corporate ethics program required to benefit from a reduced sentence if convicted of criminal activity; the Sarbanes-Oxley (SOX) Act of 2002 introduced codes of ethics as a requirement for publicly traded companies; the Federal Trade Commission (in response to consumer complaints about greenwashing) revised its so-called "Green Guides" (or "Guides for the Use of Environmental Marketing Claims"),

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[189] On the history of the Internet, *see generally* Leiner et al. (2009); Sherman (2003).

[190] *See* Baldassari (1992).

[191] *See generally* The World Bank (1989).

[192] *See* Sen (n.d.) (providing a list of publications by Prof. Sen).

[193] *See,* 18 U.S.C. § 3553(a)(2)(B) (1994) (stating that sentencing should "afford adequate deterrence to criminal conduct"); 28 U.S.C. § 994(g) (1994) (requiring the United States Sentencing Commission to promulgate guidelines "to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18").

[194] Note that the FSGO were amended in 2004 to entail effective compliance and impose more stringent requirements. *See also* U.S. v. Booker, 543 U.S. 220 (2005).

which essentially interpret Section 5 of the Federal Trade Commission Act (FTC Act) as applied to environmental marketing.

Similar circumstances characterized the European market during the same period. During the 1980s, the European Economic Community began implementing outward processing relief arrangements to protect domestic production and take advantage of lower labor costs in neighboring countries.[195] This implied the "temporary export" of raw materials and intermediary products, which would be processed or assembled abroad and then subsequently returned to the European market with partial or total relief from import duties. In other words, European Community companies were encouraged to identify foreign production partners to deliver the required quantities, meet the quality standards and respect the deadlines established by their European partner (or "buyers"). For instance, West German textile producers outsourced to Eastern Europe (e.g., Yugoslavia). Other main destinations for subcontracting in Eastern Europe included Hungary, Romania and Poland, accounting for 47 percent of the total EEC production sharing imports from Eastern Europe.[196] And as the number of European Community members increased, textile production was eventually broadly outsourced to Mediterranean countries (such as Tunisia and Morocco).[197] It was a period when corruption and creative accounting were problems for many member states, including Italy.

In a nutshell, it is a period toward the end of which (i.e., by the 1980s) the notion of "sustainable development" took on a broad global significance. [198]

Perhaps more importantly, however, this period also marks a turning point in which America and Europe began to take different approaches. Namely, it marks the moment when America apparently started taking a relatively hands-off approach, relying on market forces to guide sustainable development, whereas Europe began writing its sustainability efforts into an increasing number of treaties and directives. Consequently, in America, more companies started adopting codes of ethics (or conduct) to fill an apparent regulatory gap, and either restore consumer confidence or gain a competitive advantage as being a "good" company. In

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[195] Textiles Intelligence (1997).

[196] *See* United States International Trade Commission (1989).

[197] Note generally that the EU established a trade partnership with southern Mediterranean countries in 1995 with the launch of the Euro-Mediterranean Partnership at the Barcelona Conference. These trade relations are governed by bilateral agreements established under the framework of the Euro-Mediterranean Association Agreements.

[198] Purvis, Mao, and Robinson (2019) 681-695; Grober and Cunningham (2012); Stivers (1976); Driver (1979); Pirages (1977); Cleveland (1970); Coomer (1979).

1987, a survey revealed that 90% of companies had established a code of ethics since at least 1984.[199] Although it would become a popular catchphrase only later, Benjamin Franklin's famous quote "do well by doing good" (which eventually became associated with CSR) additionally sums up such trend. Europe, on the other hand, pursued a top-down approach through legislation aimed at stimulating a circular economy.

The above paragraphs illustrate a growing consciousness of sustainability issues, a pattern that is increasingly clear from the sustainability writings and movements of the period. That is, from the 1960s onward, the concept of sustainability has been frequently depicted as one in which society and the economy are an integral part of the environment. Therefore, if the social, environmental, and economic spheres are (or must be considered as) interconnected, then sustainability means providing for human survival without prejudicing economic health and the competitiveness of nations, while at the same time preserving the natural environment. In *The Tragedy of the Commons* (1968), Garrett Harding clearly highlights how the current situation will inevitably result (for a variety of reasons) in a real "tragedy of the commons" (with resources being consumed faster than Earth can regenerate them) and stresses the need for legislative intervention so that environmental costs are absorbed by companies. In this sense, Garrett Harding identifies the major issues at the heart of the sustainability discourse: overconsumption and lack of accountability by companies.[200]

This conundrum became especially manifest in the various industrial accidents of the 20th century.

However, another challenge that arises is—once the problem has been identified—determining which legal instruments effectively respond to this tragedy. Should we turn to a system of taxes, or fiscal instruments? Should we turn to different kinds of corporate responsibility criteria? Or is a redistribution of entitlements (and therefore property) more effective? Thus, the real question becomes "which instruments offer an effective and efficient answer to the 'sustainability problem'?"[201]?

[199] Benatti (2014) 20.

[200] Pozzo (2021b).

[201] Pozzo (2021b).

From this perspective, it may be argued that the success of the sustainability movement depends on its reception by consumers. In other words, a bottom-up approach is needed. People must *want* to change their lifestyle, not be forced to do so through restrictive or strict legislation. And the only way to stimulate meaningful change is to disseminate information in a manner that effectively and intelligibly communicates sustainability issues to a very broad and diverse audience.[202]

Consequently, the 1970s and 1980s mark an important period for the modern sustainability movement. If the 1970s represent the birth of the modern sustainability movement, the 1980s denote its adolescence—when business and the economy start assimilating notions of responsibility and "being green". Indeed, the 1970s coincide with popular sustainability campaigns and mass media coverage of related issues. In the 1970s, *The Limits to Growth* is published by the Club of Rome, the United Nations held the Stockholm Conference, and the United Nations Environment Programme (UNEP) was established (introducing the concept of eco-development). An important philosophical movement also begins to emerge. In 1979, in *Das Prinzip Verantwortung* ("The Imperative of Responsibility"), Hans Jonas rethinks the foundations of ethics and proports the ideal that man has explicit duties towards himself, his prosperity, and the environment.[203] In 1984, Edward Freeman advocates a novel theory of organizational management and business ethics (the "Stakeholder Theory") based on the view that a firm should create value for all stakeholders, not just shareholders, thus challenging traditional models of corporate governance based on shareholder primacy.

It is also significant that throughout the 1960s and the 1970s, the United States was a very strong locomotive of environmental development. All the federal acts that came out between the '60s and the '70s were a model for all the global regulations. But in the '80s the cultural context began to change. In 1987, Chernobyl had just occurred and a few years before that there was Bhopal. This is the year in which the European Year of the Environment was declared in Europe and with the Single European Act, the environment entered the Treaty for the first time. And here things begin to change. On the one hand there is this fading away of the United States, which is no longer the leader of environmental legislation/regulation and somehow

[202] Pozzo (2021b).

[203] Pozzo (2021b).

passes the baton to Europe (which from 1987 onwards becomes the world leader in the production of environmental protection standards).[204]

If one were to summarize the last forty years of the 20th century, it would seem that if the 1960s and 1970s were primarily concerned with man's impact on the natural environment and domestic issues, in the 1980s and 1990s, the focus shifted to industry's social effects abroad. In fact, the 1980s and 1990s witnessed widespread legislation aimed at eliminating discriminatory and corrupt practices—without regard for national borders.[205]

Therefore, following the globalization and offshoring of manufacturing that occurred in the second half of the 20th century, it is in the late 1980s and with the 1990s that the notion of sustainability becomes "three dimensional". That is, the notion of sustainability starts to comprise the environment, society and the economy. They are seen as closely related, as connected, and their integration was considered essential for any form of development that is effectively sustainable.[206]

In any event, by the 1990s, both American and European stakeholders became increasingly skeptical of whether current production and consumption models of industrialized societies were compatible with the long-term preservation of environment, especially considering the excessive exploitation of natural resources. Therefore, despite occurring during different periods and perhaps for different reasons, it is significant that both Europe and America underwent (and are still undergoing) a process of reform in favor of more responsible business practices. In Europe, just as the Foreign Corrupt Practices Act (FCPA) of 1977 outlawed bribery of and by U.S. officials and company managers, the 2003 Framework Decision[207] on combating corruption, Directive 2015/849, and Directive 2018/843 against money laundering aims to achieve the same result in Europe. And, similar to the Sarbanes-Oxley Act, European Directive 2006/46/EC introduces codes of ethics as a requirement for publicly traded companies. Moreover, the act of greenwashing is (at least indirectly) governed by Directive

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[204] Pozzo (2021b).

[205] Linked to this, it is additionally significant that the 1980s witnessed a change in perspective about notion of corporate interest. More specifically, during the 1980s, the (traditional) shareholder primacy dogma was contested by the stakeholder theory of corporate governance. And the number of public corporate scandals and the support for such alternative theory of corporate governance seemed correlated. This discourse was also present in Europe. Recently, the more mitigated theory of shareholder enlightenment appears to be preferred.

[206] Pozzo (2021b).

[207] Framework Decision 2003/568/JHA.

2005/29/EC and various national consumer codes. The 2011 Green Paper on Corporate Governance and the EU Action Plan on Human Rights and Democracy 2015-2019 also collectively require European corporations to significantly consider stakeholder interests when carrying out business operations, including when choosing business partners. Finally, related to reporting issues of CSR initiatives and the risk of greenwashing, Directive 2014/95/EU regulates how public companies should disclose non-financial information (such as efforts made in compliance with CSR programs, often included in or linked to corporate codes of ethics) in their annual reports.

In this context, national laws such as the UK Bribery Act 2010 and the Modern Slavery Act of 2015, the French Criminal Code and Loi n. 2016-1691, the German Sustainability Code of 2011 and the *Gesetz zur Bekämpfung der Korruption* of 2015, as well as Italian Legislative Decree No. 231/2001 also play an important role in the sustainability discourse.

All these legislative initiatives illustrate, on the one hand, a general trend to promote an organizational culture of compliance and ethical behavior and, on the other, a relative convergence of regulation on related issues. What is more, this trend can also be seen on an international level through various agreements, treaties, conventions, guidelines and standards. To name a few: The Universal Declaration of Human Rights (1948), the OECD Guidelines for Multinational Enterprises (1976), the United Nations Conference of the Earth Summit (1992), the Rio Declaration (1992), OECD Convention on Bribery (1997-2000), the UN Global Compact (2000), the UN Convention Against Corruption (2003), UN Global Compact adopts 10th principle against corruption (2004), the UN Guiding Principles on Business and Human Rights (2011), numerous international labor organization (ILO) conventions, and various ISO standards (including ISO 26000, ISO 45001, and ISO 9001).

In any case, what is important to remember in the context of the current contribution is that sustainable development means economic growth for the current generations, but it also implies a commitment to future ones. And the idea of leaving future generations at least the same level of opportunity as current generations have had, although simple in theory, seems much more difficult to achieve in practice: because policy makers must understand which legislative measures must be taken to achieve this magical balance between the needs of today and those of tomorrow. This question leads to an investigation of what concrete legal instruments will allow the Sustainable Development Goals to be implemented effectively.

An analysis of the trends in comparative law to achieve these objectives reveals that, in recent years, there is certainly a reinterpretation of the classical/traditional instruments of private law to achieve a more efficient involvement of all parties in environmental protection. It is also possible to observe, however, that in interpreting these instruments of private law from the perspective of environmental protection and defense against certain new phenomena, the classic distinction between private and public law that characterized legal systems in the past has been overcome. At the same time, this is a sector where the circulation of models takes place at the speed of light. Because once it is seen that an instrument works (be it a system or a rule), it is easy to copy it. It if works, copy it. And it is easy to copy it because sustainability deals with problems (such as the environment) that affect basically all countries at the same time with exactly the same characteristics. It is not a problem that scholars have been trying to solve since the establishment of the French *code civil*. It is not a problem addressed by Blackstone. Instead, it is a problem that emerges at about the same time everywhere with the same fallout. And if a tool works in Germany, there is a presumption that it will also work in Japan, and also China. Obviously, it is not as simple as a mere translation or "legal transplant"[208], but this adaptation gives rise to a very rapid circulation of models.[209]

Then there is the development of new legal instruments to better achieve the objectives of sustainable development.

So, in Europe, starting from the Fifth Framework Programme, but also with the command-and-control rules, it is possible to observe that the instruments of private law have also been taken up at the community level to ensure that there is a range of tools available to achieve a broad and all-encompassing discourse on sustainability and environmental protection. The tools involve all levels of society in a spirit of co-responsibility requires a deepening and broadening of the instruments put in place to complement regulatory and legislative action, including: market and other economic instruments; research and development, information, education and training; financial support mechanisms; and voluntary projects. At the same time, the Fifth and Sixth Framework Programmes advocate a market that favors preservation of the environment. In sum, it is possible to note a new integrated approach that increasingly involves both citizens and businesses alike.

[208] On the problems of legal translation, *see generally* Gambaro (2007); (2012); Pozzo (2011); Pozzo (2019); Pozzo (2014); Pozzo (2012); Pozzo (2007).

[209] *See generally* Pozzo (2017b); Pozzo (2016).

As concerns market instruments, these are aimed at raising awareness of producers and consumers to use natural resources responsibly and avoid pollution and waste production through the internalization of external environmental costs (through economic and fiscal incentives and disincentives, the principle of liability, etc.). Indeed, the Sixth Environmental Action Programme (2002-2010) aims to get the market to work in favor of the environment, through better collaboration with the industrial world; to introduce incentives for companies with the best environmental performance; to promote a transition towards greener products and processes; and to encourage the adoption of eco-labels to allow consumers to compare similar products on the basis of their environmental performance. Regarding the new integrated approach, the market begins to increasingly involve citizens, businesses and other stakeholders; measures are taken to induce changes in public and private production and consumption patterns that negatively affect the environment. And these exact objectives are repeated in the Seventh Action Programme ("living well within the limits of our planet"). All policy instruments must be considered (e.g., economic incentives, market-based instruments, information obligations, voluntary measures and instruments). It provides for a combination of policy instruments to help economic operators and consumers gain a better understanding of the environmental impact of their activities and manage it.

But then, in practice, the foundations of private law (i.e., property, civil liability, contract) are also reinterpreted and adapted to become useful and necessary tools in this very context. Therefore, liability for environmental damage, proprietary instruments, voluntary agreements, environmental contracts—these are all experiencing a season of great vivacity, of great development, precisely because they seem to be the most useful, the most appealing, the most harbingers of good results within the sustainability discourse.[210]

On liability for environmental damage, it is clear that civil liability that is being redesigned with different boundaries and instruments, a notion created ad hoc with repair methods invented from scratch. The above paragraphs note Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, which establishes a new notion of damage, new rules on legal standing, and new compensation criteria. As regards ownership, it is sufficient to consider that the emission trading legislation is based on the idea that there can be ownership over the emission allowance. And this, in turn, leads to trading in the allowance

[210] *See generally* Pozzo (1997); Jacometti (2013); Jacometti (2010); Jacometti (2007).

trading market, which is supposed to lead to a decrease in pollution. The idea behind the use of proprietary tools is that environmental degradation is the result of incomplete allocation of property rights over the use of natural resources. So we see the creation of new rights to use resources or pollute the environment – rights that can be traded in the market. In this way, the market is used to allocate a scarce resource, i.e., the ability of the environment to absorb pollutants efficiently (tradable pollution right/ETS). And ownership also becomes a way to allocate responsibility for harm caused or for an activity owed. In terms of voluntary agreements, instead, it is possible to note a sort of "contractualization" of environmental law.[211] This means that also under the profile of voluntary agreements and under the profile of the use of the contract, modern society is witnessing a season that is a harbinger of excellent results. Namely, since the 1990s there has been much attention and debate in the EU on the use of voluntary agreements to achieve sustainable environmental and energy policy objectives. To improve energy efficiency or reduce CO_2 emissions, the EU and its member states have implemented measures to address climate change legal requirements.

And, for the comparatist, measures aimed at achieving sustainability are particularly interesting with respect to the circulation of models because models circulate very quickly. That is, models that are ideated and applied in very particular contexts are then exported internationally. Therefore, for the comparatist, the circulation of efficient models on environmental protection is not only rapid, but it is also very appealing. For example, Mexico's 2013 *Ley Federal de Responsabilidad Ambiental* (Federal Law on Environmental Responsibility) is nothing but an improved version of Directive 2004/35. It was obviously inspired by Directive 2004/35, but the Mexican government added an entire section on evidence and on the environmental process (which is absent in EU Directive 2004/35). No matter that it has never been applied in Mexico, because – at least formally – it is certainly an excellent initiative. Another example is found in the Chinese Environmental Liability Law of 2009, which was inspired by the German Environmental Liability Law of 1991. Similarly, the market-based instruments that were introduced in the Kyoto Protocol and that gave concrete form to the Global Convention on Climate Change are also certainly inspired by the U.S. experience (which never joined the Kyoto Protocol).

Furthermore, if one considers the traditional schools of thought on the circulation of the models, the works of Rodolfo Sacco come to mind, according to which models circulate either

[211] *See* Jacometti (2021b).

because of their incredible prestige (e.g., the Pandectists in Italy), or because of an imposition (e.g., the *Code Napoléon* in places under French rule, such as Belgium, Luxembourg and parts of Germany and Italy, and even Louisiana, and common law in English colonies). In other words, traditionally, the profound motivations that have led to the adoption of foreign rules or institutions can be traced back to the prestige to which a legal model at a given historical moment (Pandectics), or to imposition (the *Code Napoléon*, Common law). Nowadays, instead, models also circulate because they are efficient (whether effective or presumed). And this is especially evident in the field of environmental protection and sustainability, and economic efficiency. However, efficiency can also mean the ability to achieve a certain goal. For instance, a model can be implemented to enter a specific market or dialogue with a particular actor (such as the EU). And, again, countries – like Korea or Japan – can dissect models and adapt them to make them part of their own national systems, sometimes because they find these laws to be efficient, or effective, or maybe even just because they want to dialogue and do business with certain countries or market actors. In this sense, both prestige and imposition become mere keys to interpreting a phenomenon that is constantly evolving and can therefore be reread and reinterpreted in the light of the most recent developments. In fact, these classic criteria have been integrated with the criteria of economic efficiency (true or presumed) of a given legal model, which can be also considered a new way to reinterpret the concept of prestige, as well as a valid reason to impose it in a supranational or international context. Furthermore, as concerns sustainable development, whether a model or instrument circulates clearly depends more on whether it is considered efficient, rather than culturally authoritative. And insofar as it is efficient, it may also be used as a reference model when negotiating international treaties or agreements.

At the same time, one must be mindful of the unique characteristics of these models that are developed and implemented in a specific legal and cultural environment, as well as the framework (both in terms of legal formants and cryptotypes) in which they must be applied. In fact, one of the challenges of such a rapid circulation of models is due precisely to an apparent lack of attention to the particular legal process of the system of arrival, or with a path dependence that will vary from context to context, of factors that affect the concrete effectiveness of the instrument or the “stilted” rule. Not to mention the problems of legal translation of the “stilted” rule that sometimes undermine the functioning of the system.

On this point, in a 1996 ruling by the Supreme Court of India, the Supreme Court[212] judges stated: "If the mere enactment of laws relating to the protection of environment was to ensure a clean and pollution-free environment, then India would, perhaps, be the least polluted country in the world. But this is not so. There are stated to be over 200 Central and State statutes which have at least some concern with environment protection, either directly or indirectly. The plethora of such enactments has, unfortunately, not resulted in preventing environmental degradation which, on the contrary, has increased over the years." And, as concerns the European context, if Europe now—with its European Green Deal, with the Commission's 2019 Communication[213]—wants to become a "trend-setter" in environmental and sustainability issues, including the fight against climate change and the circular economy, it must also be aware of these phenomena.

In any case, it is interesting to note that despite the different paths initially chosen—and namely, that American policy has primarily relied on self-regulation, whereas Europe has mainly used legal obligations—it is possible to note a general convergence and the trend for both nations to impose more responsible and sustainable practices on businesses and consumers. In this sense, it is also possible to note a dual, reciprocal circulation of models: America, on the one hand, is said to be the birthplace of codes of ethics, and Europe, on the other, has a predisposition – due to its history of codification – to regulate. Over the years, it is possible to notice a certain exchange of instruments. Indeed, codes of ethics have made their way into the schemes of European market regulators and American lawmakers have gradually increased regulation, with the two often resembling the other such that it is possible to argue there is a general convergence of systems—at least as concerns the sustainability discourse.

[212] *Indian Council for Enviro-Legal Action v. Union of India*, 1996 (5) SCC 281, 293.

[213] Com(2019) 640 Final.

CHAPTER 2: The Fashion Industry

Chapter 1 briefly discussed the concept of sustainability and the sustainability movement in general, also highlighting its relevance as a matter of public interest. Chapter 2 will attempt to use the fashion industry as a reference point (or case study) to analyze how the various instruments – both legal and private initiatives – have influenced the industry over the years, with the aim of shedding light on the sustainability dilemma within this specific sector of the global economy.[214] The discussion will begin with a relatively succinct description of the fashion industry, focusing on the three – economic, social and environmental – "pillars" of the sustainable development discourse outlined in Chapter 1. Hence, the discussion will begin with a brief overview of the industry's economic and social impact, followed by a presentation of the environmental risks posed by the current consumption model. The subsequent paragraphs, instead, will illustrate how the sustainability movement has influenced the fashion industry in general, both in terms of the trends that have emerged over the period and industry responses to legislative and consumer demands for more responsible practices. In this last context, some relevant international initiatives and local legislation will be highlighted for the purpose of demonstrating how sustainability initiatives have come to take on a 360-degree approach and reshape specific aspects of private law. We will also see how the circulation of models is particularly effective in this field, due to the relatively similar circumstances that have developed around the world at (more or less) the same time.

I. Description of the fashion industry

The fashion industry generates trillions of dollars each year. However, it also leaves a large environmental footprint by operating according to an intricate globalized supply chain (meaning the effects of its practices are potentially far reaching), at a significant social cost to producer countries. Thus, the fashion industry impacts all three pillars of sustainable development, making it possible to analyze such discourse in the context of the fashion industry.

[214] Although not discussed in this contribution, economic stability is also fundamental for sustainable development. *See generally* Peroni (2020).

Economic impact

To understand the economic impact of the fashion industry, it is fundamental to begin from an understanding of the term "industry". That is, if an "industry" may be defined as a cluster of enterprises operating in the same economic or business sector, then "fashion industry" is comprised of all the enterprises whose business purpose is, directly or indirectly, tied to apparel and other fashion accessories. Indeed, hundreds of companies[215] are involved in fashion operations worldwide. According to a report by the California Fashion Association, manufacturing is only a fraction of the modern apparel industry as "it is a highly sophisticated industry involving fashion and market research, brand licensing/intellectual property rights, design, materials engineering, product manufacturing, marketing and finally, distribution."[216] And the physical presence of fashion companies is astounding. For example, by the end of 2016, Inditex (the parent company of Zara) operated 7,292 retail stores in 93 markets.[217] As a result, the fashion industry generates trillions of dollars[218] annually and employs millions[219] of people with varying skill levels (from skilled designers to unskilled garment workers, as well as agricultural workers), geographically dispersed over a global supply chain. To put it in perspective, in 2016, Inditex reported €23.3 billion in net sales, ranking third among the world's 20 largest apparel companies according to Forbes Global 2000 ranking.[220] As concerns the importance of the fashion industry for national economies, in the United States, approximately 1.9 million people are employed in fashion-related industries, representing 4% of the labor market.[221] Similar figures are reported with regard to the European labor market,

[215] Including, for example, major retailers, wholesalers, large design houses and one-person design shops. *See* "Top 100 Companies" (providing a list of the top 100 companies). The industry additionally includes computer programmers, lawyers, accountants, copywriters, social media directors and project managers. And then there are the laborers involved in the cultivation and manufacture of products materials, the garment workers employed in textile factories, as well as all the related industries (such as printing businesses, logistics and transportation services, and the like).

[216] Chavan (2018).

[217] Simionato (2021).

[218] It is responsible for approximately 2% of global GDP and, in 2017 alone, Euromonitor International estimated the industry had grossed around $1.7 trillion, or roughly €1.4 billion, corresponding to a 4% growth increase compared to the previous year. And had it not been for the Covid-19 pandemic and global industry downturn, the industry would have likely achieved an additional 2% growth by 2022 ("Global Apparel and Footwear Valued at US$1.7 Trillion in 2017, yet Millions of Used Clothing Disposed of Every Year" 2018).

[219] Estimates range between 60 million and 75 million people.

[220] Debter (2008); Murphy et al. (2021).

[221] Fashion United (n.d.).

where the textiles and apparel industries employ between 1.7 million people (accounting for about 6% of employment in the manufacturing sector in 2013)[222] and generate a turnover of €166 billion.[223] According to the State of Fashion 2020, 50% of the top 20 players were based in Europe in 2018; Amed et al. (2019) clarify that these top market players were responsible for generating an aggregate profit of $11.5 billion. In developing countries, where much of the production takes place (and particularly China, Bangladesh, India, Pakistan, Vietnam, Cambodia, Indonesia, Sri Lanka, South Korea, and The Philippines), the fashion industry represents a significant source of Gross Domestic Product (GDP) and provides jobs for much of the labor force. In 2014 alone, the European Parliament estimated that China housed more than 100,000 manufacturers and employed over 10 million people in fashion-related sectors. Bangladesh was stated to be the second biggest exporter of textiles and clothing, next to China, with textiles and clothing representing 85.9% of all exports. Similarly, in Cambodia, the garment industry accounts for about 80% of the country's GDP. In India, textiles and clothing made up about 4% of GDP and 11% of the country's export earnings in 2014. Next to agriculture, these fashion sectors are said to constitute the second largest provider of employment for Indian laborers. Fashion contributes to 9.5% of GDP and gives jobs to around 15 million people in Pakistan, accounting for 30% of the country's workforce. In Vietnam, textile goods account for around 15% of the country's exports; in 2014, over 3,800 textile companies were located in Vietnam, employing about 2.2 million people. And, with the United States and Europe constituting the two most important markets and therefore trading partners with these countries, it is significant that in 2019 the United States imported 32.59% of textiles and clothing from China, 12.09% from Vietnam, 7.37% from India, 5.15% from Bangladesh, 4.34% from Mexico, and 38.47 from other 201 partners.[224] Likewise, more than 70% of Europe's imports of textile and clothing come from Asia.[225] Thus, it is clear that the fashion industry plays a substantial role in the development of a variety of countries. In a nutshell, "if the fashion industry were ranked alongside individual countries' gross domestic product, the global fashion industry would represent the world's seventh-largest economy."

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[222] D'Ambrogio (2014).

[223] European Commission (n.d.) "Internal Market, Industry, Entrepreneurship and SMEs".

[224] World Bank. *See* Freund, Roop, and Colby-Oizumi (2018) (providing statistics from the United States International Trade Commission in 2017, reporting similar figures).

[225] The report by the European Parliament, stating that more than 70% of EU imports of textile and clothing come from Asia and providing more detailed statistics on textile and clothing exports, as well as the number of laborers employed by such sectors in each country (Parlement Européen 2014).

The above figures are possible due to the fashion industry's complex and highly intricated supply chain, essentially based on a subcontracting[226] model whereby production is decentralized by shifting production from one entrepreneur to another. Subcontracting is a practice applicable to just about every sector (whether industrial or artisan), including agriculture. And, in the case of the fashion industry, this practice is represented by the fact that buyer countries tend to outsource the various stages of production of a fashion design to a designated and specialized producer-supplier.

As for the legal notion of subcontracting, Feola (2016) notes that – according to the definition contained in Art. 1 of Italian Law No. 192/1998, which, for the first time, intended to provide an organic discipline within the Italian legal system – subcontracting is the performance of work "on semi-finished products or raw materials supplied by a client company or in the supply of products or services destined to be incorporated or, in any case, to be used within the economic activity of the client or in the production of a complex good, in compliance with executive projects, technical and technological knowledge, models or prototypes supplied by the client company." In this sense, the Italian legal notion of subcontracting is inspired by the earlier-established EU notion. More precisely, Feola (2016) observes that, already in 1978, the Commission issued a Communication (of 18 December) on subcontracting contracts in accordance with Art. 85(1) of the Treaty establishing the European Economic Community[227], that precisely states "contracts, whether or not they are concluded following an order from a third party, whereby an undertaking, known as the 'principal', instructs, by giving instructions, another undertaking, the 'subcontractor', to manufacture products, provide services or carry out work for the principal or on his behalf." At the same time, despite subcontracting is broadly applied throughout the fashion supply chain, it is important to note that the legal definition expressly denotes two *entrepreneurs*. This means that subcontracting technically does not apply when the client is an entrepreneur (e.g., a fashion company) and the supplier is a natural person (e.g., a garment worker or a designer). To get around this technicality, interested parties may use another legal instrument (such as a limited partnership or a limited liability company), thereby "masking" the subcontracting relationship with another legal form. Under the Italian system, however, Feola (2016) correctly observes that subcontracting is not part of the "single

[226] There is little legal literature on subcontracting. However, some scholarly works include: Draetta and Vaccà (1993); Feola (1998); Iudica (1998); De Nova (1998); Caso and Pardolesi (1998); Cuffaro (1998); Priscoli (1998); Alpa and Clarizia (1999); Bertolotti (2000); Longu (2000); Prosperi (2002); Musso (2003); Maugeri (2003); Berti and Grazini (2004); Maugeri (2012).

[227] In Gazette No. C001, January 3, 1979: 0002 - 0003.

contracts" provided under the Italian civil code. Accordingly, it is not possible identify a single discipline applicable to all "types" of subcontracting relationships, just as it is impossible to identify a single structure of the *negozio*. Indeed, the law on subcontracting applies to an infinite series of exchange contracts, including employment contracts, sales contracts (e.g., one-time sales with real effects, sales with various deliveries, compulsory sales), exchanges of services.[228]

In terms of how this model became widely diffused along the fashion supply chain, one must essentially note how the industry has evolved since the 1950s.[229] Indeed, while the phenomenon of outsourcing emerged in around the 1980s, the market conditions for such model were established gradually following the post-war recovery period of the 1950s. That is, it was in the late 1950s that mass consumption (or "consumerism") became more or less commonplace and a "waste culture"[230] first emerged in Western societies. This period coincides with "the emergence of a capitalist economy and consumer-based culture in which the value of goods played a role in the performance of a modern identity,"[231] and the fashion industry benefitted significantly from such post-war rise of consumerism. More specifically, after a period of ultraconservatism[232], by the 1950s, people were eager to wear luxurious fabrics and lavish style clothing. In women's fashion, Christian Dior released a collection called the "Corolle Line" (later renamed the "New Look") that emphasized voluminous skirts and heavy pleating. The craze for luxurious apparel was also apparent from looks by Cristóbal Balenciaga, Hubert de Givenchy, Coco Chanel, and Pierre Balmain. Men's fashion embraced the "Bold Look" in response to the reserved style that characterized men's dress for much of the first half of the 20th century. Add such demand to the technology developed during the war period to mass produce textiles and apparel (necessary to manufacture millions of military uniforms) and the ever-growing middle class, and it is apparent how market conditions fostered the

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[228] Feola (2016).

[229] It is also interesting to note that, in 1931, the Garment District in New York had the highest concentration of apparel manufacturers in the world (Jackson 2010; "Garment Industry Historical Overview" n.d.).

[230] This term is frequently associated with Stella McCartney. However, it is not a new concept. For instance, Lawrence Alloway refers to the "aesthetic of abundance" to describe a culture that sought a sort of "over-crowding" of goods and products (Whiteley 2012). These themes were also addressed by Andy Warhol's Pop Art, which depicted the changing relationship between consumer goods and the waste produced by consumer surplus.

[231] Craik (2009) 91.

[232] imposed by the depressed global economy following the Great Depression in the 1930s and then World War II in the early 1940s.

democratization of fashion through the establishment of new fashion magazines (such as *Vogue* for women and *Esquire* for men) to promote the latest styles, as well as huge department stores (like Sears and J.C. Penney) to sell them.

The 1960s and 1970s, instead, experienced significant social turmoil. It was the period of the civil rights movement and the Vietnam War. Legislation such as the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Fair Housing Act of 1968, and the Education for all Handicapped Children Act of 1975 are characteristic of this period. As concerns case law, among the many noteworthy cases, there were Engle v. Vitale[233] and Tinker v. Des Moines Independent Community School District[234], in the 1960s, and Roe v. Wade[235] and Milliken v. Bradley[236] in the 1970s. And, in terms of fashion trends, it is relevant that the 1960s and 1970s were accordingly characterized by a variety of competing fashions. For instance, there were the elegant styles of Jacqueline Kennedy and Audrey Hepburn. Then there were the "mod look" and "beatnik fashion" with their short haircuts, flat shoes, and little makeup. The "rockers" had a scruffy or rebellious style of leather jackets, heavy jeans, and biker boots, while the "space age" look mixed new materials such as acrylics with colored prints. Indeed, the fashion trends changed relatively rapidly, and it may even be argued that they were consistent with the period's social movements (e.g., civil rights and the second wave of feminism). That is, as women fought for equality and independence (and both men and women generally against traditional images), fashion styles changed accordingly and reflected both a growing struggle for (female) independence and individualism. Women wore bright colors. Miniskirts/minidresses and pants (trousers) became popular. It was stylish to wear crop-tops and/or go braless. Men traded bland gray suits for more colorful apparel. Their ties became bolder and wider. The buzz-cut was replaced by longer hair and a more groomed look. The "t-shirt and jeans" look caught on. Thus, the 1960s and 1970s political and legal debates about civil freedoms and the nature of equality reached as far as the fashion houses and were also expressed in the form of popular culture and middle-class apparel. And no matter one's preference, it was obvious that the *dernier cri* was increasingly casual and individualist, and there was a general ideal that fashion should be available to everyone.

[233] 370 U.S. 421 (1962).

[234] 393 U.S. 503 (1969).

[235] 410 U.S. 113 (1973).

[236] 418 U.S. 717 (1974).

Therefore, by the 1980s, as demand and competition among fashion brands increased, significant market pressure for reduced prices meant that companies had to shift production to markets where labor and manufacturing was cheap, resulting in the global economy witnessing the rise in offshore manufacturing and therefore globalization. As discussed in Chapter 1, the decision to move production overseas was partially influenced by the costs of labor and government restrictions on businesses. Advances in transportation, the spread of technology to developing regions, and the abandoning of protectionist policies in favor of free trade agreements were additionally important. For instance, in a 1997 article by economist Mark Mittelhauser in the Office of Employment Projections, Bureau of Labor Statistics, it is noted that "According to the U.S. International Trade Commission, roughly half of the total productive capacity in the apparel industry has shifted from developed countries to [less-developed countries] over the past three decades[237]. Many of these nations now play a key role in textile and apparel trade with the United States, as is clear from the data on exports and imports. Several least developed countries (LDCs) are among the top 10 countries receiving U.S. textile and apparel exports. As for imports, the largest supplier to the United States is China, followed by Hong Kong, Mexico, Taiwan, and South Korea. Among the major suppliers, apparel imports are growing most rapidly from Mexico, the Dominican Republic, Indonesia, and India. The primary incentive for transferring certain phases of production to LDC's is the lower cost of labor in these countries. It is estimated, for example, that the average apparel worker in Honduras earns about 10 percent of the hourly wage of a comparable worker in the United States."[238]

Similar circumstances characterized the European market during the same period. During the 1980s, the European Economic Community began implementing outward processing relief arrangements to protect domestic production and take advantage of lower labor costs in neighboring countries.[239] This implied the "temporary export" of raw materials and intermediary products, which would be processed or assembled abroad and then subsequently returned to the European market with partial or total relief from import duties. In other words, European Community companies were encouraged to identify foreign production partners to deliver the required quantities, meet the quality standards and respect the deadlines established by their European partner (or "buyers"). For instance, West German textile producers

[237] That is, since the '60s.

[238] Mittelhauser (1997).

[239] Textiles Intelligence (1997).

outsourced to Eastern Europe (e.g., Yugoslavia). Other main destinations for subcontracting in Eastern Europe included Hungary, Romania and Poland, accounting for 47 percent of the total European Economic Community (EEC) production sharing imports from Eastern Europe.[240] And as the number of European Community members increased, textile production was eventually broadly outsourced to Mediterranean countries (such as Tunisia and Morocco).[241] Thus, in the 1980s both the United States and the European Community adopted policies that would be instrumental in the establishment of a supply chain based on the subcontracting model.

In this context – aside from the more publicized social problems arising from a dependent relationship between buyer and producer countries – it is important to note that, in the absence of mandatory rules, the subcontracting model also has potential direct detrimental effects on contracting parties. In this perspective, Italian law provides for a series of mandatory rules aimed at limiting party autonomy and protecting the weaker party to the contract. One of these protections is represented by Law No. 192/1998 which requires sub-contracts to be made in writing[242] in accordance with Arts. 1325, n. 4 and 1418 It. c.c. However, the written form requirement relates only to the proposal, meaning that a subcontractor can also accept such proposal via performance of the undertakings established therein, given the scheme described in Art. 1327 It. c.c. Thus, it is possible for such protection to (in practice) have an adverse effect on the presumably stronger party to the contract to the extent that – in the event the supplier fails to communicate the commencement of work – the party having commissioned the assignment (the "client") might inadvertently subcontract to two different suppliers and ultimately wind up with double the amount of product initially desired (and having to pay for it). Another protection is envisaged under Arts. 2 and 3 of Law No. 192/1998, which dictate

[240] *See* United States International Trade Commission (1989).

[241] Note generally that the EU established a trade partnership with southern Mediterranean countries in 1995 with the launch of the Euro-Mediterranean Partnership at the Barcelona Conference. These trade relations are governed by bilateral agreements established under the framework of the Euro-Mediterranean Association Agreements (European Commission n.d.).

[242] However, as Feola (2016) highlights, such formal requirement – which only refers to offer and not also to the acceptance thereof – may be met by providing proof of email exchanges whereby the terms of the offer (and therefore agreement) are set out in writing, provided there are no subsequent documents establishing anything contrary thereto. In this context, it is noted that such provision is inconsistent with the widespread meaning of a "written contract", nor is it what the legislator intended when he drafted the law on subcontracting. At the same time, if the aim is to protect the weaker party in the sub-contracting relationship, a sort of loose application of contract law is required to achieve the desired outcome (of protecting the weaker party in general, and the subcontractor in particular).

that the contract (*rectius*: the client's proposal) must indicate the "agreed price", and that payment must take place generally within 60 days (and, in any case, no later than 90 days) from the time of delivery or from notification of the subcontractor's performance.[243] However, such language could also mean the price determined (solely) by the proposing client, just as it could be (and usually is) determined via reference to usages (e.g., reference to a supplier price list, if present) or a rough estimate of the amortization costs (e.g., the cost of the samples or the copies is a multiple of the unit price of the product). Additionally, it is important to note that the fashion industry is highly volatile and subject to rapidly changing consumer demands (generally, "fashion trends"). This tends to mean that orders are placed and filled relatively quickly, with little lead time between an assignment and its performance. In this context, it is imaginable that the quantity required by the client can change between the time an order is placed and the time it is filled. For this reason (at least in part), contracts usually contain a commitment by the supplier to deliver products by a certain essential deadline, but *not* a minimum guarantee of orders by the client. Therefore, from a regulatory perspective, it is significant that Art. 6 of Law No. 192/1998 sanctions, with the penalty of nullity subcontract, agreements that entitle the client to unilaterally modify one or more clauses of the subcontract; however, this law permits agreements under which the client may specify, with prior notice and within pre-established terms and limits, the quantities to be produced and the delivery deadlines. Finally, the mandatory provisions of Arts. 1337 and 1375 It. c.c. provide more general protection to both parties to a contract, ensuring that neither will behave in a manner contrary to good faith and fair commercial practices; although subcontractors do not usually go to court on the grounds of mere violations of good faith provisions, given the difficulty of demonstrating a party has behaved in bad faith.[244]

At the same time, it must be observed that abuse of economic dependence (which occurs when one business takes advantage of the economically dependent status of another business, for example, because a contractor fills orders for just one client or a small number of clients, or when limited product supply determines a monopoly situation)[245] is not limited to the

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[243] Note that this rule was established even before the entering in force of Legislative Decree No. 231/2002 regarding the implementation of directive 2000/35/EC on combating late payment in commercial transactions (subsequently amended by Legislative Decree No. 192/2012).

[244] Feola (2016).

[245] Other examples of abuse of economic dependence (outlined in Art. 9 Law No. 192/1998) include, for example, the refusal to sell or buy, the imposition of unjustifiably onerous or discriminatory contractual conditions, the arbitrary interruption of commercial relations in progress, demand to verify the subcontractor's profit margins for the purpose of determining the "appropriate" fee, the imposition of stringent controls on business activity

subcontracting relationship.[246] That is to say, a dependent relationship can also materialize from a continuous business relationship (e.g., repeated supply contract, franchising arrangements, sales concession agreements, agency contracts, credit notes, and so on). Indeed, Art. 9 of Law No. 192/1998 prohibits the abuse of economic dependence, defined as those situations in which the "strong" party uses its status to determine an excessive asymmetry of rights and obligations in business to business (B2B) contracts, also in consideration of the real market alternatives for the dependent party. Therefore, while economic dependence is in itself lawful, it becomes unlawful to abuse such status. Moreover, this prohibition constitutes a general provision aimed at sanctioning bad faith dealings and the "reading in" of unwritten terms favorable to the dominant party at the determinant of the weaker party.[247-248] In this sense, if European laws on abuse of economic dependence[249] support – in theory – sustainable development in non-industrialized countries, it is also true that ideals are not always as simple to put into practice as they are to write into law. That is, one cannot ignore the propensity of parties in these situations to endure unfair treatment not to prejudice important commercial relationships, such as the case in the two above-cited industrial accidents (i.e., the KiK disaster and the collapse of the Rana Plaza).

Moreover, for the fashion industries of developed countries, recourse to the subcontracting model – to the extent that it constitutes a significant legal tool that allows brands to outsource production and maintain operations that require more skilled labor – has meant a shift from manufacturing to focus on retailing and marketing, as well as the manifestation of "fast fashion".[250] And, to maintain competitiveness, it has also meant that the fashion system has

(for reasons other than monitoring compliance with codes of conduct), the imposition of sub-subcontractors, or the stipulation of very long payment terms.

[246] *Corte di cassazzione, sez. un., 25 novembre 2011, no. 24906* clearly expresses the principle that economic dependence and the related abuse are not limited to subcontracting.

[247] According to Pinto (2000), abuse could also occur outside of the contract.

[248] Feola (2016).

[249] Di Mario et al. (2022).

[250] Fast fashion is a term first coined by *The New York Times* in the early 1990s to describe a large sector of the fashion industry that produces and markets cheap and low-quality clothing. As opposed to luxury fashion (which distinguishes itself with few, expensive, classic pieces that are typically classic or not subject to going out of style and represent the "elite"), fast fashion is epitomized by rapidly changing cycles that are incessantly pumped through stores to meet new trends. It represents the extreme democratization of fashion, with cheap and ready-to-wear clothing designed and produced in just two weeks and expected to last roughly ten washes before being thrown away. It is a highly competitive market (examples of fast fashion brands include Zara, H&M, UNIQLO, and Forever 21) and such intense competition drives fast fashion brands to maintain market share by increasing the number of seasons and lowering prices. And the more demand increase, the more

become increasingly comprised of a variety of products introduced in the market according to a cyclical trend linked to the nature of the seasons and past collections. In fact, nowadays, the system is characterized by a continuous product turnover whereby an item is intentionally rendered obsolete to nourish consumer demand for new products. And the more demand, the more products the industry produces.[251] Accordingly, over the years, and especially since around 2000, the fashion system has become more complex and its cycle more rapid.[252]

Thus – unlike the fashion industries in developing countries, which is characterized by low wages and unskilled labor – the fashion industries in developed nations tend to be characterized by higher-paying occupations (e.g., the people involved in the creative process; market research analysists and marketing specialists; computer professionals and graphic designers; fabric and apparel patternmakers; production, planning and expending clerks; installation, maintenance, and repair workers; purchasing agents; marketing and sales managers). Indeed, the European textiles industry has experienced "a gradual shift from lower towards medium and higher-skilled employees." With the European fashion industry comprising 160,000 companies (over 90% of which are small businesses with fewer than 50 employees), employing 1.5 million people, and generating €162 billion in turnover in 2019 alone, European policy attempts to maintain competitiveness through processes aimed at adding value and creating investment opportunities. Some of its strengths include high quality production, innovative materials, and strong brand names. According to the European Commission, sustainability and circularity constitute key challenges for the industry (as reflected in a variety of European policy initiatives). Additional challenges include increased competition (especially from e-commerce), high labor costs and low profit margins, an aging workforce, lack of skills, and

production increases, leading to a vicious cycle of overconsumption and unsustainable production. Fast fashion benefits consumers to the extent that stylish clothes are made affordable to the masses, but the excessive production and consumption harms the environment, especially as the short life spans of cheap clothing contribute to increased textile waste. And therein lies the problem. The fast fashion model promotes incessant consumption of cheap clothing, which tend to be discarded quickly due to its poor quality. Such linear consumption cycle produces large quantities of textile waste (most of which is not biodegradable) and creates significant environmental damage as Earth's natural and finite resources are used at unsustainable rates.

[251] Saviolo and Testa (2005) 10-11.

[252] Although it is possible to affirm that fashion has always been cyclical, in the 19th century this cyclical rhythm was further intensified by the industrial and technological progress realized during World War II. Whereas the cyclical and seasonal nature of fashion once concerned only *haute couture* and a limited ready-to-wear market, from around the 1950s onward, this characteristic has gradually come to impact the entire supply chain of the textile and apparel industry.

high dependence on imported goods.[253] Similarly, the United States is a leader in textile research and development, with its textiles industries focusing on work processes, niche products and markets, and advanced technologies. Although the U.S. textile industry employed just 286,300 people as of September 2020 (almost half compared to the 594,147 reported[254] in 2018), in 2019, it exported $23 billion in textile-related products and imported $311 billion in garments, making the U.S. a significant market for the international textiles industry. Additionally, the New York Fashion Week alone contributes $20 million to the U.S. economy.[255]

Aside from free trade agreements[256] (which governments can use to guide an industry, for example, by imposing tariffs to discourage imports, thereby protecting local jobs and promoting domestic consumption), contract law is also an important tool for regulating commercial relationships among industry players.[257] Additionally, the trend for fashion retailers in developed countries to opt for increasingly flexible commercial arrangements reflects the growing vulnerability of the fashion industry to volatile consumer demand. And this is especially true as online shopping becomes more popular. More specifically, to cope with the fixed costs of maintaining a physical store for customers to "experience" fashion, more and more department stores are characterized by the so-called "corner" (or the "shop-in-shop") model. Furthermore, as competition and pressure to constantly stimulate consumer senses increases, this model has been further elaborated such as to create the "pop-up shop-in-shop" to satisfy the needs of consumers and mitigate the retailers' risk of being left with unsold (seasonal) merchandise. Indeed, Cerchia & Piccolo (2020a) note that: "The in-store experience[258] is crucial for attracting customers, especially in an era where shopping can be

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[253] (European Commission n.d.).

[254] Moran (2019); Mordor Intelligence (n.d.).

[255] *See generally* Freund, Roop, and Colby-Oizumi (2018); International Trade Administration (n.d.).

[256] Although free trade agreements will not be discussed in this contribution, it must be recognized that the fashion industry – in its globalized formation – is inherently sensitive to the politics of cross-border trade. For a non-legal but informative report, *see* Amed et al. (2019) (noting, in particular, "The Fashion Market and 'Trade 2.0'".). *See also* (European Commission n.d. "International Trade"; U.S. International Trade Administration n.d.). *See generally* Trebilcock (2021) (especially as concerns the recent US-China trade war, which has a significant impact on the fashion industry due to heavy reliance on Chinese producers for several accessories and other textile materials); Bhagwati (2002).

[257] For an overview of the types of contracts used in the fashion industry, with a particular focus on distribution models, *see generally* Cerchia (2016); Lanna N. and Bernardi (2021); Maietta (2018); Giannini (2021).

[258] The in-store shopping experience relates to the retailer's customer engagement and relationship-building strategy, and occurs when a customer, rather than purchasing online, walks into a shop. Therefore, factors such

done with the click of a button.[259] It is therefore not surprising that the well-known concession model has grown in popularity in recent years. The model is governed by contracts that developed in English law, although they have since circulated globally and been transposed into national law in various jurisdictions."[260] They note that, until a few years ago, the wholesale distribution[261] model was a relatively popular way of marketing fashion items. However, since such arrangements also transfer the risk of unsold inventory to the retailer,[262] over the years these contracts have tended to include a provision that effectively transfers risk back to the manufacturer, making the wholesale model less attractive for brands.[263] In this context, the concession model[264] provided a solution whereby brands could establish single-brand corners within department stores, allowing control over product sales and distribution, without incurring certain risks of setting up a physical brick-and-mortar shop. But these arrangements, too, present challenges and require "a well thought-out, well structured, meticulously drafted and balanced agreement that takes into account the interests and concerns of the parties." And the more volatile the retail market, the more important it is for fashion lawyers to pay attention to details, such as clauses for inactivity (as evidenced by the recent Covid-19 pandemic). At the same time, Cerchia & Piccolo (2020a) highlight how – in response to rapidly changing consumer demands – commercial arrangements tend to be increasingly flexible. In this perspective, they note "the 'pop-up shop-in-shop' (i.e., a temporary or even seasonal corner) is one example of how brands and department stores have responded to today's shoppers' expectation of constant innovation, due – at least in part – to the frequency

as friendly, approachable and/or supportive sales staff, displays, merchandise organization and store layout, click-and-collect services, the checkout experience (e.g. number of registers, in-app or self-checkout options, contactless payments), presence of a kids area (where children can stay occupied while parents shop), number of changing rooms, and other elements that cater to customer needs influence whether customers prefer in-store to online shopping, for example. On the so-called 'in-store experience', *see generally* Cavaliere (2020); Som and Blanckaert (2015); Soysal, Zentner, and Zheng (2019).

[259] On the difference between online and in-store shopping experiences, *see* Soysal, Zentner, and Zheng (2019); Pecoraro and Uusitalo (2014); Chevalier and Gutsatz (2020).

[260] Cerchia and Piccolo (2020a) 2.

[261] On the wholesale distribution model, *see generally* Lu, Zhang, and Tang (2019).

[262] On management strategies for unsold fashion apparel and accessories, *see* Butz (1997); Elia (2020); Allwood (2018); Brewer (2019); Dwyer (2010).

[263] On contractual terms providing for returns of unsold merchandise, *see* Sarker (2014) (on the various consignment policies used in inventory management); Kandel (1996) (discussing generally the factors that affect contract choice in retail sectors).

[264] On the concession model, *see, inter alia,* Cerchia (2016); Adida and Ratisoontorn (2011); Chevalier and Gutsatz (2020); Pellegrini and Reddy (2013).

and speed at which fast fashion and social media bring new collections to the attention of fashion consumers."

Nevertheless, in industries such as (fast) fashion that are not only subject to but also rather dependent upon rapidly changing consumer tastes, subcontracting becomes fundamental to the extent that it represents a mode of production that allows the firm to realize various designs at reduced fixed costs. In fact, outsourcing produces the same result for the brand (i.e., the creation of a product) without purchasing or renting necessary machinery or hiring specialized labor necessary for their realization.

However, the subcontracting model is not risk-free. It also has potential social costs, which are particularly evident in the fashion industry.

Social impact

Although the tendency to outsource production is well established (the fashion industry is a good example), it is also extremely common for sub-suppliers to sub-contract to one or more sub-suppliers, and for the latter to further contract out production or services. At the same time, Feola (2016) highlights that these sub-subcontracting arrangements tend not to emerge from formal sub-contracts. That is, contracts between suppliers and sub-suppliers often omit reference to an "upstream" assignment, generating a sort of opacity in the supply chain as sub-suppliers attempt to conceal relationships with additional sub-suppliers, the name of their principals and the details of any sub-supply contracts. According to Feola (2016), such obscurity is induced by several factors, including the desire to limit liability and prevent the diffusion of sector specific know-how which might constitute one supplier's competitive advantage over another. In terms of the social impact, it is no secret that the further down the supply chain one goes, the lower the wages paid to workers. Sometimes, an employer's desire to secure a certain profit margin with each assignment translates to unsafe working conditions or other "corner cutting" to the detriment of workers. Lack of a formal employment relationship may also constitute a cost-cutting strategy to the extent the employer is alleviated of a series of fiscal or similar obligations on behalf of an employee. Sometimes laborers have no protection at all, working from home or other conditions that constitute a sort of "black" labor market.

Another risk is represented by the opposite scenario in which a sub-supply contract makes express reference to the upstream contractual relationship. In this case, such contractual link

justifies and even imposes the application of the legal discipline of "subcontracts". In the fashion industry (which, it must be recalled, increasingly depends on certain sources and short lead times), these sub-contracting relationships are often the result of a careful check of a potential partner's productive and organizational capacity. Sub-suppliers are frequently either identified or imposed by the client himself, and buyer companies usually reserve the contractual right to supervise operations and conduct factory audits or spot controls to ensure compliance with certain buyer-imposed standards, such as codes of conduct or codes of ethics (see *infra*, Chapter 3). Additionally, the inherent specialization involved in the subcontracting model enables economies of scale in which – as is especially evident in the fashion industry – each subcontractor is increasingly dependent on the party (often a subcontractor itself) closest to the "buyer" company. In fact, suppliers must often cater to client demands *and* manage a series of challenges related to further sub-contracting relationships. Again, the social impact is evident if one considers, for example, the potential for abuse of such a dependent relationship.

According to Feola (2016) the current legal environment offers – albeit abstractly – adequate protection capable of achieving balanced market conditions and economic efficiency. However, in practice, Feola (2016) notes that the contracts which govern such subcontracting relationships rarely provide a clear discipline for the commitments undertaken. For instance, perhaps the parties neglect to consider such details or they lack the technical capacity to draft such a contract (consider, for example, a small enterprise that lacks in-house counsel and must rely on an external consultant to provide continuous assistance). Another reason could be attributed to the brief period between the date of assignment and the deadline for execution of the subcontract; given the limited time available, the parties might prefer to concentrate their resources on operational aspects.[265]

As stated above, the subcontracting model has allowed many Western fashion brands to outsource production to countries where labor and manufacturing costs are relatively cheap. On the one hand, the presence of foreign direct investment (FDI) contributes to development in these countries. On the other hand, outsourcing has also resulted in the establishment of a dependent relationship that induces developing countries to relax or not enforce legislation that might deter multinational companies from incorporating or generally doing business abroad (the "race to the bottom"). For workers – and especially textile workers – lack of labor protections and/or enforceable laws means that the subcontracting relationship only

[265] Feola (2016).

exacerbates social problems inherent to an industry based on a model of production that drives costs (and therefore wages) down with each "link" added to the supply chain. Meaning that the more sub-contractors involved to produce a fashion item, the lower the wages at the source of production. Furthermore, the above-mentioned opacity of the supply chain (facilitated by the diffusion of the subcontract model) makes it difficult for buyer companies to monitor working conditions within the factories of their various suppliers, especially when the identity of sub-suppliers is unknown to parties "upstream". And the more difficult it is for a buyer-retailer to supervise distant producer-suppliers, the greater the opportunity for the latter to commit human rights violations. Indeed, much of the fashion industry's so-called "social problem" is attributable to the structure and opaque supply network of the textile sector.

In a briefing by the European Parliament, it was noted that:

> "As fashion becomes increasingly globalised, garment and footwear production has shifted to low-wage, mostly Asian countries. Thanks to lower manufacturing costs, clothes have become increasingly affordable for European consumers. For developing countries, fashion exports create jobs and growth, helping to bring poverty rates down. While there are benefits on both sides, the fashion industry highlights inequalities between the global North and South. With almost unlimited flexibility between countries and factories, European and North American brands and retailers can dictate conditions to developing-country manufacturers, forcing them to cut costs in order to compete. The ultimate victims are factory workers, toiling long hours in harsh and sometimes dangerous conditions, for wages that barely enable subsistence. In many countries, restrictions on trade unions make it harder for workers to assert their rights. With employers reluctant or financially unable to invest in safety, many have died in industrial accidents, such as the Rana Plaza building collapse in Bangladesh, which claimed over 1 000 lives. Decent work has become a priority for the United Nations, the International Labour Organization and other international organisations. The EU supports decent work, for example through its international trade agreements. European consumers and companies are also increasingly interested in sustainable fashion. After the Rana Plaza disaster, over 200 mostly European companies joined the Bangladesh Accord, which has helped to eliminate some of the worst safety hazards. While these are positive developments, a lot more still needs to be done."[266]

To illustrate this point, one might recall the Nike sweatshop scandal of the 1990s that involved consumer protests, boycotts and heavy media attention after a report detailing the low wages

[266] Russell (2020).

and poor working conditions in Nike's Indonesian factories. Although the '90s Nike scandal apparently sparked an investigation into the working conditions in the fashion industry – notably, in 1994, the United States Government Accountability Office issued a 20-page report[267] focused on the legal standards of developed country workplaces (revealing there were still thousands of sweatshops in the United States) and, importantly, triggered a debate about whether such standards can or should be applied to the workplaces of the developing world – and resulted in a sort of persistent criticism of the fashion industry for such human rights violations, sweatshop scandals seem to be a reoccurring problem.[268]

In accordance with the "race to the bottom", one reason sweatshop conditions are possible has to do with the inadequate labor laws and minimum wage standards in producing countries, especially as the national minimum wage relates to a living wage (i.e., the minimum wage necessary to ensure a family can meet is basic needs such as food, accommodation, education and healthcare). For instance, in 2015, the Asia Floor Wage Alliance issued a report[269] stating "While the macro-data for emerging economies shows rising GDP and wealth, there is also the concomitant and consistent rise in inequality and stagnation of real wages. In India since the start of neo-liberal economic reforms in the 1990s, multinational companies have firmly established their presence and benefitted greatly, but for a vast majority of workers producing for the global market, things have gotten worse in terms of wages and working conditions." Indeed, the problem appears to be less the fact that employers pay garment workers below the minimum wage and more a matter of poor legal standards; the Asia Floor Wage Alliance describes the minimum wages in India, Pakistan, Vietnam and China as "abysmal" and cites a variety of contributing factors (including poor capacity, limited resources and even adverse

[267] U.S. Government Accountability Office (1994).

[268] First it was American-brand, Nike, in the '90s (although sweatshop conditions in the Nike supply chain existed well before they made the headlines). Then it was German sportswear giant, Adidas, in 2000 (Osborn 2000). *See also* Concrete (2022); War on Want (n.d.). In 2015 a sweatshop claim was brought against Japanese fast-fashion brand Uniqlo for low pay and dangerous working conditions in supply chain factories ("Uniqlo Named in New Sweatshop Claim" 2015; War on Want 2015; Apparel Resources News-Desk 2015). A year later, in 2016, H&M underwent a series of criticism related to workers' rights abuses in partner factories. *See* Mayer and Sorrell (2016); Butler (2016). And the situation does not appear to have improved over time. *See generally* Assoune (2022); "Student Anti-Sweatshop Labor Movements (1990s-2010s)" (n.d.).

[269] Bhattacharjee et al. (2015).

attitude of the state towards labor). The numbers do not appear to have improved significantly in the following years.[270]

Additionally, lack of regulation and oversight (whether public/government or private) have contributed to industrial accidents such as the 2012 fire in the Ali Enterprises textile factory in Karachi, Pakistan that killed nearly 260 people (the "KiK disaster"),[271] and the 2013 collapse of the Rana Plaza in the Savar Upazila of Dhaka District, Bangladesh that resulted in approximately 1,100 deaths and 2,500 non-fatal injuries. Indeed, common to both incidents are (1) failure to meet adequate building, construction, and safety standards, and (2) production of clothing for major Western fashion brands.

On this first point, Jacometti (2016) observes how the above industrial accidents sparked international dialogue and appear to have urged the *Accord on Fire and Building Safety* in Bangladesh and the *Alliance for Bangladesh Worker Safety*, as well as *the Understanding for a Practical Arrangement on Payments to the Victims of the Rana Plaza Accident and their Families*. However, from a legal perspective, if these private initiatives constitute a form of Transnational Private Regulation (TPR),[272] then they also present critical issues in terms of legal status, legitimacy, implementation and especially enforcement. According to Jacometti (2016), *The Understanding for a Practical Arrangement on Payments to the Victims of the Rana Plaza Accident and their Families* is an agreement between stakeholders (i.e., fashion brands, the Government of Bangladesh, workers, national and international trade unions and nongovernmental organizations (NGOs)) facilitated and supervised by the ILO to establish a credible, transparent and independent compensation scheme for the victims of the Rana Plaza. One of the problems with the Arrangement is that—despite the ILO created the *Rana Plaza Donors Trust Fund* in 2014 at the parties' request—it did not provide for financial commitments by the signatories. Thus, had it not been for awareness campaigns by NGOs and

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[270] *See* "Living Wage" (2020) (nothing the numbers show that most people live far below the living wage standard).

[271] It is noteworthy that the German clothing retailer "KiK" was, by its own admission, the factory's main customer. Additionally, in March 2015, Humammad Hanif, Muhammad Jabbir, Abdul Aziz Khan Yousuf Zai and Saeeda Khatoon filed a claim for compensation against the German company at the before the Regional Court in Dortmund, Germany. The case was ultimately dismissed by the German court in January 2019 on the grounds that the lawsuit had exceeded the statute of limitations (ECCHR and Medico International n.d.; Business and Human Rights Centre n.d.).

[272] i.e., a set of rules created by private actors to either govern practices in sectors that are not governed at all by national or international norms, or to supplement or replace the latter (for instance, in favor of more adequate, stringent or effective measures). For an overview of the topic *see inter alia* Cafaggi (2013).

pressure from the home governments of relevant brands, the victims of the accident might not have been compensated (the Coordination Committee estimated the extent of damages at $30 million, a sum that was only actually achieved in 2015)[273]. On the other hand, the *Accord on Fire and Building Safety* in Bangladesh and the *Alliance for Bangladesh Worker Safety* are initiatives aimed at improving factory safety in Bangladesh.[274] It is important to note that signatories of the *Accord* primarily include large European fashion companies, while many North American brands are party to the *Alliance*, an "alternative agreement" that has been criticized for establishing loose commitments and following to a traditional command-and-control model. In any case, Jacometti (2016) notes that both agreements present limitations with respect to the undertakings established and the scope of action. Specifically, both agreements have a limited term of five years and only deal with building safety. Thus, given the scale of the problems, the five-year term is unlikely to be sufficient, and the limited scope of the agreement casts doubt as to whether the parties will effectively improve workers' conditions in Bangladesh; aspects such as extremely low wages, poor working conditions and minimal levels of social security are not addressed by either agreement. Finally, Jacometti (2016) highlights that the agreements are limited geographically (to Bangladesh), so they have no impact on safety conditions in other countries involved in the fashion supply chain.[275]

On the second point, following the KiK disaster, an interview with Dr. Gisela Burckhardt (director of FEMNET, an NGO that advocates women's rights in the Asian garment industry and a member of the 2018 jury selecting the German Sustainability Award) revealed: "Working conditions in the textile industry are very bad. We have discrimination against women, especially in India and Bangladesh. Women are sexually harassed and the payment is very, very low. Even though in Bangladesh the minimum wage increased from about 60 euros to 85 euros (per month) in December, it is not a sufficient living wage and women need to work overtime to survive. We also have the problem of a lack of organization in the factories. If women try to organize themselves in trade unions, they are normally threatened by management and must leave the factory. These are some of the problems that have not been resolved."[276] Likewise, Human Rights Watch reports that "Workers at Rana Plaza were forced

[273] On the Arrangement, *see* Blackett and Trebilcock (2015).

[274] *See* "Accord on Fire and Building Safety in Bangladesh" (providing a copy of the Accord); "Alliance for Bangladesh Worker Safety" (providing a copy of the Alliance).

[275] On this topic, *see* Caleca and Rose (2014); Haar and Keune (2014); Jimenez and Kolosun (2003).

[276] Hucal (2018). *See* European Center for Constitutional and Human Rights (2021).

to enter the damaged building on April 24, 2013 – they had complained the day before about sounds coming from obvious cracks in the building – which then collapsed on them."[277] Perhaps more pressing, however, is that – according to the International Labor Organization (ILO) – "Since the Rana Plaza disaster, no fewer than 109 accidents have occurred. Among these, at least 35 were textile factory incidents in which 491 workers were injured and 27 lost their lives. In the absence of a well-functioning labour inspection system and of appropriate enforcement mechanisms, decent work and life in dignity are still far from reality for the vast majority of workers in the garment industry and their families."[278] Additionally, although the labor code was subsequently amended to require employers hold liability insurance, the ILO notes that "the amounts of compensation envisaged are also very low and take the form of lump sums, offering inadequate protection to beneficiaries against ill health and poverty in the medium and long term. The system is also plagued by major practical application issues (e.g. evasion, lack of proper enforcement, absence of effective recourse), with the result that legal entitlements very rarely materialize."[279]

On a related note, it is interesting to observe that, according to the Corruption Perception Index, the countries perceived to have the highest rate of government corruption also have inadequate labor protection legislation. Coincidentally, many of the "orange" and "bright orange" countries are also the traditional partner countries of multinational fashion brands.[280] In terms of human rights and sustainability issues, such corruption affects the fashion industry to the extent that textile suppliers might engage in illegal practices (such as bribery to obtain quality or standards certification, providing marginal salary to workers, or condoning child labor).[281] And, in fact, in a story from 2012 by the New York Times, that this is precisely what happened in both the KiK disaster and the Rana Plaza collapse. That is, according to the source, the Pakistan textile mill associated with the KiK disaster supposedly obtained a SA8000 certification for health and safety a week before it caught fire.[282] Instead, the Rana Plaza collapse is said to be attributable to poor infrastructure and illegal construction of factory

[277] Thapa (2018).

[278] "The Rana Plaza Accident and Its Aftermath" (n.d.).

[279] "The Rana Plaza Accident and Its Aftermath" (n.d.).

[280] Transparency International (2021).

[281] Cline (2012); Martin (2013).

[282] Walsh and Greenhouse (2012).

floors.[283] Needless to say, the more opacity in the supply chain, the higher the chances that illegal practices will occur unknown to brand owners.[284]

Indeed, much of the social problem related to the fashion industry stems from its production model. That is, the fashion industry is highly labor intensive; in 2018, it employed approximately 75 million people. Due to a series of market conditions, in the 1980s fashion companies opted to outsource a significant portion of labor to developing countries where manufacturing and production is cheap. Additionally, in these countries, minimum legal working ages tend to be either lower than Western standards, not regulated or not enforced. Although the legal and ethical challenges inherent to such conditions are complex (consider, for example, a family that depends on the minor's salary from working in a textile factory), child labor is nonetheless a major concern in the fashion industry. According to the ILO, "around 260 million children are employed around the world…[and] of them, [approximately] 170 million are engaged in child labour, defined by the UN as 'work for which the child is either too young – work done below the required minimum age – or work which, because of its detrimental nature or conditions, is altogether considered unacceptable for children and is prohibited', with many making textiles and garments to satisfy the demand of consumers in Europe, the US, and beyond."[285]

Then there are the manifest disparities between the Global North and the Global South that are at least partially augmented by the environmental impact of the fashion industry. Specifically, if much materials cultivation, processing, production and manufacture occurs abroad (namely, in the Global South), and these processes are known to involve harmful chemicals and generate significant pollution – which, in turn, affects the physical development and health of the communities in which such cultivation, processing, production and manufacture take place – then modern economic markets and Western consumption models drive the debate on "climate justice". Moreover, given the fashion industry's role in the globalized economy, as well as its ecological footprint (e.g., resource consumption and pollution rates), it may be argued that the current fast fashion model has a direct impact on the social development of producer nations. Indeed, according to experts, "Outsourcing manufacturing is a core element of global injustice in the context of the climate crisis, as it results in both the exploitation of developing countries,

[283] Burke (2014).

[284] Cline (2012); Martin (2013).

[285] Moulds (n.d.).

as well as environmental degradation. The rise of multinational corporations and monopolisation through big industry brands has led to an increase of high-capital companies producing and manufacturing offshore, particularly in post-colonial states and the Global South. This reduces their cost of production, as well as regulation pressures to ensure ethical working conditions and pay, endangering the lives of labourers as well as ignoring questions of carbon emissions[286] and sustainability...Developing countries are less resilient to environmental disasters. In communities that are heavily dependent on agricultural exports, damage to crops, deforestation, draught, etc. there are more serious implications for their community wealth and competitiveness in the global economy. The Chronic Poverty Report[287] underlines how this affects the standards of living in these areas and increases chronic poverty and unemployment."[288]

As briefly mentioned above, respect for human rights is a corporate social responsibility theme that – although not unique to the fashion industry – is strongly correlated to the fashion system and its production model. As such, it has been thoroughly discussed both in the literature and in the media. It has also been the subject of several legal proceedings aimed at holding companies accountable for human rights violations, also occurring within the supply chain by affiliated or related parties. Consequently, also due to the complexity of the issue, this portion of the contribution will be limited to acknowledging the relevance of the human rights discussion without analyzing the legal aspects.[289]

Regarding the fashion industry's impact on developed countries, it is important to note that the first decade of the 2000s was characterized by controversy over size zero models after models Luisel Ramos and Ana Caroline Reston died from complications related to eating disorders. The fashion industry was highly criticized for pressuring models to reach and maintain unrealistically low body mass indexes, thereby inducing unhealthy dietary habits and distorted body image. What is more, given the media coverage of such figures, the pressures of the fashion industry were also said to have indirect effects on viewers, and especially on young girls who idolize and emulate runway models.

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[286] Pardikar (2020) (noting "[t]he United States is responsible for 40% of the climate breakdown the world is experiencing today, and the European Union is responsible for 29%").

[287] Shepherd et al. (2019).

[288] Ipakchi (2020).

[289] On the social dimension and "humanitarian crisis" in the fashion industry, *see generally* The True Cost (n.d.); Brasile and Cattaneo (2019) (recounting episodes of exploitation in the fashion supply chain); Kent (2020).

Consequently, in absence of legislation, European regulators intervened to combat the fashion industry's practice of using underweight models. Spain was the first to intervene in 2006, setting the direction to combat use of dangerously thin models. Countries such as France, Italy, and Israel followed Spain's example by introducing laws requiring models to meet certain body mass index (BMI) requirements. More specifically, in 2006-2007, the Spanish Association of Fashion Designers turned away nearly 30% models at Madrid fashion shows because they had a BMI of less than 18.[290] Italy, instead, has relied on a voluntary code of conduct (a *manifesto*) since 2007 to impose bans of ultra-thin women (with BMIs lower than 18.5) from fashion shows; other requirements include health certificates for models and a minimum age (of 16 years old) to showcase women's clothing.[291] In 2008, France, too, began to follow suit when the French Fashion Federation announced a plan to introduce a voluntary charter on promoting healthier body images. Compliance with the charter was reinforced by a so-called "Pro-Ana" law, which became binding from April 15, 2008, to combat proliferation of websites promoting extreme slenderness and provoke others to deprive themselves of food.[292] Also, in 2015, a bill was passed decreeing that models working in France must possess a medical certificate of good health; the bill also requires disclosure of digital alteration of images (especially fashion advertisements and photographs of models).[293] Similarly, in 2012, Israel passed into law the Act Restricting Weight in the Modelling Industry. Like the previously mentioned European laws, the Israeli law requires models to have a BMI of at least 18.5 and provide medical proof of a healthy weight to participate in catwalks. Additionally, advertisements must disclose if an image has been altered to make a model appear thinner.

However, not all countries have adopted legal measures to combat eating disorders in the fashion industry.[294] Countries such as the United Kingdom, Denmark and the United States rely more on peer pressure and less on legislation to force the fashion industry's hand. Indeed, although the British Fashion Council pushed for measures like those imposed by Spain and Italy, London Fashion Week refused to ban thinner/skinny models.[295] Instead, the weight of

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[290] BBC News (2006b), "Madrid bans waifs from catwalks".

[291] BBC News (2006a) "Italy pact to stop skinny models".

[292] Segal (2015).

[293] Willsher (2015); Mahoney (2015). *See* Fuller (2017) (noting that the law officially went into effect in 2017).

[294] Some people (including models themselves) even criticize existing laws for not taking into account a person's natural constitution. That is to say, the establishment of a minimum BMI does not consider people who are naturally skinny.

[295] Doocey (2009).

fashion models is regulated through consumer complaints to the United Kingdom's Advertising Standards Authority. Recently, the Authority (acting on a consumer complaint) mandated that Gucci refrain from running an ad that featured a "thin and gaunt model."[296] Despite lack of legislation, some designers have reacted to consumer criticisms and began sending fuller sized models down their runways. For example, at London Fashion Week in 2010, Mark Fast sent both "normal size" and size 12, 14 and 16 models down his catwalk.[297] Now, in response to consumer demands that models should represent more body types than just "skinny", a growing number of designers use fuller-size models to advertise their collections. Denmark's fashion industry introduced a Fashion Ethical Charter, produced by the country's Fashion Institute and some of its largest modeling agencies. Among the various commitments outlined in the charter (including giving models a wage instead of, for example, paying them in clothes), those who choose to adopt the charter undertake to subject models under the age of 25 to an annual medical checkup and provide healthy food at photo shoots and events. The United States, too, lacks formal legislation on underweight models. However, in 2007, a health initiative was launched by the Council of Fashion Designers of America to protect fashion models. The initiative requires those working in fashion to learn how to recognize the early signs of eating disorders, for example through workshops organized by employers. Additionally, the initiative promotes offering healthy food at photo sessions and fashion shows, and models with eating disorders are encouraged to take a break from modeling and seek professional help before returning to work. Like European initiatives, the health initiative[298] launched by the Council of Fashion Designers of America introduces a minimum modeling age of 16 years old. Between 2016 and 2018, the Model Alliance (a New York-based organization that champions models' rights) worked closely with California State Assembly member, Marc Levine, to pass the Talent Protections Act (California AB 2338)[299] aimed at fighting sexual harassment and eating disorders in the state's fashion and entertainment industries. Similar to European laws, the California Talent Protections Act, among other things, also seeks to protect talent from dangerous standards of thinness by requiring agencies to obtain a doctor certification of good health before hiring a model. Additionally, talent agencies must provide educational materials (about sexual harassment, good nutrition, and eating disorders),

[296] ASA Ruling on Guccio Gucci SpA.

[297] Reuters (2007).

[298] Council of Fashion Designers of America (2007).

[299] CA Assembly Bill No. 2338.

and minors are required to have specific training in these areas together with their parents or legal guardian.

Finally, the fashion industry further impacts the social dimension of sustainability merely through its designs. In this sense, the significance of the term "fashion" is also important to fully grasp the breadth of reach of the fashion phenomenon—especially as it relates to the industry's social impact.

The term "fashion" derives from the Latin word *facio*. Although the word initially referred to political acts, around the 14th century it was associated with mode or custom.[300] Today, "fashion" may be defined as "a style that is popular at a particular time, especially in clothes, hair, make-up, etc."[301] or "the area of activity that involves styles of clothing and appearance."[302] It is "a cultural practice that is bound up with the specification of our sense of self both as individuals and as members of groups. [...] At a broader level, the fashion industry is also a 'cultural industry' that establishes the aesthetic and practical dimensions of our clothing habits as well as constituting a keynote global consumer industry."[303] In this sense, the fashion industry has a clear social impact both on the cultures in which it comes in contact and those from which it "borrows". In the words of Professor Barbara Pozzo:

> "Fashion is considered an element of 'cultural identity'. At the same time, it has always been a dynamic phenomenon in which different styles, designs and models converged, acting both as a source of attraction for designers as well as a source of inspiration to draw and depart from in an attempt at innovation. Influences were reciprocal, with the phenomenon of *Orientalism* going hand in hand with that of *Occidentalism*."[304]

Indeed, according to Pozzo (2020a), designers must be mindful when taking inspiration from other cultures or religions. On the one hand, designers risk offending groups of people if they (even inadvertently) misuse a phrase, symbol or item; on the other, cultural appropriation is also a problem to the extent the designer essentially profits from showcasing elements of another culture which are not the product of the designer's direct creativity (but rather, just the foresight to exploit such elements for gains). Aside from the specific examples of such *faux*

[300] Craik (2009).

[301] Cambridge Dictionary.

[302] Collins Dictionary.

[303] Craik (2009) 2.

[304] Pozzo (2020a).

pas, Pozzo notes that "These cases share the common feature that the community is harmed by uses that degrade cultural or religious items because they are displayed outside their traditional setting and for purposes that are different from those for which they were originally created."[305] In this context, Pozzo (2020a) discusses some of the obstacles to and challenges of legally protecting folklore from misappropriation or use, noting in particular the abstract potential of copyright law to preserve cultural heritage but also highlighting the difficulties inherent to 'transplanting' legal models "based on the principle of originality, on a term of protection restricted to the life time of the author plus a limited period after his death and the concepts of '*author*' and '*work*', that are indistinguishably linked with a different legal tradition."[306] Despite the scope of the current contribution does not allow a further discussion on this topic, it is interesting to consider the fashion industry's social impact in this regard.

Nonetheless, to the extent culture also plays a role in the economic and business practices embraced by much of the fashion industry, it is significant that the emergence of the fast fashion model has challenged the traditional product-focused model based on seasonality (spring, summer, fall, and winter). As concerns mainstream fashion, the traditional concept of seasonality seems to have been integrated with a system of intermediate collections such that the result is a fragmented fashion system at best, and some brands have overcome the concept of seasonality all together so that continuous design and production of new collections has become the *status quo*.[307] Much of the fashion market is segmented and driven by speed, affordability, and ever-changing fashion trends. Fast fashion is based on a business model of flexibility and highly responsive supply chains, "frequent assortment changes", and cheap and fashionable mass-market collections.[308] It relies on short lead times, low-cost materials, and cheap labor. These characteristics are primarily due to the shift from a product-based model to a consumer-based model, and namely with the emergence of the fast fashion model in the late 1980s. Indeed, from a consumer perspective, fast fashion allows instant gratification and satisfaction of consumer "desire for novelty."[309] Hence, fast fashion retailers launch several new collections of inexpensive garments that reflect emerging consumer preferences (often according to whatever new trend has been set by high-profile designers). Market

[305] Pozzo (2020a).

[306] Pozzo (2020a). On the Western legal tradition, *see generally* Gambaro (1998) 686.

[307] Saviolo and Testa (2005) 11-14.

[308] Caro and Martínez-de-Albéniz (2015); Sull and Turconi (2008).

[309] Fletcher (2014) 260; Taplin (2014).

competitiveness tends to depend on how quickly a retailer responds to the latest styles, meaning that new designs arrive continuously. According to one source, this rapidly changing market produces a fashion system of 50 to 100 micro seasons yearly, with new collections arriving in retail and online stores on a weekly or daily bases.[310] Another, more conservative estimate, indicates fast fashion brands like Zara and H&M offer around three times as many collections as traditional product-driven businesses ("Zara puts out 24 collections per year, while H&M offers between 12 and 16.").[311] In any case, these numbers are significant if one considers that, in 2000, European fashion companies offered just two collections, and five in 2011.[312] And all this competition—this fret to constantly create new styles, new collections, new trends, the drive to offer more for less—has caused production to move further and further away from the target market; it has moved overseas where regulation is more relaxed and labor is cheaper, despite environmental costs are typically higher.

In this context, the above paragraphs lend themselves to turn the discussion to the environmental risks posed by the current consumption model.

Environmental impact

In terms of the sustainability discourse, it is widely recognized that the fashion industry consumes unghastly amounts of water, and that textile pollution poisons water sources, contributes to the formation of haze and smog, and strains (and even exploits) human capital—almost exclusively in developing (or "producer") countries.[313] The above paragraphs briefly depict how the fashion industry involves the first two pillars (i.e., the economic and social) of development. The following paragraphs will describe how the fashion industry impacts the environment before transitioning to discuss how such negative externalities of the trillion-dollar industry have sparked public and private reactions, as well as how the fashion industry has responded to the same.

In terms of its environmental footprint, the fashion industry is a very resource intensive, polluting industry. According to the World Economic Forum, "Fashion production makes up

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[310] Drew and Yehounme (2017).

[311] McFall-Johnsen (2020).

[312] McFall-Johnsen (2020).

[313] *See* Cerchia and Piccolo (2020b). *See also*, *inter alia*, Muthu (2020); Muthu (2014); Fletcher (2014); Brenot et al. (2019); Cherny-Scanlon and Agnes (2016); Slater (2003).

10% of humanity's carbon emissions, dries up water sources, and pollutes rivers and streams. What's more, 85% of all textiles go to the dump each year. And washing some types of clothes sends thousands of bits of plastic into the ocean... Washing clothes, meanwhile, releases 500,000 tons of microfibers into the ocean each year — the equivalent of 50 billion plastic bottles. Many of those fibers are polyester, a plastic found in an estimated 60% of garments. Producing polyester releases two to three times more carbon emissions than cotton, and polyester does not break down in the ocean. A 2017 report from the International Union for Conservation of Nature (IUCN) estimated that 35% of all microplastics — very small pieces of plastic that never biodegrade — in the ocean came from the laundering of synthetic textiles like polyester. Overall, microplastics are estimated to compose up to 31% of plastic pollution in the ocean."[314] In 2015, the fashion industry consumed about 80 billion cubic meters of fresh water, emitted over one million tons of CO_2, and produced 92 million tons of waste.[315]

Of all the water used by industry, the fashion industry consumes about one tenth just to operate factories and clean products. For example, dying and finishing machinery consumes 200 tons of water for every ton of textile products made.[316] Then there is the water consumed to cultivate and produce cotton (e.g., it takes thousands of liters to create a cotton t-shirt). Consider that it takes roughly the same amount of water (i.e., approximately 700 gallons) to produce one cotton t-shirt as it does to give a person eight cups of water a day for 3.5 years, or that a pair of jeans (also made of cotton) requires as much water (i.e., about 2,000 gallons) as one person drinks in 10 years, consuming 8 cups per day. Cotton is used in about 40% of all clothing, making it the most frequently processed natural fiber. This fact is reflected also in the number of countries producing cotton, as well as the annual yield.[317] Cotton and other natural fibers made from vegetable cellulose are biodegradable, but they are not necessarily a more ecological choice. Cotton is a highly water-intensive industry. "In Uzbekistan, for example, cotton farming used up so much water from the Aral Sea that it dried up after about 50 years. Once one of the world's four largest lakes, the Aral Sea is now little more than desert and a few small ponds."[318] Production also uses approximately 2.5% of the world's arable land and requires large quantities of pesticides and fertilizers for its cultivation; globally, cotton plantations account

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[314] McFall-Johnsen (2020).

[315] Perris et al. (2020).

[316] Perris et al. (2020).

[317] *See* World Atlas (n.d).; Atlas Big (n.d.); The World Counts (n.d.).

[318] McFall-Johnsen (2020).

for 10% of pesticides and 24% of insecticides used in global agriculture,[319] and it takes 2,650 liters of water, 0.09 kg of fertilizers, 0.05 kg of pesticides, 0.54 kg of fossil fuels, 2.7 kg of CO_2 every 50 washes/dries to produce a cotton t-shirt.[320] These numbers can provide a good idea of what impact a single t-shirt can have on the environment. Most of the cotton grown in the world is genetically modified to make it more resistant to certain pests, thus improving yields and reducing pesticide use. However, this can lead to the emergence of infested grass that is resistant to standard pesticides, which require more potent pesticides (that are harmful to livestock and humans).[321] And "organic cotton" does not appear to be all that much better for the environment; it also consumes a lot of water and is sometimes harvested in developing countries under questionable working conditions.

Synthetic fibers use less water and energy than cotton (in fact, over half of clothing is made with synthetic fibers such as polyester, polyamide, polyacrylic and elastane). However, synthetics also have their drawbacks. Polyester (the most commonly used synthetic material), for example, is made from petroleum, hard coal, limestone and natural gas. Its production requires 98 million tons of crude petroleum every year,[322] which is about 1% of the oil produced worldwide.[323] And the trend is rising. If the fashion industry remains on this course, consumption could rise to 300 million tons of oil by the year 2050.[324] Overall, the production of polyester (= 6 kg CO_2 per T-Shirt) emits three times more CO_2 than the production of cotton (= 2 kg CO_2 per T-Shirt).[325]

Thus, it is difficult to determine whether substituting synthetics for natural materials effectively alleviates the environmental impact of textile production.

Additionally, textiles are often treated with chemical dyes, sometimes even multiple times, before the desired color is achieved. The textile industry uses over 15,000 different types of chemical agents during the production process,[326] beginning with the production of the fibers

[319] Perris et al. (2020).

[320] Perris et al. (2020).

[321] Perris et al. (2020).

[322] Ellen MacArthur Foundation (n.d.).

[323] Sönnichsen (2021).

[324] Ellen MacArthur Foundation (n.d.).

[325] Kirchain et al. (2015).

[326] Roos et al. (2019).

themselves. Most of these chemicals are used during the “wet process” (a process that “uses enough water to fill 2 million Olympic-sized swimming pools each year”[327]) and subsequently find their ways into lakes and rivers as wastewater without any kind of filtering or recycling (especially in developing countries).[328] Indeed, approximately 20% of industrial water pollution is generated by the fashion industry. Some estimates suggest that 6% of pesticides used worldwide are applied to cotton crops,[329] not to mention that the fashion industry is responsible for 16% of insecticides, 4% of herbicides, and 1% of fungicides worldwide. The immoderate use of agrochemicals can cause: nausea, diarrhea, cancer and respiratory problems[330] and acute pesticide poisoning is responsible for approximately 1000 deaths per day, causing neurological and reproductive issues, such as infertility, miscarriages and severe birth defects.[331] In the environment, agrochemicals seep into the soil, where they cause a decrease in biodiversity and fertility, disrupting biological processes and destroying microorganisms, plants, and insects.[332] Despite the human side effects and environmental impacts of pesticide application, non-target species have become increasingly persistent and difficult to repel,[333] such as the whitefly Bemisia Tabaci, which has as a direct consequence an even more massive use of pesticides. While on the one hand the introduction of genetically modified cotton plantations leads to a reduction in the application of external pesticides, the actual reduction seems to have been only a temporary phenomenon in the cotton plantations of the main producing countries such as India, Brazil, China and the United States.[334]

In terms of the production phase, most of the chemicals used during manufacturing are associated with spinning and weaving activities (lubricants, accelerators and solvents) and wet processing (bleaches, surfactants, softeners, dyes, antifoaming agents, durable water repellents, etc.). For example, a single European-based textile finishing company uses over 466g of

[327] McFall-Johnsen (2020).

[328] It goes without saying that these chemicals can also be life-threatening for animals, plants, and local communities. They can also irritate the skin.

[329] Pesticide Action Network UK (2017).

[330] *See* Reeves, Katten, and Guzmán (2002); Scarborough et al. (1989).

[331] Pesticide Action Network UK (2017).

[332] Pesticide Action Network UK (2017).

[333] Rocha-Munive et al. (2018).

[334] Pesticide Action Network UK (2018).

chemicals per kilo of processed fabric, including bonding agents, pretreatment auxiliaries, dyes, pigments, dyeing auxiliaries, final finishing auxiliaries, and other basic chemicals.[335]

Although this topic will be addressed in the context of the European REACH Directive, it is noteworthy that approximately 80% of European textile consumption is produced outside the EU,[336] making it even more difficult to ascertain the actual use of chemicals. Similarly, even some garments labeled as "European production" are in fact imported as semi-processed from other countries, and thus it is not possible to have an accurate estimate of the actual use of chemicals in obtaining the final product. Thus, most of the chemical use associated with textile production for European consumption occurs outside the European Union.

Another source of pollution comes from clothes made of synthetic fibers. The fashion industry is responsible for 35%[337] of the microplastics in the sea and is the main source of microplastics in the oceans. This is partially because synthetic materials release plastic microfibers in the wash, and these fibers then are flushed into water sources. Thus, clothes made from man-made fibers such as polyester can compromise the biological cycle of marine and animal life in general and impact the human food cycle (and thus humans). Furthermore, as microplastics are absorbed into food sources, which are then consumed by humans, humans too are absorbing microplastics.[338]

Additionally, transporting materials and finished products along the global supply and distribution chain requires elaborate transportation networks which further pollute the environment. Not to mention, packing materials are not usually biodegradable.

Moreover, once fashion items reach the end-user, after-production maintenance also consumes substantial amounts of water, energy, and non-renewable resources. There have been arguments made to use more natural fibers (such as cotton, silk, or wool) to reduce the microfibers that are released into water sources during wash cycles. However, as already discussed above, synthetics are not necessarily a more sustainable solution, especially if one considers that man-made fibers (and especially polyester), in addition to being treated with toxic chemical dyes, are made from fossil fuels and other toxic substances. This means that they generate a significant environmental impact at the end of their lifecycle (when they are

[335] Schönberger (2020).

[336] European Environment Agency (2022).

[337] Boucher and Friot (2017).

[338] Westphalen and Abdelrasoul (2018).

discarded into landfills). Indeed, according to the European Environment Agency, 80% of textile waste cannot be recycled and therefore winds up in landfills.[339] Similar figures are reported by the United States Environmental Protection Agency.[340]

And it must be mentioned that not all fashion items produced arrive at the end user. That is, when retailers are left with a surplus, unsold fashion merchandise must be disposed of—one way or another. Many fashion brands have been accused of burning unsold merchandise.[341] Indeed, according to Napier & Sanguineti (2018):

> "The burning of unsold goods is a common practice amongst fashion retailers resulting in detrimental environmental consequences. Fashion merchandisers like Burberry, Louis Vuitton, Nike, Zara, Gap, and H&M group have recently been exposed for the improper disposal of deadstock. Motives for fashion firms for engaging in this practice include: maintaining scarcity of luxury brands, overproduction due to poor forecasting, excessive consumption habits of consumers, and securing tax write-offs (at least in the United States and Italy). Burning unsold products has been a common practice by luxury and fast-fashion marketers for years. Destroying deadstock prevents it from being sold at discount prices and preserves the exclusivity of the fashion brand.
>
> The global fashion industry manufactures approximately 100 billion garments per year. Of this massive amount, 92 million tons of solid waste is created due to overproduction.[342] Few consumers are aware of the harmful ecological effects of their desire to keep up with new styles. By the year 2030, it is estimated that the negative climate impact of the fashion industry will double.[343] The long-term consequences of dumping toxins are yet to be determined as there is an influx of air and water pollution from producing more clothes at lower prices. Marketers like H&M and Zara practice the fast- fashion business model by launching new collections rapidly. Fast-fashion merchandisers are retailers who manufacture quickly in order to keep up with changing trends.[344] Thus, in order to produce a large amount of garments inexpensively, many companies utilize massive supply chains across developing economies, making it difficult to monitor if every facility is following proper health and safety regulations. Monitoring the production and disposal of goods is a challenge to many governments and watchdog organizations. There are currently few established

[339] European Environment Agency (2019).

[340] United States Environmental Protection Agency (n.d.) "Textiles: Material-Specific Data".

[341] Shannon (2020).

[342] Hendriksz (2017).

[343] Planet Aid (2018).

[344] Amatulli et al. (2016).

> decrees that prevent fashion retailers from burning their deadstock for their own reasons."[345]

According to The Wall Street Journal, many high-end fashion brands have started trying first to sell unsold merchandise to employees, friends, and family (often at a discounted price) to avoid waste and harm to brand reputation.[346] However, research suggests this is a relatively new practice. Moreover, if apparel is not sold at discounted prices or otherwise disposed of sustainably, current tax law creates an incentive for brands to discard fashion surplus, but not before rendering the items unsellable, either by lacerating them, dousing them in chemicals (such as bleach), or burning them. Specifically, in Italy, Italian Presidential Decree No. 441/97, mandate 193/E of 23/7/98, allows fashion companies deductions for unsold merchandise, which serves as a tax incentive. In the United States, the Customs and Border Protection Agency provides that "if imported merchandise is unused and exported or destroyed under customs supervision, 99 percent of the duties, taxes or fees paid on the merchandise by reason of importation may be recovered as drawback."[347]

Regarding motives, high-fashion brands have an interest in maintaining an image of exclusivity. Their business model is based on limited availability of products. Additionally, according to Forbes,[348] companies might justify incineration to the extent it prevents counterfeiting. Also, while it is more ecologically sound to recycle unsold merchandise, it is also more expensive than burning it. And, if goods are kept for recycling, they could also be stolen and sold on the black market at lower prices. Either way, the message is clear: several companies would rather burn all unsold merchandise and maintain a reputation of exclusivity than dilute brand image by selling at discounted prices.[349] For instance, in 2017, it was revealed that H&M had burned 60 tons of its merchandise since 2013[350] (supposedly because they contained unsafe chemicals[351]). In 2018, Burberry was publicly criticized for burning around $38 million in unsold clothing. Later that year, Burberry announced that it had stopped burning

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[345] Napier and Sanguineti (2018).

[346] Dalton (2020). *See also* Dalton (2018)

[347] Napier and Sanguineti (2018) 162 (citing Dalton 2018).

[348] Pinnock (2018).

[349] *See* Siegle (2018).

[350] Hackwill (2017).

[351] Abdullah et al. (2017).

clothing, effective immediately.[352] In 2020, The Guardian reported that hundreds of Victoria's Secret bras were found in a dumpster outside a Colorado apartment building.[353] In 2021, Coach vowed to stop destroying unsold merchandise.[354] In sum, despite knowledge of the environmental damage caused by burning clothes (and especially those treated with chemical dyes), many fashion brands continue to incinerate surplus to avoid saturating the market and prejudicing shareholder value.

In addition to the above, the fashion industry uses up clear air. That is, it is responsible for more carbon emissions than international flights and maritime shipping produce together in a year. And, unless the industry reorganizes more sustainably, analysts predict that greenhouse gas emissions will increase by 50% within the next ten years. According to the United Nations Environment Programme, if the globe continues this trajectory, the fashion industry will have used up a quarter of the world's carbon budget.[355]

Therefore, it is easy to understand how the current textile model (based on the principles of the "linear" economy and on the drive for exaggerated consumption) contributes significantly to man's ecological footprint. From this perspective, the environmental impact of the fashion industry lends itself, then, to examine how fashion and society engage in a dialogue whereby the fashion industry influences environment, and consumers influence fashion trends and industry practices.

II. The Sustainability Movement in Fashion and Vice Versa. A Historical Perspective.

As briefly discussed in Chapter 1, "sustainability" is a broad concept applicable to almost every sector. Over the years, it has been attributed various meanings depending on the context and period. The concept of sustainability has evolved from strictly environmental to include economic and social aspects of development. The need to change our lifestyles and render industry more sustainable appears to intensify with each decade to the point where it is now a macro-trend pursued by every economic sector—from food to finance, from construction to

[352] Paton (2018).

[353] Harper (2020); Hirsh (2020).

[354] Fraiser (2021).

[355] UN Environment Programme (2021).

tourism—and represents a significant goal, especially in the textile and fashion industry. Indeed, if culture represents the ideas, customs, and social behavior of a particular group of people in a certain period, then it is interesting to note how fashion trends have changed over the years to reflect various degrees of cultural sensitivity to specific fashion industry-related problems.

Historically, the environmental consequences of consumption prompted the sustainability movement. Although man has had an evident impact on the earth since the Neolithic period (with the establishment of domesticated crops and agriculture), the extensive effects of "development" were unmistakable after the first Industrial Revolution: workers were displaced by technological improvements, and those who kept their jobs often worked long hours for miserable wages in unsanitary tenements due to lack of worker protections and regulations. Workers (including children) were exploited and abused in the workplace. And, perhaps most importantly, the sociocultural changes of the late-1700s and early-1800s created the framework of Modern Era mass consumption.

According to one source:

> [in the late nineteenth century] the fast rise of garment factories…was largely an American phenomenon. It was most visible as an industry in New York City, where more than 18,000 workers were employed in the manufacture of blouses by 1900 …The rapid shift of custom-made to ready-made clothes during the industrial revolution was stimulated by the growth of the middle class and a large increase in foreign labor, mostly Jewish and Italian immigrants who brought their tailoring skills from Europe and first organized themselves in tenements on the Lower East Side. However, the immigrant connection and overcrowded conditions generally associated with the industry led to zoning restrictions that quickly pushed production from apartment buildings into lofts and away from increasingly sophisticated showrooms. For twenty years, manufacturers continued to migrate north and west, often driven by law, such as when the Save New York Committee campaigned to move apparel factories out of the neighborhood known as Madison Square-where Broadway and East 23rd Street converge-because of fears that the factories would be a detriment to the atmosphere of nearby Fifth Avenue, known as the Ladies' Mile. Working conditions declined as manufacturers took advantage of the increasing pools of immigrants, influencing the rise of sweatshop labor as well as the move to unionize workers. The industry grew exponentially-by 1915, apparel was the third largest in America, after steel and oil. The Triangle Shirtwaist fire of 1911, in which 146 workers were killed, had finally led to the regulation and scrutiny of garment industry working conditions."[356]

[356] Wilson (n.d.).

While already noted above, it is worth repeating here. In the late 1950s, Western society witnessed the emergence of a waste culture following the years of ultraconservatism imposed by the war-era and a depressed global economy. Once the war was over and money started circulating again, people were eager to wear luxurious fabrics and lavish style clothing. Collections such as the "New Look" for women and the "Bold Look" for men were popular. Additionally, the technology developed to mass produce millions of military uniforms was now available to benefit the fashion industry and serve the ever-growing middle class. There were also new fashion magazines (such as *Vogue* for women and *Esquire* for men) to promote the latest vogues, as well as huge department stores (like Sears and J.C. Penney) to sell them. In other words, the 1950s represented a time in Western history when consumers generally started paying attention to fashion; they wanted to consume, and they wanted to consume a lot.

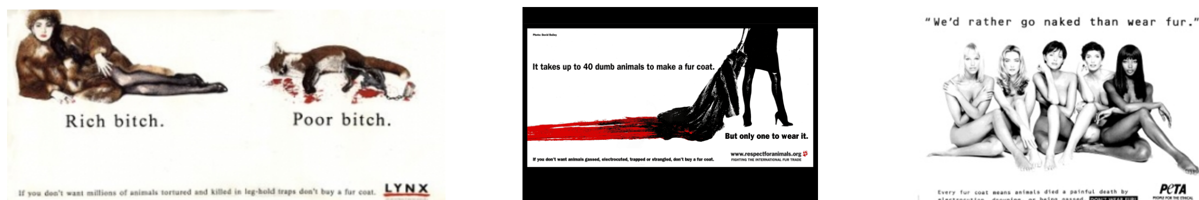
The social turmoil of the 1960s and 1970s is, to some degree, also reflected in the fashion trends of the period. More importantly, however, these decades witnessed an increasing sensitivity towards recycling, waste, and discarded materials. And the years of protest and unprecedented forms of expression brought to the fore "antagonistic" opinions about the prevailing development models. Although the environmental laws passed during the period have already been noted in Chapter 1, as concerns the fashion industry, it is sufficient to note the polarity between "rockers" and "mods" in London, as well as the counterculture "hippie movement" and so-called "hippie fashion" in America.[357] That is, if the 1960s were a time when young people rebelled against "the establishment", then rockers and hippies were also anti-fashion. And, importantly, the hippie movement spread worldwide alongside the environmentalist movement. This is significant because hippies criticized industrialization and materialism, condemned American foreign policy, and advocated preserving the state of nature. They embraced using natural fabrics and a simplistic lifestyle. In a nutshell, they were the founders of what would later be known as "sustainable fashion".

The Goth and Punk movements continued this "anti-conformist" trajectory and rejected conventional fashion. Unique vintage and second-hand clothing were characteristic preferences over new, mainstream attire and accessories. In this sense, the Goth and Punk looks started the trend of recycling clothes. The anti-fur movement became part of popular culture in the 1980s,

[357] The hippie counterculture first emerged in Germany and Switzerland in the mid-19th century (known as the "Lebensreform movement"), but became a widespread, global trend by the 1960s.

representing both a repudiation of the upper-class status symbol and the beginning of the ethical consumer movement.

Although the animal rights movement was already well-established, in the 1980s, these groups used mass-media to promote more general and organized campaigns focused on the fashion industry's treatment of animals for luxury garments;[358] primary targets included middle- to upper-class white women. Rather than something to boast about, wearing fur was now something to be ashamed of.[359] In this context, one might recall the 1984 Lynx and Greenpeace collaboration on the "Dumb Animals" campaign that gave rise to the slogan, "It takes up to 40 dumb animals to make a fur coat. But only one to wear it."[360] The People for the Ethical Treatment of Animals (PETA) was also founded in 1980, contributing to the anti-fur movement with controversial media campaigns such as, "We'd rather go naked than wear fur". Below are some examples of the ads aimed at encouraging the public to refrain from supporting brands that used fur in their collections.



https://www.bing.com/images/search?view=detailV2&ccid=%2byQKC9%2b7&id=14B9F00CB0B9536CC2F86EFD6F02F29E30D09D78&thid=OIP.-yQKC9-7LAu2Lrdrm5unFgAAAA&mediaurl=https%3a%2f%2fcached.imagescaler.hbpl.co.uk%2fresize%2fscaleWidth%2f1180%2fcached.offlinehbpl.hbpl.co.uk%2fnews%2fNST%2fdumb-animals-20140411040849773.jpg&cdnurl=https%3a%2f%2fth.bing.com%2fth%2fid%2fR.fb240a0bdfbb2c0bb62eb76b9b9ba716%3frik%3deJ3QMJ7yAm%252f9bg%26pid%3dImgRaw%26r%3d0&exph=270&expw=400&q=dumb+animals+campaign&simid=607992302191919370&FORM=IRPRST&ck=7C5C88CADBE4FD0CCBB492D8B2C797A1&selectedIndex=2&qpvt=dumb+animals+campaign

Figure 1: See https://www.vogue.in/fashion/content/fashion-designer-fake-fur-prada-gucci-shrimps-animal-cruelty

[358] *See generally* Cerchia and Piccolo (2020b).

[359] *See generally* Emberley (1997).

[360] Selby and Greenpeace (1988); Bailey (n.d.).

So, if production of textiles and ready-made garments depends on chemical processes and a heavy reliance on manual unskilled labor, then the outsourcing that occurred in the 1980s had the effect of merely relocating the development and sustainability issues that concerned the Western industrialized nations in the 1960s and 1970s—now, from the 1980s, industrial pollution and serious workers' rights violations would become primarily associated with the developing world. And once the public had increased access to instruments such as the Internet and the World Wide Web (in the 1990s), these issues became a public concern. In fact, during this period (of fast fashion) the fashion industry experienced the "sustainability question" through the so-called "eco-fashion" movement and collections such as Esprit's Ecollection. Katharine Hamnett and Patagonia began diffusing information about the environmental impact of the fast fashion industry. Certain extreme views even promoted an antagonistic and pauperistic vision of anti-consumption to manifest rejection of a consumer society.[361]

Thus, given the consumer-driven, market-oriented society, the 1980s and 1990s experienced the proliferation of private CSR instruments—such as codes of ethics/conduct—in response to consumer pressure for more responsible business practices, in the absence of specific legislation[362]. Although the evolution of modern codes of ethics/conduct will be discussed in greater detail in Chapter 3, it is noteworthy that America is the birthplace of modern corporate codes, by the 1980s "the majority of North American corporations awakened to the need for their own ethical guidelines,"[363] and there was a general surge in the adoption of corporate codes of ethics/conduct following the Sentencing Reform Act of 1984.[364]

Thomas (2020), too, notes that:

> "in the 1990s, when reports on sweatshop labor appeared in major media outlets, intensifying international public concern and moving many large-scale firms to adopt voluntary codes of conduct. Although designers had been producing "ecofashion" collections and engaging in a range of practices that might be labeled 'sustainable' for decades, internal, focused attention on 'sustainability' as a problem coalesced in the face of critique. Since the 1990s, sustainability platforms and CSR claims have become

[361] *See* Thomas (2020).

[362] On the legal environment of the period, see *supra* at pages 25-35.

[363] Brooks (1989).

[364] A market analysis in 1987 revealed that of the companies surveyed, 90% of the companies with a code of ethics/conduct stated to have had it in place for at least three years. Benatti (2014).

> standard across large firms. Smaller firms that specialize in ethical and sustainable goods have also proliferated. Industry associations such as Business for Social Responsibility (US), the Fair Labor Association (US), and the Ethical Trading Initiative (UK) advance models of sustainability and socially conscious business practice and promote the notion that member firms are increasingly 'ethical' in their operations. But there is no uniform agreement or regulatory system to evaluate what counts as 'ethics' or 'sustainability' in fashion."

At the same time, lack of uniform standards to evaluate ethical or sustainable products resulted in businesses falsely claiming or misleading consumers to believe certain products or practices were "environmentally friendly" without, however, possessing such qualities. Thus, the term "greenwashing"[365] (a neologism clearly deriving from the verb "to whitewash" or, figuratively speaking, to conceal something) came to signify marketing strategies that involve the use of expressions enriched with pro-environmental claims that, however, do not meet the expected environmental performance. The term was coined in America in the mid-1980s by environmentalist Jay Westerveld, who first used it to capture the unfair practice of a hotel chain that had launched a campaign to raise awareness of the negative environmental consequences of continuous washing of bathroom towels. Despite the campaign's "green" message (inviting guests to reuse towels), the effort was criticized for being driven more by economic interests than environmental ones.[366]

In response to consumer complaints about greenwashing, the Federal Trade Commission designed "Green Guides" (or "Guide for the Use of Environmental Marketing Claims") to help marketers avoid making environmental claims that mislead customers. The Green Guides—first issued in 1992 and subsequently revised in 1996, 1998, and 2012—essentially interpret Section 5 of the Federal Trade Commission Act (FTC Act) as applied to environmental marketing. Despite the Green Guides are not a source of hard law, companies can avoid civil liability for unfair or misleading claims by adhering to the Green Guides' recommendations.

[365] It should be noted that greenwashing gained momentum in the mid- to late-1960s, but it "peaked" in the 1990s after the Bhopal, Chernobyl and Exxon Valdez disasters of the 1980s, which prompted increased consumer activism and demand for more responsibly made products. Greenwashing is the act of misleading consumers for profit, or – in more simple terms – portraying products or services as "green" or "sustainable" or "responsibly made" in order to encourage consumption over other less green products on the market. In this sense, it represents an act of unfair competition and harms public interest to the extent it undermines consumer faith in business. On greenwashing in general, *see* Bowen (2014).

[366] Camusso (2021).

Aside from specific state consumer protection laws (e.g., the Florida Deceptive and Unfair Trade Practices Act, and the California Consumers Legal Remedies Act and the California Unfair Competition Law), it is significant that common law generally recognizes greenwashing claims as false statements and/or a violation of warranty claims.[367]

As directly related to the fashion industry, in 1996 Nike responded to negative media attention[368] and alleged mistreatment and exploitation of workers at overseas facilities. The company used various strategies, including press releases and writing letters to the editors of various newspapers around the country, to mitigate reputational damage. However, in April 1998, Marc Kasky sued Nike in California for unfair and deceptive practices,[369] claiming Nike had violated California's Unfair Competition Law and False Advertising Law[370] by making "false statements and/or material omissions of fact" about the working environments where its products are manufactured "in order to maintain and/or increase its sales."

The negative effects of greenwashing prompted legislative responses in Europe, too. More specifically, the European Unfair Commercial Practices Directive[371] was enacted in 2005 "to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests" (Art. 1, Directive 2005/29).[372] In addition to the broad language of Art. 6(1), Art. 6(2)(b) expressly prescribes that "a commercial practice shall also be regarded as misleading if … it causes or is likely to cause the average consumer to take a transactional decision that he would not have

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367 *Cfr.*, e.g., Paduano v. American Honda Motor Company, 169 Cal. App. 4th 1453 (Cal. Ct. App. 2009); Appliance Recycling Cts. Of Am., Inc. v. Jaco Envtl., Inc., No. 09-55168, 2010 WL 1767313 (S.D. Cal. May 4, 2010) (notwithstanding the claims by the plaintiff were not considered actionable); KOH v. S.C. Johnson & Son, Inc., No. C-09-00927, 2010 WL 94265 (N.D. Cal. Jan. 6, 2010).

368 For a review of the 1990s events that involved Nike and the labor conditions of contractors in its factories, *see* Vogel (2005) 77 ff.

369 The case made it all the way to the US Supreme Court (USSC), Nike, Inc., et al. v. Kasky, 539 U.S. 654 (2003), but was ultimately dismissed.

370 In the United States, laws against false or misleading advertising are regulated on two levels: at the state-level and on the Federal level. The Federal Trade Commission (FTC) Act (enforceable by the FTC on behalf of consumers) and the Lanham Act are two fundamental federal laws.

371 Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC, and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, OJ L 149/22 of 11 June 2005.

372 On the liability of companies under EU law for breach of CSR obligation, *see* Beckers (2017).

taken otherwise, and it involves: … (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code."[373] In Italy, greenwashing is regulated by Legislative Decree No. 145/2007[374] on misleading advertising.

As time went on, the 2000s highlighted some of the darker moments in human history—even if not all events were fashion related.

In 2001 the world was shaken by the September 11th terrorist attacks on the Twin Towers in New York, right in the middle of New York fashion week. The attack affected the fashion industry first by resulting in a cancelling of the remainder of the scheduled fashion events. It also resulted in a sort of "toning down" of the New York market in the following six months as the city focused on rebuilding. Two years later, in 2003, the world witnessed the invasion of Afghanistan, and Iraq. "Coincidentally", army and camouflage patterns were popular.

The decade experienced several natural disasters.[375] To list a few: In the 2000s, Australia and California experienced extreme drought.[376] Other regions, instead, experienced extreme rainfall. For instance, on January 31, 2000, over 20,000 were forced to evacuate Butuan City, Philippines as torrential rains caused floods and landslides. Weeks of rain produced deadly floods in southeastern Africa in February 2000. On June 4, 2000, an earthquake measuring 7.9 on the Richter scale struck Sumatra, Indonesia. In early July 2000, a recording breaking heat wave with temperatures as high as 50°C (122°F) hit southern Europe, including Italy and the Balkans. From February 9, 2002, more than 5,400 acres were burned in 2 separate southern California brush fires. On February 28, 2001, a 6.8 magnitude earthquake (the "Nisqually earthquake") hit Washington State. In Italy, on October 31, 2002, a magnitude 5.4 earthquake caused a school to collapse in San Giuliano di Puglia, Italy. On December 26, 2003,

[373] It seems possible to assume that, given the Directive's purpose and availing of a teleological interpretation, this article covers both multiparty codes and self-regulatory codes. *See also* Chiari (2017).

[374] Art. 2 b), Legislative Decree No. 145/2007 "*Misleading advertising: any advertising which in any way, including its presentation, is likely to mislead the natural or legal persons to whom it is addressed or which it reaches and which, because of its misleading nature, is likely to prejudice their economic conduct or which, for this reason, is likely to harm a competitor"* (AGCM n.d.).

[375] "World Disasters" (n.d.) (providing a list of natural disasters by year).

[376] In Australia, the "Millennium Drought" is said to perhaps be the worst drought recorded since European settlement, whereas California has experienced extreme and more or less frequent drought for the past twenty years, from approximately 2000 to 2021.

southeastern Iran was struck by the “Bam earthquake”, with 6.6 magnitude on the Richter scale and 4 intensity on the Mercalli scale. 2003 was also the year of severe acute respiratory syndrome (SARS), a deadly form of pneumonia that killed thousands of people worldwide. Similar to the effects of Covid-19, the travel and tourism industries suffered following the SARS outbreak as people were hesitant to travel due to concerns about contracting the virus. In early May 2003, a series of tornadoes passed through Kansas, Missouri, Arkansas, and Tennessee; officials from Federal Emergency Management Agency (FEMA) reported sightings of more than 80 tornadoes in parts of central and southeastern United States. In 2004, hurricane season in Florida was particularly intense and caused exceptional damage. That year, there were 15 named storms, with nine becoming hurricanes and four of which occurred in a 6-week period.[377] Namely, category 4 Hurricane Charley hit on August 13. Then, on September 5, category 2 Hurricane Frances made landfall at Hutchinson Island and, moving on to the panhandle, created numerous tornadoes statewide. On the same day, category 3 Hurricane Ivan developed over the Atlantic Ocean and came ashore just west of Gulf Shores, Alabama on September 16. Then, just ten days later, on September 26, category 3 Hurricane Jeanne crossed the Florida coast at virtually the same spot where Frances struck three weeks prior. In December 2004, the Indian Ocean tsunami killed approximately 230,000 people in South and Southeast Asia. 2005 was the year of category 5 Hurricane Katrina (which severely impacted New Orleans, Louisiana) and the 7.6 magnitude earthquake in Kashmir, Pakistan. In 2007, drought in the Southeastern United States was so severe that Atlanta and other areas of the Southeast were expected to eventually run out of water; fortunately, the Southeast did not run out of water. In 2008, Chinese and foreign media collaborated for the first time to broadcast the devastation of the China Sichuan Province earthquake; likewise, social media was used to inform the world of the Mumbai terrorist attacks. There was also Cyclone Nargis Myanmar in May 2008, killing tens of thousands and leaving hundreds of thousands homeless and vulnerable to injury and disease. In 2009 Italy experienced the Messina mud slides. In 2010 the world rushed to aid Haiti after a deadly and devastating earthquake.

[377] U.S. Department of Commerce (2019).

III. The Current State of Fashion. A Loud Call for Sustainability.

It is interesting to note how by the 2000s social media had become more popular and contributed to the dissemination of information. In the context of the fashion industry, the diffusion of information resulted in a more educated and conscious consumer. Indeed, at around the same time as high fashion knockoffs were becoming increasingly accessible to the mass market and retailers aimed to increase profit by furthering the reach of the fast fashion business model, social media was being used to inform consumers about the true cost of their clothes.

Fast forward to the 2020s. Half a century has passed since the United Nations held the Stockholm Conference and sustainability became recognized as a global issue. And most of that time, the fashion industry has been designing and producing ready-to-wear garments at unsustainable rates. Increasingly frequent news and social media stories of drought, heatwaves, and environmental pollution have contributed to the rise of a new wave of consumer culture. Compared to the past, most consumers are at least *aware* of the impact of the fast fashion model. And the more educated, the more environmentally and socially conscious they are. And the more demand for cheap items and new styles, the greater harm to the environment. Some apparel companies have attempted to render their operations more sustainable by implementing measures (e.g., recycling, investing in materials innovation, and revamping operations to reduce waste) or joining initiatives (e.g., the UN Alliance for Sustainable Fashion) to cut back on textile pollution and grow cotton more sustainably. However, change needs to happen industry wide and on a global scale, involving market players, fashion companies and governments alike. To substantiate this point, the following paragraphs will highlight some of the more relevant voluntary initiatives within the fashion industry, making connections with select applicable law as appropriate.

Some top-down approaches.

With regard to top-down approaches, Jacometti (2016) correctly observes that legislation has had and continues to have a decisive influence on the adoption of sustainable practices in the fashion industry. On the one hand, regulation compels business to conform to certain standards by increasing business risk and the costs of doing business for transgressors. On the other, legal incentives make it advantageous for companies to comply with set rules. In this context, if the sustainability movement was first concerned with environmental sustainability (as well as human health and the safety implications of unregulated business), then it is no surprise that

the most relevant examples of legislation in the textile and fashion industry relate to product safety and the prohibition of the use of hazardous chemicals.

In the United States, the fashion industry is indirectly affected by laws such as the Clean Water Act (CWA), the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA). More specifically, the CWA is the federal law that establishes the regulatory framework for controlling direct and indirect discharges of pollutants and regulating surface water quality378. The CAA, on the other hand, sets the framework for protecting air quality in the United States379 and includes national emission standards for certain categories of facilities, as well as standards for hazardous pollutants. Instead, the RCRA is a federal law on the management of hazardous and non-hazardous waste and applies to facilities that generate, treat, store, or dispose of waste that is listed as hazardous or has specific hazardous characteristics as determined by the Environmental Protection Agency (EPA).[380-381]

The Toxic Substances Control Act (TSCA)[382] is another relevant U.S. affecting the fashion sector as it regulates the production, import, use and disposal of chemicals. Moreover, the TSCA distinguishes between "existing chemicals" and "new chemicals", the latter of which must be assessed before permitted to enter the market. With reference to the fashion trends and social movements of the period, it is interesting to note that the TSCA was passed in 1976, around the time when the hippie and environmentalist movements advocated use of more natural fibers and approaches to fashion.[383]

Consumer information and transparency is also a key policy issue,[384] as is consumer safety. If labelling allows consumers to make more informed decisions about purchase choices, it is significant that the US Custom and Border Protection (CBP) and the Federal Trade

[378] 33 USC. § 1251 et seq.

[379] 42 USC § 7401 et seq.

[380] Other regulations potentially relevant to fashion industries are also the Safe Drinking Water Act (SDWA) (42 USC § 300f et seq.), the Emergency Planning and Community Right-to-Know Act (EPCRA) (42 USC § 11001 et seq.), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 USC § 9601 et seq.). *See* Muthu (2020); Muthu (2014) 46 ff.

[381] Jacometti (2016).

[382] 15 USC § 2601 et seq.

[383] Jacometti (2016).

[384] *See generally* Cerchia and Piccolo (2019).

Commission (FTC) are responsible for the labelling of products, including apparel.[385] Moreover, it is important to note that some fashion items are adorned with accessories—such as buttons, cords or zippers—that can also significant safety risks (especially to children).[386] Certain items are even flammable. As regards the latter, for example, in 2011 the US Consumer Product Safety Commission (CPSC) set a standard prohibiting the use of certain products (e.g., strings) for children's upper clothing (e.g., jackets, hoodies, sweatshirts, etc.).[387]

In October 2021,[388] a bill for the Fashion Sustainability and Social Accountability Act (FSSA, or "The Fashion Act")[389] was introduced to the New York Senate and Assembly. If passed, the FSSA will require fashion brands with at least $100 MM in revenues (e.g., Armani, LVMH, Nike) doing business in New York to map at least 50% of their supply chain (including raw materials sources, factories and shipping companies) and to disclose information related to social and environmental impact therein. Thus, under The Fashion Act, companies will have to disclose total volumes of materials production (e.g., how much cotton or leather they sell) for the purpose of conveying their environmental impact reduction strategy. As concerns workers' rights, brands will be required to disclose median wages and measures in place to implement responsible business conduct in their policies and management systems. Moreover, noncompliant companies that do not remedy a harm within 3 months from receiving notice (aside from being entered in a register of noncompliant companies compiled and published annually by the New York attorney general) will be fined up to 2% of their annual revenues (i.e., $2 MM), which will be then allocated to a Community Fund for environmental justice projects in New York.

In Europe—similar to the Clean Water Act (CWA), the Clean Air Act (CAA) and the Resource Conservation and Recovery Act—the fashion industry is impacted by regulatory instruments such as the Industrial Emissions Directive[390], the Biocides Regulation and the Waste

[385] *See* Textile Fiber Products Identification Act (Texile Act) 15 U.S.C. §§ 70 et seq.; Wool Product Labelling Act (Wool Act) 15 U.S.C. §§ 68 et seq. *See* Dayal et al. (2014); Hadfield and Simpson (2014).

[386] More specifically, the mechanical risk relates to the risk of suffocation, strangulation, ingestion of small parts and the like, and concerns mainly certain categories of consumers, such as children.

[387] ECFR § 1120.

[388] The bill was announced in a press conference held on Friday, January 7th, 2022.

[389] The bill text is available at: https://www.nysenate.gov/legislation/bills/2021/A8352

[390] Directive 2010/75/EU.

Framework Directive.[391] Specifically, the 2010 Industrial Emissions (Integrated Pollution Prevention and Control) Directive combines seven previous enacted laws on industrial emissions to establish a single set of rules aimed at preventing and controlling pollution and the generation of waste from industrial installations. As part of this scheme, the Directive also requires certain installations to obtain a specific permit for operation.[392] The Biocides Regulation[393], on the other hand, applies to the fashion industry to the extent that biocides are used to treat certain products (such as leather or textiles), whereas The Waste Framework Directive[394] establishes a legal framework for the treatment of waste in the European Union. Importantly, the Directive requires companies to treat waste in a manner consistent with the protection of the environment and human health, sets out a waste hierarchy[395], and uses a compensation scheme that follows the polluter pays principle. Regarding textile waste, the Directive supports a circular economic model by encouraging companies to consider the criteria that define waste.[396-397]

As concerns chemical substances, in 2006, the European Commission passed the REACH Regulation (Registration, Evaluation, Authorisation and Restriction of Chemicals)[398] to govern the production, import, marketing and end use of certain chemicals. Although REACH is directly applicable to the chemical industry, it broadly applies to all industries that avail of such substances within the EU. Accordingly, also the fashion industry is affected by the Regulation given that textile manufacturers, tanners and shoe manufacturers use dyes, adhesives and other chemical substances to transform raw materials into marketable finished products. Moreover, the REACH Regulation affects producers outside the European Union. Specifically, it applies to all imported products regardless of whether the same substances are considered dangerous in their respective countries of origin. Therefore, for the fashion industry (which is characterized by a long supply chain, often reaching extra-EU countries) REACH has

[391] Directive 2010/75/EU.

[392] For the textile sector, *see* the European Commission (2003).

[393] Regulation (EU) No 528/2012.

[394] *See* Directive 2008/98/EC and in particular recital 1.

[395] The hierarchy that applies by order of priority is as follows: prevention, re-use, recycling, other recovery, e.g. energy recovery, disposal.

[396] Art. 6. *See* EC Issue paper (2013).

[397] Jacometti (2016).

[398] Regulation (EC) 1907/2006.

significant strategic and organizational[399] implications, and at least abstractly encourages brands to shorten their supply chain and adopt more sustainable solutions.

Like in the United States, issues surrounding consumer information and transparency are also addressed by European legislation. Whereas in the United States the US Custom and Border Protection (CBP) and the Federal Trade Commission (FTC) are responsible for the labelling of products, including apparel, in Europe, this same effort is complex for reasons inherent to European integration. In any event, in 2011, the European Commission adopted Regulation (EU) 1007/2011 to harmonize the various national provisions on the labelling and marking of textile products and to improve consumers' ability to make informed choices.[400] As concerns safety risks from fashion items adorned with accessories, in Italy, the issue is broadly regulated by Art. 105 of the Consumer Code[401], implementing the Directive on general product safety[402]. This means that, without specific Community or national provisions, product safety in Italy is assessed on the basis of voluntary national standards, such as the technical standards adopted by standardization bodies like the *Ente Nazionale Italiano di Unificazione* (UNI).[403] In this context, it appears significant that UNI has established a series of technical standards, including: UNI/TR 11359/2010 "Safety management of textile, clothing, furnishing, footwear, leather and accessories products" (on the main features related to safety and human health, the critical chemicals potentially present and the related risks, and physical-mechanical risk as well as fire risk); UNI CEN/TR 16792:2015 "Safety of children's clothing - Recommendation for the design and manufacture of children's clothing - Mechanical safety" (providing recommendations for the design and manufacture of children's clothing in relation to

[399] In Italy, the *Associazione Tessile e Salute* supports the Ministry of Health and other competent authorities to ensure that producers located outside Europe also comply with REACH requirements (Jacometti 2016).

[400] Regulation (EU) 1007/2011 on textile fibre names and related labelling and marking of fibre composition of textile products. In particular, according to Art. 1 the Regulation: "lays down rules concerning the use of textile fibre names and related labelling and marking of fibre composition of textile products, rules concerning the labelling or marking of textile products containing non-textile parts of animal origin and rules for the determination of the fibre composition of textile products by quantitative analysis of binary and ternary textile fibre mixtures, with a view to improving the functioning of the internal market and to providing accurate information to consumers". The Regulation does not apply to: textile products given to homeworkers or to independent firms working from materials supplied to them without the transfer of goods for consideration; textile products made to measure by tailors acting in a self-employed capacity (Art. 2 (3)).

[401] Legislative Decree No. 206/2005.

[402] Directive 2001/95/EC.

[403] UNI (*Ente Nazionale Italiano di Unificazione*) is the Italian body that draws up voluntary technical standards for all sectors, the Italian branch of European Committee for Standardization (CEN) and International Standard Organization (ISO).

mechanical hazards); and UNI EN 14682:2015 “Safety of children's clothing - Cords and laces in children’s clothing - Specifications” (containing the specific requirements for cords and laces in children’s clothing up to 14 years).[404-405]

The above paragraphs demonstrate that sustainability has fully entered the legal and scientific debates. For years, and long before the term permeated the daily policy statements of institutions and corporate advertising, experts explored the feasibility of economic development models and production methods that would not affect the availability of environmental and economic resources for future generations and that would guarantee social upgrading. According to De Chiara et al. (2020), what emerges from these reflections is that rethinking business models and intervening in production activities requires time and the evaluation of complex dynamics. The authors also observe, on the one hand, a tendency by scholars to “simplify” the need to embrace a more sustainable lifestyle and, on the other, a reluctance by those same scholars to promote an approach that could appear too didactic or theoretical. Therefore, those who write about sustainability (including its premise, corporate social responsibility and its corollary, the circular economy), expose themselves to both risks.

From this perspective, bottom-up initiatives appear increasingly important for a comprehensive sustainability action plan. Luckily, it is possible to note how the current information society appears to be positively correlated with a growing number of consumers willing to contribute towards a more sustainable world.[406] According to Jacometti (2016), the impetus of the information campaigns conducted by humanitarian and environmentalist movements against the policies of relocation to emerging and developing countries without any attention to the conditions of ethical and ecological sustainability of production have yielded an increasing number of consumers demanding products that are produced fairly and with a low environmental impact. Porter & Kramer (2006) also emphasize that development and sustainability issues have now reached a global level, with consumers placing increased pressure on corporations to implement more sustainable and responsible business strategies.

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[404] UNI, www.uni.com.

[405] Jacometti (2016).

[406] Urbański and ul Haque (2020); Townsend (2018).

Some bottom-up initiatives.

As a result of such market demand, not only are companies producing "greener" products, but they have introduced additional measures (more technically, "voluntary initiatives"[407]) to gain competitive advantages.[408]

(1) Eco-friendly materials

Some companies have begun using more eco-friendly materials to offset the environmental impact of operations, for example by manufacturing textiles made from hemp, nettle (Ortica) plant, bamboo, food waste (e.g., coconut shells, pineapple, citrus, banana, and crab shells), spiderwebs, beer, and cork.

Hemp is incredibly versatile, grows fast and requires very little water. It is also antibacterial, durable, and flexible, in addition to not requiring herbicides, pesticides, synthetic fertilizers or Genetically Modified Organism (GMO) seeds. Similarly, nettle can be used as an alternative to cotton thread and has several sustainable qualities, and textiles made from coconut reduce dependence on synthetic materials and this material is particularly suitable for sportswear due to its moisture resistance and high strength.[409]

Sustainable and natural fabric made from pineapple or other citrus fruits have the advantage of replicating leather, but without the toxic environmental effects of leather production. Additionally, water and fertilizers are not required to create "leather" made from pineapple and citrus residues, and all waste may be used as a fertilizer in agriculture – for example. Importantly, pineapple and citrus are considered low-cost materials, making their use more feasible and increasing likelihood of use as companies transition to a more sustainable industry. Banana fibers can also be used to create a durable, waterproof, light and elastic fabric, and banana is an abundant natural resource in tropical and subtropical countries which produces little waste since almost every one of its parts can be utilized.

Bamboo fiber can be processed to create very versatile clothing material because it is breathable, hygroscopic, soft, biodegradable and antibacterial. Shells of crabs, lobsters and squids can be transformed into crabyon for the manufacture of products such as underwear,

[407] *See generally* Jacometti (2016).

[408] Turunen and Halme (2021).

[409] Martins and Sanches (2019).

sportswear, household linen, and so on. And a 3D modelling technique has been used to create threadless fabric made from fungus root which, aside from being completely biodegradable, has the added benefit of being easily mended and can take on various textures and shapes.

Spider silk is another natural resource which has been used for artistic creations, including a dress made of spider silk displayed in 2012 at the Victoria and Albert Museum in London. Beer has additionally been used to make a wedding dress (the "Dress Beer"). More importantly, however, (at least from an industry perspective) is that the process of harvesting spider silk inspired the invention of Biosteel—a highly resistant, completely biodegradable and eco-friendly material which uses are potentially unlimited—and Suberis—a material created out of cork and another natural material. In the textile and apparel industries, Biosteel has already been commercialized to produce biodegradable shoes, and Suberis can be used as an alternative to leather.

(2) Certifications

Some companies rely on certifications[410] to communicate their commitment to issues that consumers care about. However, there are various types[411] of certifications that a fashion brand can choose. For example, there are social and environmental certifications, but then there are also those that concern more technical aspects, such as safety.

Social certifications

As concerns social certifications, these primarily deal with workers' protection, i.e., legal guarantees for laborers and employees (including of suppliers) to adequate hygiene and health conditions, as well as fair payment. Within this category, there are also several sub-categories of social certifications. Versions of the fair-trade trademark also fall within this general category of social certifications.

Regarding the term's definition, in everyday lexicon, "fair trade" is associated with one of the highest forms of CSR and sustainable business to the extent it promotes entrepreneurial development among communities in developing countries and encourages market engagement

[410] For a detailed recount of some of the more relevant certifications in the fashion industry: Jacometti (2016).

[411] It is noteworthy both that there are currently numerous certifications available and that, of such certifications, it is possible to certify the sustainability of a variety of aspects involved in the production cycle. For instance, some certifications are designed to verify ethical and social responsibility, while others to certify the commitment to environmental sustainability, and still others to certify the level of product safety.

of these same businesses. In very simple terms, fair trade is the opposite of free trade in the sense that it imposes a higher standard of care for the interests of the parties involved in the trade agreement (as opposed to free trade, which follows a more Darwinian "survival of the fittest" approach). And this connotation does not appear far off from the definitions provided by organizations such as the Fair Trade Federation (FTF) and the World Fair Trade Organization (WFTO).

The FTF defines "fair trade" as "an approach to business and to development based on dialogue, transparency, and respect that seeks to create greater equity in the international trading system. Fair trade supports farmers and craftspeople in developing countries who are socially and economically marginalized. These producers often face steep hurdles in finding markets and consumers for their goods." The WFTO has also incorporated the notion of fair trade in its 10 principles to fair trade (i.e., creating opportunities for economically disadvantaged producers; transparency and accountability; fair trading practices; payment of a fair price; ensuring no child labor or forced labor; commitment to non-discrimination, gender equity and women's economic empowerment, and freedom of association; ensuring good working conditions; providing capacity building; promoting fair trade; and respect for the environment"). However, there does not appear to be significant evidence of fair-trade practices in the fashion industry despite the literature indicates that CSR initiatives, such as fair trade, are important given consumers' growing awareness and concern about workers' rights and general supply chain and product lifecycle issues. Indeed, fair trade has spread internationally from Northern Europe to Western and Southern European markets, as well as parts of Asia and North America.[412]

The growing demand for fair trade practices in the fashion industry is largely attributable to media, consumer, and non-governmental organizational demand on firms to implement such agreements with producers in developing countries. For example, since at least the 1990s, NGOs have motivated fashion companies to sell apparel that is manufactured under socially and environmentally sustainable practices through campaigns such as the Clean Clothes Campaign, the Ethical Trading Initiative and Labour Behind the Label. And it is widely recognized that consumer demand for more sustainable products has gradually increased over the years. According to Goworek (2011), "the instigation of such groups provides further evidence of a growing awareness of the need for fashion retailers and manufacturers to

[412] Doherty, Davies, and Tranchell (2013). *See also* Trebilcock (2021); Goworek (2011).

undertake a more socially responsible approach to clothing consumption"[413] And while some companies might claim to produce garments that are ethically and sustainably sourced, the well-known transparency issues that characterize the fashion industry supply chain make it difficult for consumers to verify they are effectively purchasing a fair trade product. In this context, certifications play an important role in the sustainability discourse as it relates to fashion and textiles.

Among the many fair trade certifying agencies, some of the leading certifiers include Fair Trade Federation,[414] Fair Trade USA/Fair Trade Certified,[415] World Fair Trade Organization (or "Fair for Life"),[416] and Fairtrade International.[417] However, notwithstanding a common vision or purpose, the solutions offered may be vastly different. For instance, Fair Trade USA focuses on producer certification, meaning it does not necessarily contemplate the entire production chain and, specifically, such certification does not ensure that sub-suppliers use sustainable products or ethical practices. Additionally, Fair Trade USA's standards are not easily accessible to consumers (they are available upon request, by sending an email to the address found on the organization's website). By contrast, Fairtrade International appears to take a more holistic approach and offers standards for small-scale producers, standards for hired labor organizations and standards for contract production. In this sense, it seems that the certification process under Fairtrade International is more likely to capture every step of apparel through use of a distinctive fair-trade mark. Moreover, it supports transparency as it sets stringent criteria – available online – that that involve all three sustainable development pillars.

Then there are the so-called ethical sustainability certifications, which are generally based on principles and/or requirements already set out in international human rights declarations and ILO principles. Here, too, there are a variety of standards to adhere to. For the fashion industry,

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[413] Goworek (2011).

[414] Fair Trade Federation, https://www.fairtradefederation.org/

[415] Fair Trade Certified, https://www.fairtradecertified.org/

[416] World Fair Trade Organization (WFTO), https://wfto.com/

[417] Fair Trade International, https://www.fairtrade.net/

the main ones are Worldwide Responsible Accredited Production[418] (WRAP) and Social Accountability 8000[419] (SA 8000).[420]

WRAP is a certification program developed by an independent international non-profit group of social compliance experts. Certification is aimed at assuring adherence to 12 principles based on generally accepted international standards, local rules and regulations pertaining to workplaces, workers' rights and human resources management, health and safety, and sustainable environmental practices. As concerns the certification process, after an initial self-assessment, applicant companies subject themselves to an audit by a WRAP-accredited inspection body.[421]

SA 8000 (Social Accountability 8000), on the other hand, is a social accountability certification standard developed by Social Accountability International (SAI)[422]. Based on the principles of the United Nations Declaration of Human Rights, the ILO and UN conventions, as well as national legislation on workers' rights, SA 8000 sets out the requirements that must be met by companies in order to obtain certification in relation to child and forced labor, health and safety, freedom of association and the right to collective bargaining, discrimination, disciplinary procedures, working hours and remuneration. Furthermore, the standard potentially applies to the entire supply chain as it requires all upstream suppliers to meet the same requirements as the certified company. In this sense and like the process under Fairtrade International, the SA 8000 certification appears to benefit from a high degree of efficacy when it comes to the sustainability issue within the fashion supply chain.[423]

Environmental certifications

With regard to environmental certifications,[424] Jacometti (2016) provides a thorough outline of the legal framework in Europe and internationally. In particular, Jacometti (2016) notes that the most widespread international standards on environmental sustainability are developed by the International Organization for Standardization (ISO), classified under the acronym ISO

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[418] Worldwide Responsible Accredited Production (WRAP), http://www.wrapcompliance.org/en/home.

[419] Rinaldi (2013) 145 ff.

[420] Jacometti (2016).

[421] Jacometti (2016).

[422] Social Accountability International (SAI), http://www.sa-intl.org.

[423] Jacometti (2016).

[424] *See* Ecolabel Index (n.d.) (providing a list of ecolabels).

14000.[425] Eco-labels, instead, fall within the scope of the ISO 14024 - Type I Environmental Labelling, which are voluntary ecological labels based on a multi-criteria system that considers the entire life cycle of the product – based on scientific evidence – and subject to external certification by an independent body.[426]

For Europe, although both voluntary, the European Eco-Management and Audit Scheme[427] (EMAS) and the EU Ecolabel[428] play an important role. The former sets requirements for environmental management systems that are very similar to the ISO 14001 Standard to promote the improvement of environmental performance of public and private entities in all sectors of activity. The latter applies to products and services with a low environmental impact throughout their entire life cycle and is part of the ISO 14024 labels. The Ecolabel is identifiable by the "flower" symbol, which can be used only by companies whose compliance with Ecolabel requirements[429] has been independently verified. Accordingly, the EU Ecolabel facilitates consumers wishing to make environmentally responsible choices.

Almost analogous to the organic *food* movement, recent years have also witnessed a resurgence of the organic *fibers* movement. However, as Jacometti (2016) observes, the current laws on organic farming[430] (which concerns aspects relating both to the use of chemicals and GMOs and to soil management[431]) are not directly applicable to textile production process. Thus, this

[425] International Organization for Standardization (ISO), http://www.iso.org.

[426] There are also Type II eco-labels (ISO 14021), which are self-declared environmental claims by manufacturers, importers or distributors without the intervention of an independent certification body (e.g. "Recyclable", "Compostable", etc.); and Type III eco-labels (ISO 14025), which are environmental claims based on established parameters and which contain a quantification of the environmental impacts associated with the life cycle of the product calculated through an LCA system. They are independently verified and presented in a clear and comparable form. These include, for example, the "Environmental Product Declaration" (EPD) required by EU environmental policies. *See also* Morris, Koep, and Damert (2021).

[427] Regulation (EC) 1221/2009.

[428] Regulation (EC) 66/2010.

[429] Commission Decision 2016/1349/EU for footwear and Commission Decision 2014/350/EU for textiles.

[430] According to *Associazione Italiana Agricoltura Biologica* (AIAB), "organic farming" is a method of cultivation and breeding that uses only natural substances present in nature and without recourse to chemical or synthetic substances (e.g., fertilizers, herbicides, insecticides). At the EU level, organic farming is disciplined by Regulation (EC) 834/ 2007, implemented in Italy through Ministerial Decree No. 6793/2018. In the United States, organic farming is governed by the National Program for Organic Production (NPOP), enacted as federal law in 2002 (although in force in India since 2000).

[431] *See* Jucker (2011); Jucker (2012). In relation to this issue, it is worth noting that there is often some confusion about the real environmental impact of raw material production. In fact, synthetic fibers are generally perceived in a negative way, while natural fibers are evaluated positively. However, if there is no doubt that the production of synthetic fibers generates impacts on the environment and on people, one cannot overlook

regulatory gap has been filled by various certification systems aimed at ensuring the integrity of the production chain. The best-known systems are the Global Organic Textile Standard (GOTS)[432] and the Organic Content Standard (OCS).

GOTS is the leading international standard for the certification of textile products made with natural fibers from organic agriculture, probably because certification depends on whether textiles are composed of at least 70% organically grown fibers[433]; a product is considered "organic" if it is composed of at least 95% natural and organically grown fibers. Thus, being GOTS certified – in an industry known for being detrimental to the environment and in which social pressure to become greener is intense – is clearly prestigious. Furthermore, being GOTS certified also means a company adheres to the following four fundamental rules: the production of natural fibers in accordance with the rules of organic farming; reducing the environmental impact of production processes; compliance with social responsibility criteria defined on the basis of ILO conventions; and traceability of raw materials, semi-finished and finished products throughout the production chain.[434]

The OCS is for "organic" textile products. It is issued by Textile Exchange[435] and relates to the presence and quantity of natural fibers from organic farming. Although verification is carried out by a third party who also verifies natural organic fibers are used throughout the supply chain, no testing is conducted as concerns the use of chemicals or other social or environmental impacts. Instead, in this respect, it is important that bodies such as Oeko-Tex International and Bluesign monitor compliance with European regulations on general product safety and on the use of chemicals.[436]. The need to verify the composition of materials and to communicate the

the considerable impacts caused by the production of natural fibers, such as cotton. The example of the very high environmental impact of cotton production on land use and water consumption highlights how it is not correct to automatically consider a natural fiber a more sustainable product than a synthetic fiber. For further information, *see also* Environmental Justice Foundation (2005).

[432] Global Organic Textile Standard (GOTS), https://www.global-standard.org.

[433] In detail, in order to obtain GOTS certification, a product must contain 70% or more organic fibers, 30% or less non-organic fibers, but no more than 10% synthetic fibers.

[434] Jacometti (2016) 356.

[435] Textile Exchange (OCS), https://textileexchange.org/standards/organic-content-standard/.

[436] *See* Regulation (EC) 1907/2006, Regulation (EU) 528/2012 (on biocidal products) and Directive 2001/95/EC.

results to the consumer through labels is also enshrined in Art. 1 of EU Regulation 1007/2011.[437]

Oeko-Tex International[438] is an international association for Research and Control in the field of Textile and Leather Ecology that issues two important labels for the textile and fashion industries: the STANDARD 100 and Sustainable Textile Production (STeP). The former consists of a control system with subsequent certification of the absence in products – at every level of processing – of substances harmful substances to humans and the environment. Additionally, depending on the potential for harm, Oeko-Tex subjects products or clothing to more or less stringent criteria; products are divided into four classes: articles for children up to 3 years of age, articles used in contact with the skin, products not in contact with the skin, and decorative or furnishing materials. The first category (clothing for children up to 3 years of age) is subject to the most stringent criteria. The latter trademark by Oeko-Tex certifies that a product is made and manufactured in compliance with the rules for the protection of the environment, and that respect for such rules occurs at each phase of the production cycle.[439]

Similar to the STANDARD 100, the Bluesign[440] certification aims to assist companies in reducing their environmental impact throughout the entire production cycle. It focuses particularly on the use of chemical substances and requirements[441] fall into 5 categories of criteria: resource productivity, consumer safety, air emissions, water emissions and occupational health and safety.[442]

Among the marks and certifications applied in the fashion industry, there are also marks related to the use of recycled materials. Also in this case, the certification ensures the transparency of the declaration, which would not otherwise be demonstrable.[443] Without going into detail, some

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[437] Art. 1: "*This Regulation lays down rules concerning the use of textile fiber names, the labeling and marking of the fiber composition of textile products, rules concerning the labeling or marking of textile products containing non-textile parts of animal origin, and rules for the determination of the fiber composition of textile products by quantitative analysis of binary and ternary textile fiber mixtures, in order to improve the functioning of the internal market and to provide accurate information to consumers.*"

[438] OEKO-TEX®, https://www.oeko-tex.com/en/.

[439] Camusso (2021).

[440] Bluesign, https://www.bluesign.com/en

[441] Bluesign SGS Group, https://www.sgsgroup.it/it-it/consumer-goods-retail/softlines-and-accessories/textile-and-clothing/audits-and-certification/bluesign.

[442] Camusso (2021).

[443] Jucker (2011).

of the better-known international certifications include the Recycled Content Certification[444] (which indicates the percentage of recycled content in accordance with FTC guidelines and ISO standards) and the Global Recycle Standard (GRS), developed by Textile Exchange.[445] And then there is Made in Green[446], which is a traceability mark for sustainable textile products. Importantly, each product with the Made in Green label has a product identification code and/or QR code that allow the consumer to trace the item's production.[447] In this sense, the Made in Green brand illustrates how new technologies[448] can be very useful in ensuring product traceability.[449]

<u>*Certifications on product safety*</u>

On product safety, Oeko-Tex® Standard 100[450] is an independent control and certification system for textile products (raw materials, semi-finished and finished products) at all stages of production. It guarantees that textile products do not contain or release substances harmful to human health. The purpose of the brand is to raise awareness among all the components of the textile chain towards a careful and conscious choice of chemicals used in production to reduce the impact of the final product on the health of consumers. Seri.co[451] is a trademark that is specifically useful within the European context as it deals with the substances considered harmful according to the REACH regulation. More specifically, it guarantees fabric and the upstream supply chain also incorporates some requirements of international certification systems in the field of environmental management (ISO 14001) and social responsibility (SA 8000).

[444] Recycled Content Certification, http://www.scsglobalservices.com/recycled-content-certification**Error! Hyperlink reference not valid.**.

[445] Textile Exchange (OCS), https://textileexchange.org/standards/organic-content-standard/.

[446] OEKO-TEX®, Made in Green overview, http://www.madeingreen.com.

[447] Jucker (2011).

[448] *See* Zincardi (2020).

[449] *See also* Rinaldi (2013) 70 ff.

[450] Standard 100 by OEKO-TEX®, www.oeco-text.com.

[451] Centro Tessile Serico, www.seri.co.it.

(3) Other private sustainability initiatives. The Green Carpet Awards and the Fashion Pact.

As briefly discussed above, there are numerous initiatives promoted by companies in the name of sustainability. Additionally, the National Chamber for Italian Fashion has implemented various initiatives that highlight how sustainability must become one of the priorities for Italian companies. For example, the "Guidelines on eco-toxicological requirements for clothing, leather goods, footwear and accessories" aims to progressively reduce the use of certain types of chemical substances in the supply chain; it considers more than 350 chemical substances, describes how they are used in the supply chain and provides a methodological analysis for individual products. The "Crafting the Future: Stories of craftsmanship and innovation" seeks to connect excellent craftsmanship and Made in Italy[452] companies that are investing in the development of new technologies applied to fashion with attention to sustainability. The "Green Carpet Fashion Awards" (or the "Oscars" of sustainable fashion) reward the exceptionally sustainable brands by giving them a certain type and amount of publicity. Finally, the National Chamber for Italian Fashion has promoted the "Manifesto of Sustainability for Italian Fashion" with the aim of outlining an Italian way to responsible and sustainable fashion and to encourage the adoption of models of responsible management along the entire value chain of fashion to the advantage of the national industry.[453] The Manifesto is divided into sections that follow the stages of the value chain ([454]), starting with design and ending with promotion of adherence to the Manifesto and communication of such adherence to stakeholders.[455]

Another important initiative promoted by a large group of fashion companies is the "Fashion Pact", which sets out (in black and white) signatories' intent to strengthen the common commitment to protect the planet. Although the Fashion Pact specifically aims to stop global warming, restore biodiversity and protect the oceans, it is also and more generally significant for the sustainability of the fashion industry because it promotes cooperation between private

[452] *See generally* Pozzo (2021c) (analyzing some of the measures recently taken by the Italian government, as well as private initiatives such as certifications and labelling, aimed at protecting "Made in Italy" fashion products).

[453] "Manifesto Della Sostenibilità per La Moda Italiana" (n.d.).

[454] In particular: design, choice of raw materials, processing of raw materials and production, distribution, management systems, fashion and the national industry, business ethics, transparency, education, promotion of the Italian Fashion Manifesto.

[455] La Spina (2021).

companies and national governments, based on the principles promoted by the Science-Based Target initiative. However, notwithstanding such aims are certainly laudable, the Pact's impact is uncertain to the extent that its concrete legal value is unclear given the voluntary nature and therefore non-binding scope of the guidelines contained therein. Indeed, according to La Spina (2021) it is likely that only a reporting system, as an integral part of the covenant, would ensure transparency of the brands' progress towards the objectives identified in the covenant. Failure to comply with the guidelines could result in damage to the company's reputation, but without such damage being accompanied by some form of sanction or the incorporation of a breach of contract. On the basis of these considerations, the form of the benefit company, to date, represents the most structured and concrete model to implement a serious and stable program of action in the name of social responsibility.[456]

Still other noteworthy initiatives include, for example, the 2020 Circular Fashion Commitment, introduced by the Global Fashion Agenda, and the Sustainable Clothing Action Plan (SCAP) 2020 Commitment, introduced by the Waste and Resources Action Programme (WRAP).

IV. Some Considerations. The B-Corporation as a Viable Solution?

From a legal standpoint, certifications (no matter the nature) are generally classifiable as voluntary initiatives to which adherence essentially depends on a brand's willingness to self-impose obligations established and monitored by a third-party certifier. However, despite the attribution of a certain certification, the right to use such trademark usually entails a series of obligations for the supplier-producer (e.g., promotion of training courses on topic-specific practices, prohibition of child labor, commitment to non-discrimination and support of freedom of association, etc.), as voluntary commitments; the enforceability and legal repercussions for violation of such undertakings are debatable (see *infra* in Chapter 3 on the debate concerning the legal value of codes of ethics). Moreover, they also lack uniform standards. This means that, given the are various types[457] of certifications, a brand can "shop" the certification market for the best cost-benefit solution. Simply put, it is possible for a brand to obtain those

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[456] La Spina (2021).

[457] It is noteworthy both that there are currently numerous certifications available and that, of such certifications, it is possible to certify the sustainability of a variety of aspects involved in the production cycle. For instance, some certifications are designed to verify ethical and social responsibility, while others to certify the commitment to environmental sustainability, and still others to certify the level of product safety.

certifications that allow it to appear as sustainable as possible for the lowest organizational, logistic, production and/or transformation cost.[458]

In response to the lack of a uniform set of standards in the fashion industry, independent associations such as Greenpeace, Textile Exchange and the Oeko-Tex Association, have united to bring together numerous brands and create standards on which such brands can base their commitments to supporting the environment. In this context, Camusso (2021)[459] notes that if, on the one hand, consumers demand that companies obtain certifications (so that these same "ethical consumers" can then verify the veracity of environmental and sustainability information), on the other hand, entrepreneurs compete to acquire as many labels as possible, with the aim of becoming an industry leader and distinguishing *their* brand from others without such or as many labels. In other words, certifications have become a useful marketing tool through which fashion companies communicate their environmental and ethical appeal, and therefore competitiveness in a market that is increasingly sustainability-oriented.

At the same time, if improving consumer awareness of a brand's commitment to ethical and environmental sustainability requires an effective marketing and communication strategy, then associating oneself with a third-party label also means increased greenwashing risk. Thus, for fashion companies and consumers alike, it is important that the relevant label offers a (legal) guarantee as to the authenticity of the claims made or eluded. Often, these guarantees are offered in the form of an obligation to perform audits or other forms of monitoring activities. However, to the extent that such certification schemes are contractually based, there is some doubt as to the adequacy of remedies available to aggrieved consumers, and the burden of proof of reputational damage is cumbersome for affiliated parties.

On the other hand, it is also true that these initiatives – generally CSR practices or programs – have gradually became an integral part of the company's brand image.[460] Jacometti (2016) observes the search for more sustainable products and processes pushes fashion companies to adopt voluntary actions that go beyond the minimum obligations imposed by law (both in terms of ethical and environmental sustainability) and notes that monitoring of the fashion supply

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[458] *See generally* Ferrando (2017) (proposing that certifications present information that serves a company's economic interests and creates an information asymmetry).

[459] Camusso (2021).

[460] Lewis (2016).

chain is a central sustainability challenge of the fashion industry.[461] At the same time, traditionally, such voluntary forms of self-regulation (generally CSR practices) have been considered non-binding and therefore criticized – to the extent a company might declare one thing but do another – for being mere "window-dressing". There has also been a debate about whether companies had any legal obligation to respect the environment or social interests beyond what was established by applicable law.[462]

From this perspective, it appears significant that business models are undergoing a sort of revolution through the rapid circulation of an innovative concept embodied by the B-Corporation Movement. More specifically, the Certified B Corporation,[463] issued by the U.S. non-profit organization, B-Lab, is a particular standard by which companies make a binding commitment to social and environmental sustainability,[464] after completing the relevant verification process and passing the Business Impact Assessment (essentially, verification of conformity to set certification requirements). Unlike traditional business structures, certified

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[461] Jacometti (2016).

[462] Porter and Kramer (2006).

Another point of contention concerns CSR programs in general and the way companies communicate certain sustainability commitments—especially to the extent that CSR is built into a company's organizational structure. According to Jones & Jonas (2011), corporate social responsibility refers to corporate conduct that exceed its own interests and legal obligations in favor of creating a positive impact on society. Over the years, the concept of CSR has focused increasingly on its material profitability (or financial and competitive performance goals) and supporters of CSR advocate the long-term benefit for corporations that embrace such responsible practices (M.-D. P. Lee 2008). Porter & Kramer (2006) argue that elaborate CSR reports actually mislead stakeholders and contributes to a greater company-stakeholder gap because reports tend to focus on all the activities carried out by a company in a limited period of time (usually the previous quarter) rather than, as Jones & Jonas (2011) proport, using a more analytical approach whereby a company reflects on past initiatives to identify the activities that would effectively help minimize the harmful effects of their own operation. Alternatively, companies can publish a sustainability report to communicate the social, economic, and environmental aspects of its business, including how effective it has been in achieving sustainable growth, to stakeholders. However, these reports, too, have been criticized for lack of uniform guidelines on how they should be drafted. Indeed, without clear rules on sustainability report design, companies have full discretion as to what included to included, meaning the reports likely have little purpose other than portraying the company in the best possible light and essentially just become another marketing tool. Porter & Kramer (2006). Still, the fact that these initiatives have remained, for the most part, voluntary has sparked a debate concerning their legal value and whether voluntary initiatives can establish a legal obligation of companies towards stakeholders. Various measures have been employed to make corporations truly accountable to stakeholders, especially as concerns human rights abuses and environmental damage occurring along the supply chain. However, this aspect will be discussed in greater detail in Chapter 3.

[463] B Corporation, https://bcorporation.eu.

[464] The verification of the correspondence of the company's values with the criteria predefined by B Lab focuses on 5 areas: governance, people, community, environment and customers. Only companies scoring at least 80/200 can obtain the certification and to use it for its products.

B-Corps (such as Patagonia) formally pursue a dual purpose: profit maximization *and* generation of value for the environment and society. That is, they "do well by doing good" and build social responsibility into their corporate charters, articles of association or bylaws. Accordingly, pursuit of stakeholder interests no longer lies within the scope of the Business Judgement Rule—it becomes a legal obligation of the company and its managers.

In this sense, it may be argued that this particular certification is, at least partially, the result of the growing adhesion to the stakeholder theory of corporate governance (or, more accurately, the enlightened shareholder value theory) and the legal challenges of pursuing issues that do not directly serve the traditional notion of corporate interest. Indeed, as a business entity for which commitment to sustainable commercial practices becomes enshrined in its corporate purpose, obtaining the B-Corp certification provides an effective legal guarantee for consumers and suppliers alike. It is also an innovative and alternative form of commercial organization that effectively meets sustainability goals in terms of maintaining competitiveness and transitioning to a sustainable and circular economy: "Around the world, certified B Corporations stand out in the marketplace from all others because they go beyond the goal of profit and continuously innovate to maximize their positive impact on employees, the communities in which they operate, the environment and all stakeholders"[465].

Although an adequate discussion of the B-Corp movement would require at least a designated chapter, for the purposes of the present contribution it is important to note that, in Italy, Law no. 208/2015 (concerning "*Provisions for the formation of the annual and multi-year budget of the State*") introduced a new form of enterprise – i.e., the Benefit Corporation – in the Italian panorama, making Italy the first country[466] to positively recognize this business model after the United States, where it is already provided for in 33 States.[467-468] And such recognition did not happen overnight. Instead, the introduction of this "hybrid"[469] enterprise is the result of an extensive EU and international debate[470] aimed at affirming the idea of a business capable of

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[465] "B Corp Certification in Italy" (n.d.).

[466] On June 21, 2018, Colombia passed the Benefit Corporation Law becoming the second state in the world, after Italy in 2016, to introduce the legal form of Benefit Corporation.

[467] Benefit Corporations (n.d.).

[468] The State of Maryland was the first to pass legislation for Benefit Corporations in 2010.

[469] *See* Rawhouser, Cummings, and Crane (2015) (discussing, among other things, how legislation contributes to creating new legal organizational categories, especially as related to Benefit Corporations).

[470] It is sufficient to recall the principles drawn up on the subject of CSR, the 2001 Green Paper on Corporate Social Responsibility and the 2011 communication of the European Commission entitled "A renewed

combining and favoring both social progress and economic prosperity. Therefore, if society's needs and markets' needs are inherently interdependent, then—consistent with the European policy agenda since the early 2000s—it is logical (and perhaps even "smart business") that companies should consider social and sustainable business as a vehicle for differentiation and long-term success.[471] And that is precisely what is reflected in the above-mentioned legislation.

Despite reference to an innovative and new form of business, it is equally important to clarify that – pursuant to Art. 1(377) L. 208/2015 ("*The purposes referred to in paragraph 376 are specifically indicated in the corporate purpose of the benefit company and are pursued through management aimed at balancing the interest of the shareholders and the interest of those on whom the social activity may have an impact. The purposes can be pursued by each of the companies referred to in book V, titles V and VI, of the Civil Code, in compliance with the relevant regulations.*") – a benefit company in Italy can adopt any of the corporate forms provided for in Arts. 2247 et seq. It. c.c. (e.g., S.p.A., S.r.l., S.N.C.). In other words, a Benefit Corporation is nothing more than a traditional business with the difference that its aim (or corporate purpose) and governance are designed *also* to produce a benefit for the societies in which they operate.[472] According to La Spina (2021) and Riolfo (2016), then, the purpose of the new rules is not to create a new type of company, but rather to integrate the already existing corporate discipline with rules that allow: the company to include among their statutory objectives the pursuit not only of distributable profit but also for some public benefit; the

European strategy 2011-2014 for Corporate Social Responsibility". The European Directive 95/2014 on the disclosure of non-financial information also represents a tendency to move in this direction.

[471] Porter and Kramer (2011).

[472] The purpose of the new rules, therefore, is not to create a new type of company, but rather to integrate the already existing corporate discipline with rules that allow: the company to bind in time the original values that inspire the company's activities; the directors to allocate resources and activities to the pursuit of further purposes indicated in the bylaws; the market to enjoy a truthful and transparent information of the commitment assumed by the company to combine the profit and growth objectives of the company with the respect of the socio-environmental context in which it operates (Assonime Circular No. 19/2016).

At the same time, it is worth mentioning that some scholars have raised doubts regarding the compatibility of the regulations governing benefit companies with Art. 2247 c.c. It.. The introduction of this corporate model has led part of the doctrine to suggest that it is necessary to proceed to an amendment of Art. 2247 c.c. It., in the part in which the rule dictates that a company's economic activity must be aimed (solely) at generating economic profit (Tombari 2018). Others, on the other hand, believe that the regulation of benefit corporations has not had any systematic impact on corporate law. Specifically, according to Libertini, the overcoming of shareholder value can be achieved through statutory autonomy, i.e., the possibility of shareholders to identify the interests to be pursued, but that the implementation of this autonomy can be put in place without the need for a modification of Art. 2247 c.c. It., as it is a defining norm, it must be interpreted in the light of the evolution that the system has undergone since its introduction (1942).

company to create a legal obligation to pursue the original values that inspire the company's activities; the directors to allocate resources and activities to the pursuit of further purposes indicated in the bylaws; the market to enjoy a truthful and transparent information of the commitment assumed by the company to combine the profit and growth objectives of the company with the respect of the socio-environmental context in which it operates.

Accordingly, for the CSR[473] movement, Certified B-Corps and Benefit Corporations[474] transform vague and abstract principles into concrete and effective business objectives. That is, if CSR is based on voluntary self-regulation, then the establishment of an enterprise under the form of a Benefit Corporation represents a further step forward, since a tangible effort is made by the company in the direction of social responsibility.[475]

Moreover, with regard to the circulation of models, as reported by Candian (2021), it is interesting that as of 2018 (i.e., only three years after Law 208/2015 entered into force), Officina delle Idee Benefiche (Odib) reported approximately 200[476] benefit corporations registered in the companies register, compared to 110 in June 2017 and just 64 at the end of 2016. At the same time, Candian (2021) advises that, as must be generally cautioned when adopting a model or instrument originally implemented in another jurisdiction (with its own legal culture, sets of cryptotypes and rules), the translation of words from one language to another plays an important role. Indeed, while the English language distinguishes between "responsibility" (responsibility in a moral sense) and "liability" (responsibility in a legal sense), the Italian language uses only one word (*responsabilità*) to denote both concepts.

Given the above, it is therefore imaginable that the Benefit Corporation could represent a *salto di qualità* (or "quality leap") in the way companies do business in Italy. And in the fashion industry in particular, the B-Corp movement and benefit corporations, could represent effective

[473] Corporate Social Responsibility (CSR) is defined in the European Commission's 2001 Green Paper as "*the voluntary integration by companies of social and environmental concerns into their business operations and their relationships with their stakeholders. [...] Being socially responsible means not only meeting applicable legal obligations, but also going beyond them by investing in human capital, the environment and relations with other stakeholders.*"

[474] It should be noted that there are Certified B-Corps (certified on the basis of an independent evaluation conducted by a non-profit company in accordance with its Benefit Impact Assessment) which enjoy a special legal status attributed by the B-Lab, and then there are Benefit Corporations which are a real legal structure under Italian state law. Therefore, the company can be both a certified B-Corp *and* an Italian Benefit Corporation, or it could just be one of the two.

[475] Candian (2021); La Spina (2021). *See* Castellani et al. (2016).

[476] Benefit Corporations (n.d.).

tools to bring about changes in the production paradigms and management mechanisms of the fashion companies' supply chain.[477]

Codes of ethics/conduct constitute another relevant and less straight-forward CSR instrument in terms of efficacy and legal nature. On the one hand they appear to be relevant tools capable of driving private sustainability measures and diffusing more progressive and sustainable legislation beyond western borders. Indeed, they have become broadly and extensively implemented in the past 40 years such that it is more common than not for a company to have a code in place. Additionally, there is an undeniable tendency to attempt to re-interpretate traditional private law schemes and notions such as to make companies accountable for violations of their own self-regulatory corporate governance tools. On the other hand, this discourse has not been simple or without challenges, begging the question of whether the more efficient model is the legal one. So, in this perspective, it becomes paramount to compare the bottom-up, self-regulatory (or laissez-faire) approach that has been preferred in America since around the mid-1930s with the top-down, legislative (or big government) approach that characterizes the legal environments of countries belonging to the civil law legal tradition.[478]

[477] Candian (2021); La Spina (2021).

[478] On the Western legal tradition, *see generally* Gambaro (1998) 686.

CHAPTER 3: Getting to Sustainability.

Chapter 1 provided a general overview of the sustainability movement, which began as an environmental movement in the United States and Europe and expanded into a social and economic sustainability movement (i.e., "sustainable development"). As noted, the movement in the United States originated after World War II, as the demand for consumer goods led to an economic boom and increased production that harmed the environment and endangered public health. Acute sensitivity to the impact of industry on the environment and the public at-large rose following many industrial accidents and disasters that occurred over essentially a 30-year period. Looking back at the patterns identified, we proposed that, as the negative effects of industry became abundantly evident over time, public demand for more stringent environmental policies and statutory commands on polluting activities prompted lawmakers to impose greater limitations on business activities that threatened the environment or public health. For the United States, we discussed the impacts of lack of and over-regulation, with particular attention on the deregulation movement that claimed a "free market" was the answer to development problems. We also observed the unfortunate by-product of deregulation – increased globalization – which was met by the rise of an anti-globalization movement and increased tensions between public and corporate interests. By the end of the 1990s, we saw more legislation aimed at promoting accountability and we noted that the business community responded with the adoption of a "code of ethics" largely in response to market forces and widespread publication of abuses, scandals and corruption. For Europe, we also discussed the development of the corporate sustainability movement – with its origins in international principles (that evolved into detailed rules). And, while the movement began in Europe much later than in the United States, it is noteworthy that Europe eventually surpassed the United States in terms of its focus on protecting the environment, while promoting sustainability and social responsibility. Europe and various Member States, however, took a different approach by enacting legislation and regulations to mandate sustainable business practices, including the advancement of social justice. Although the United States initially led sustainability initiatives, beginning in around 2005 we saw that the European movement was more expansive and that, on the sustainability front, Europe started leading the way in transitioning toward a more circular economy. Therefore, what began as an environmental movement in the 1960's leading into the 1970's, turned into a call for "sustainability" on both continents by the 1990's – from a social and economic perspective.

In Chapter 2, we examined how the concept of sustainability evolved to include economic and social aspects and considered the impact on sustainability for each of these "pillars" within the fashion industry. To fully appreciate fashion has been impacted by and continues to impact the three elements of the sustainable development discourse, it was first necessary to provide an overview of the industry and some of its unique concepts or business models. We then looked at the considerable economic impact the fashion industry has and continues to have on the economies of developed and developing countries alike. We discussed "subcontracting", which is how fashion system operates its complex supply chain, and its detrimental effect on the contracting parties. Finally, we noted how the relatively inexpensive/economically feasible subcontracting model has led to the development of the "fast fashion" phenomenon.

In terms of the social costs of the subcontracting arrangement, there are many. To illustrate such costs, we examined some of the more recent industrial accidents in Bangladesh and Pakistan that were due to inadequate building and safety standards in connection with the production of clothing for a global market.

Finally, we looked at the industry's environmental impact and reviewed some staggering statistics in that regard. We noted that its widespread pollution is not limited to the environment. For example, pesticides applied to cotton crops often wind up in the soil where they impact the food cycle, disrupt biological processes, destroy microorganisms, and kill plants and insects; while microplastics found in clothing wind up in waterways and are absorbed into food sources. Not only are the fashion products themselves damaging to our environment, but their packing materials, which are typically not biodegradable, further contribute to landfills. And, contributing further to the waste problem of this industry, we discussed the practice of some high-end fashion merchandisers which intentionally destroy unsold product in order to preserve the exclusivity of their brands – a practice which has been unintentionally "rewarded" through governmental incentives that allow the recovery as business deductions or tax credits for unused or unsellable product.

Moving into the 2000s and the present, we discussed how consumers have become aware about the "true cost" of their clothing, prompting some apparel companies to improve the sustainability of their operations through measures such as recycling materials, reducing textile pollution and waste, and growing cotton more sustainably. To that end, we looked at some of the "top-down" approaches in both the United States and Europe to address pollution and proper labeling of clothing, as well as some "bottom-up" initiatives. The latter are largely the result of consumer demand for "greener" products, such as using "eco-friendly" materials as

an alternative to cotton, special certifications, and private sustainability initiatives. Lastly, because the "bottom-up initiatives" we evaluated require "self-regulation" (i.e., they are purely voluntary), they are non-binding and often criticized for that reason. Therefore, we briefly explored the emergence of the Benefit Corporation, or B-Corporation, movement.

This chapter will build from the framework established in the previous chapters to analyze two fundamental legal instruments in the sustainability discourse in America and Europe: codes of ethics in the United States and the Circular Economy model in Europe. For reasons related to the chronology of developments, we will begin with a discussion of the use of codes of ethics as a regulatory tool in America, starting from their genesis in the 1930s, and illustrating how they had become a widely used governance tool by the end of the 20th century. We will highlight some reasons for their circulation and conclude with examples of how codes of ethics are used in the fashion industry. As concerns the European context, the discussion will start by clarifying the notion and goals of a circular economy. And, to the extent a circular economy aims to reduce waste, particular attention will be given to waste management. We will also briefly address the EU's recent attempt to reduce dependence on foreign merchants and suppliers with an amendment to the Value Added Tax regime. Finally, we will attempt to illustrate how these policies are applied to and received by the fashion industry. Our discussion will address the implementation challenges of both instruments, as well as some of the tools available to overcome such difficulties. In America we will observe that the doctrine has responded by re-interpreting private law, and the measures with which legislators have intervened. In Europe, on the other hand, the more complex the instrument the more complex the solution: efforts must reflect a three-pronged approach that includes fashion brands themselves, consumers, and financing institutions. In the end, the facts presented suggest that self-regulation alone is not sufficient to achieve sustainability goals in a limited timeframe; at the same time, the circular economy model is expensive to implement, and it is likely companies will require significant financing to comply with aggressive sustainable development policies. This will then lead us to explore whether existing tools may be used for new purposes, and namely whether the current legal framework allows a degree of collaboration between industry players.

I. Codes of Ethics in America

Genesis [479]

In absolute terms, professional and industry codes are not novel. For example, they existed as far back as the feudal period when associations (or guilds) of artisans and merchants were sometimes authorized to oversee and regulate the practice of a specific craft or trade in a particular geographic area. In addition to controlling the market, guilds regulated the conduct of their members and provided necessary assistance.

Likewise, the tension between business and ethics is not new either. Adam Smith's *A Theory of Moral Sentiments* and his *The Wealth of Nations* is a prime example. And if any movement or activity's success depends on its acceptance by the people toward whom it is directed, then it is logical that altruistic activities are more successful than egocentric ones—as history has frequently proved. For instance, consider that the Protestant Reformation or Lutheranism immediately highlights how these religious movements were popular reactions to several issues related to the Roman Catholic Church and the general sentiment that the Church was in urgent need of widespread reform. Similar observations can be made regarding the Enlightenment Period, from which emerged Beccaria's *On Crimes and Punishments* and the notion that the accused also have rights; Locke's idea of "natural rights" of man as inherent limits to the ruler's power; Montesquieu's notion of separation of powers of state; and Voltaire's defense of religious tolerance and free speech. Additionally, it was during this period that theorists such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau elaborated the theory of social contract whereby an implicit agreement exists between members of a society (which requires each such member to sacrifice some individual freedom for the benefit of society as a whole) and the state (pursuant to which a society elects to subject itself to a state's rules in exchange for certain protections). Therefore, it was during the Enlightenment period that the masses became sensitive to the notion that government should have obligations to its subjects—hence the sinallagmatic and bilateral structure of the *contract*. In fact, it should be remembered that a comprehensive conception of business ethics was developed by the Second Scholasticism in the period between the 15th and 17th centuries.[480] Moral import had not prevented a wide reflection on law and economics, nor the identification of universal principles that were applicable regardless of one's religious practice. The writers of that time analyzed the most

[479] *See* Benatti (2014); Cerchia and Piccolo (2019).

[480] *See* Melé (1999); Grossi (1973). *See also* Gordley (2007).

diverse themes, and addressed from an ethical perspective: the criticism of monopolies, the concern for usury, the defense of economic initiative and international trade, the evaluation of the moral necessity of setting prices and paying adequate wages. Great attention was also paid to the right to property,[481] which is not considered absolute because it is limited to the "social function", and to fairness in trade with the prohibition to maliciously conceal defects and not to commit fraud. However, the Second Scholasticism also connected to the finesse of the casuistic analysis that brought its protagonists to confront the minute problems of the practice of law, thus providing an illustrious example, even if certainly questionable in its details, of coherent conjugation between ethical principles and rules of conduct. With all this, it should be noted that in the context of moral philosophy discourse, it is not obligatory to assume a hierarchy of norms starting from the top of the pyramid and address the problem of the effectiveness of normative statements, because one can follow the inductive inverse path that starts from the analysis of the case. In the context of relations between business and society, this caustic dimension appears essential: hence the obligation to deal with all junctions through which the normative becomes performative in a broad sense. In this regard, the recent chronicle is instructive.

Equally significant is the phenomenon of circulation and exchange of ideas, as well as the fact that old ideals get "recycled" periodically. In modern times, such circulation and exchange of ideas is particularly manifest in what is known to comparatists as "legal transplants".[482] As concerns the so-called recycling of ideals, although there is a certain cyclicity in intelligent thought, nowadays it appears more appropriate to refer to a reinterpretation of traditional legal tools. In other words, rather than "recycling" (which would imply creating something new and different), scholars appear to manipulate established institutions and/or general principles to

[481] Grossi (1973).

[482] Mattei et al. (1994) note the study of legal transplants in France (e.g., in the works of Eric Agostini, who wrote about the spread of the civil law tradition in countries such as Japan and Turkey and distinguished between the assimilation versus the adaptation of a foreign law) and Germany (e.g., With the *Schriften zur europäischen Recht und Verfassungsgeschichte*, devoted to legal transplants within the civil law tradition), for instance, as well as in Italy and the United States. With regard to these last two, in Italy, Mattei et al. (1994) highlight the contributions of Rodolfo Sacco, who first developed the theory of legal transplants with *Introduction to Comparative Law* (1980) and subsequently elaborated the notion of "legal formants" and "cryptotypes". Sacco (1991a); Sacco (1991b). On the other side of the ocean, in the United States, Mattei (1994) recognize the contributions of well-known comparativists such as Rudolph Schlesinger, Edward Wise, and James Gordley. But what is most pressing is that through the circulation of models (or via the practice of "legal transplants") it was possible to "reflect on transplants as phenomenon linking two families of law".

serve new purposes. Thus, as society changes these same tools are reinterpreted and applied in another manner, according to (new) social requirements.

And this is precisely what has happened with codes of ethics, as evidenced not only by their modern evolution, but also by attempts to render them widespread in an effort to hold companies accountable for unethical behavior.

More specifically, Benatti (2014)[483] observes that the social crisis following the industrial revolution appears positively correlated with the fact that Western legal systems began neglecting the "Theory of Moral Sentiments" in pursuit of the "Wealth of Nations". Indeed, the absence of adequate legislation to protect society's values prompted a widespread critical reflection and led to, among other things, the rediscovery of self-regulation. What is more, the notion of the importance of self-regulation and ethical conduct remerged a century later.

In America[484], such revival materialized in the late 1930s after years of loose behavior. In a 1924 article in the International Journal of Ethics, W.B. Graves wrote: "The code of ethics is not a cure-all, and it possesses no magic powers by which it can change moral darkness into light, but it is an effective instrument which now contributes much, and which, with proper use, can be made to contribute much more, to the cause of truth and honor in business relationships."[485] This is also the year that Edgar Heermance wrote *Codes of Ethics* (1925). Indeed, the "Roaring Twenties" are well-known as a time of wealth and excess. Coincidentally, the 1929 stock market crash and subsequent economic crisis invoked the notion that self-regulation was necessary to overcome the economic depression and avoid the recurrence of similar situations. On this point, it is interesting how, already in 1933, President Roosevelt passed the National Industry Recovery Act as part of his New Deal to reverse the economic collapse of the Great Depression. And, although repealed as unconstitutional, the Act is significant because it led to the establishment of codes of fair practices to regulate entire industries. Specifically, Congress deliberately preferred self-regulation over other forms of regulation given the difficulty for the government to adequately control every market sector. As William O. Douglas, former SEC Chairman, stated in a 1938 speech to the Bond Club of Hartford, Connecticut: "Self-regulation…can be pervasive and subtle in its conditioning

[483] Benatti (2014).

[484] America is widely recognized as the birthplace of modern codes of ethics/conduct. Benatti (2014). With reference to the American experience, *see* Pitt and Groskaufmanis (1990).

[485] Graves (1924). For a historical recount, *see also* Benson (1989).

influence over business practices and business morality. By and large, government can operate satisfactorily only by proscription. That leaves untouched large areas of conduct and activity; some of it susceptible of government regulation but in fact too minute for satisfactory control; some of it lying beyond the periphery of the law in the realm of ethics and morality. Into these large areas, self-regulation, and self-regulation alone, can effectively reach."[486] Thus, policy in favor of self-regulation is based on the pragmatic consideration that only the experts of a specific art or craft possess the know-how to decide which activities should or should not be allowed in practice.[487] This approach – which Benatti (2014) notes borrowed from the classical liberalist theory of Austrian-British economist and philosopher, Friedrich von Hayek, that it was impossible for a public planner or legislator to possess all the information necessary to regulate all market activities – was contrary to the direct government intervention that characterized 1933–1937 (on this point, it is sufficient to recall President Roosevelt's First and Second New Deal, and the Security Act of 1935). However, without ignoring the presence of diverse opinions, the conviction that it was impossible for the government to regulate all forms of market activity did not *lead* to self-regulation (as suggested by Van Hayek)—it merely facilitated it. What (more accurately) led to self-regulation was the interaction of a variety of pressures: social, market and regulatory. In fact, the concept of modern business ethics was taking hold, and there was a growing sentiment that market players must be less egocentric. In this sense, it was the absence of designated laws, combined with the widespread consumer demand for more ethical or responsible practices that urged (or even compelled) self-regulation in the direction of more ethical behavior.

Although codes of ethics were conceptually discussed in the doctrine as early as the 1920s, by the late 1950s and 1960s, these ethical documents were by-and-large still mere "creeds" (often employee-oriented, with fair treatment of employees representing a central theme). It was rare to find a company with a code of ethics or conduct, and those codes that did exist were rudimentary.[488] In any case, if distrust for large corporations, the recurrent affirmation of the efficiency of self-regulation and the elaboration of business ethics are embryonic expressions of the needs that led to the birth of ethical codes, their real birth and diffusion is connected to the scandals that arose from the second half of the 20th century.

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[486] Quoted in Miller (1985).

[487] Benatti (2014).

[488] Benatti (2014).

One of the first scandals that prompted companies to rethink[489] the way they did business involved price-fixing and several antitrust violations in the electric industry. The indicted companies were subject to heavy fines and various managers were incarcerated.[490] However, this scandal appears to merely be the "straw that broke the camel's back"—there was already a general perception that the same freedom of enterprise that had contributed to the nation's economic prosperity no longer supported social values. In this sense it is possible to recall the works of C. Barnard, *Functions of the Executive* (1938), J. Clark, *Social Control of Business* (1939) and T. Kreps, *Measurement of the Social Performance of Business* (1940), as well as H. W. Bowen's *Social Responsibilities of the Businessman* (1953). Such attitude is further evidenced by the expansion of CSR as a concept, which occurred from the 1960s through the 1980s. Davis (1960)[491], for example, framed social responsibility as a management choice and related it to the concept of business power. Accordingly, social responsibility meant, on the one hand, that managers must recognize the company as an economic unit of civil society (and as such recipients of a "broad obligation" towards the community itself with reference to economic development concerning public welfare) and, on the other, the businessman has an obligation to respect, protect and develop human values. Thus, already in the 1960s, it is clear that economic development refers to both socio-economic and socio-human obligations, and therefore relates CSR to the legitimacy of the company in relation to the society in which it operates. In this regard, it is possible to speak of an "Iron Law of Responsibility" according to which the social responsibility of the director must be commensurate with his social power: therefore, the lack of social responsibility leads to a gradual erosion of "social power" on the side of the company.[492]

In any event, if it is true that the 1970s saw the first drafts of modern codes of ethics,[493] and that such emergence was due, in part, to increasing public criticisms, then it is also true that, as the 1970s progressed, companies alone were inept at creating effective guidelines for corporate

[489] I.e., by adopting compliance programs, and the establishment of the Business Ethics Advisory Council by Luther H. Hodges, then Secretary of Commerce.

[490] In 1961, nearly 1500 damage suits were filed against various electric industry players—the majority of which were against General Electric and Westinghouse—and several their executives for antitrust violations (namely price-fixing and collusive bidding) (The New York Times Archives 1964). However, the violations were already present and under investigation in the 1950s. *See generally* Andrews (1963).

[491] Davis (1960).

[492] Testa (2019).

[493] Benatti (2014).

behavior. Indeed, the situation did not improve following the above-mentioned scandal involving the electricity industry, and from the 1970s onwards, what can be considered modern codes of ethics gained popularity. It is also interesting to note how the rise of modern codes of ethics coincides with a period in which public opinion showed great distrust towards corporations, which worsened following subsequent SEC investigations into corruption and slush funds managed by some 300 companies. Between 1971 and 1975, three of them claimed to have paid bribes amounting to $93,700,000, mainly abroad. So, given these events, it is easy to understand why there was a perception that the same economic system based on the freedom of enterprise, which had contributed to economic growth, was in crisis: because the conduct stimulated by competition between entrepreneurs did not find an effective limit in the legal system or in its capacity to separate the licit from the illicit, in correlation between what is acceptable and what is unacceptable by a community that shares a given scale of values.[494]

Consequently, the U.S. Congress introduced the Foreign Corrupt Practices Control Act (FCPA) of 1977 to require public companies to establish detailed internal control procedures—a sort of mandated self-regulation. While some prudent companies went farther by adopting a code of ethics, for the most part, business continued as usual. Indeed, notwithstanding the presence of corporate internal control procedures, scandals during the 1980s, 1990s and 2000s suggested that the era's safeguards were inefficient.

For instance, insider trading was a major problem in the 1980s. In a The New York Times article ("Giuliani Called Too Zealous in Goldman Sachs Case") from April 1990, the head of one of Wall Street's largest investment banks described the insider-trading phenomenon "like free sex".[495] Consequently, the enactment of the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA) became decisive to the extent it established that the absence of a code of ethics could result in high fines if "A controlling person knowingly or recklessly failed to establish maintain or enforce any policy or procedure under Section 15(f) of the Exchange Act or Section 204A of the Investment Act of 1940 and such failure substantially contributed to or permitted the occurrence of the act or acts constituting the violation."

As the New York Stock Exchange's "comply or explain" model circulated globally, most national stock exchanges adopted the same policy (and offer a sort of model code of ethics and

[494] Benatti (2014).

[495] "A History of Insider Trading" (2016).

conduct), urging companies to incorporate some sort of self-regulatory code on specific issues (with relevant control procedures) in their business. Examples include the Australian Stock Exchange, Euronext, the London Stock Exchange, NASDAQ OMX Nordic Exchanges, and the Six Swiss Stock Exchange. Additionally, in 1984 and 1988, the U.S. Congress enacted the Sentencing Reform Act and the Insider Trading and Securities Fraud Enforcement Act, respectively. Measures such as the Federal Sentencing Guidelines for Organizations in 1991 and the Sarbanes Oxley Act of 2002 also made it increasingly difficult for Corporate America to formally maintain the status quo.[496] Similarly in Italy, following Legislative Decree No. 231/2003, companies have seen fit to adopt codes of ethics or amend those already in use. Indeed, the recognition by more and more countries that companies can be criminally liable for organizational failures and misconduct of their agents[497] has caused many small and medium enterprises (SMEs) and multi-national enterprises (MNEs) alike to implement an organizational structure analogous to a formal code of ethics.[498]

But even outside these areas, codes of ethics were considered necessary. As society became more critical, business reacted, not just with codes of ethics, but also with efforts such as CSR programs and ad hoc initiatives to boost revenues and improve corporate image.[499]

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[496] On the various models implemented after 2002, *see* Newberg (2005).

[497] Heine and Grabovets (2016).

[498] On the adoption of modern codes of ethics in a comparative perspective, *see generally* Benatti (2014) 19-22. With reference to the fashion industry, *see also* Jacometti (2016) (discussing the sustainability issues that have prompted government and industry to regulate processes common to textile production); Sajn (2019). (describing the trends of fast fashion—including statistics—and how the EU has responded to such trends on a legislative level, for example by passing the new Waste Directive, the Packaging Waste Directive, the Landfill Directive, as well as by laying down European standards and creating a voluntary certification program that provides incentives for fashion brands to be more eco-friendly through competitive advantage); Sajhau (2000) 75: "few European enterprises in the textile or footwear sectors have … taken any structural ethical approach at the individual level leading them to adopt a code of conduct … Mondial International has drawn up a fairly detailed code based on the United States model … however, at the European level, initiatives in this sphere have mainly come from the trade unions … employers' associations … and the Commission of the European Communities. At the EU level, France presented in February 1995 (during its presidency) a proposed social charter to promote basic social rights in the multilateral trade relations. Within the Commission of the European Communities, the question of codes of ethics in the TCF sector has been the subject of a tripartite debate within the framework of the textiles/apparel sectoral 'social dialogue' … the Union of Textile Industries (UIT) of France adopted in 1995 a code of ethics in which participating enterprises undertake to respect, within the framework of international trade, fundamental ILO standards … In the same way, the German Textile Confederation (Gesamttexil) established in 1994 a Social Guide which establishes a number of rules to be respected in international trade concerning respect for the environment and labor standards".

[499] On the adoption of codes of ethics to prevent, or limit, reputational damage, *see* Chatov (1980): "Most corporate attention is given to areas with a potential for dramatic impact on the corporation. That the corporation will be a transgressor or a victim is of most concern". *See also* Lee (2017) 14: "as negative public

In this context, Benatti (2014) notes that each new wave of scandals corresponds with a different moment in the history of codes of ethics. In particular, the first codes were "self-defense" tools for companies, used to regulate employee conduct and avoid conflicts of interest. Their introduction in a corporate governance structure was based on Friedman's thesis that businesses have a duty to increase profits for shareholders while, at the same time, conforming to the basic rules of the society, whether such rules are embodied in law or ethical culture. Therefore, codes of ethics were instruments that serviced a company's shareholders, and it is understandable that they focused on employee behavior since it was easier to control than a company's environmental or social impact. These issues remain significant, even in today's discourse on corporate social responsibility. The second generation of codes of ethics addressed the problem of corruption to gain business. The influence of the scandals in the United States and the emerging thesis on the relationship between ethics and profit is evident. It should be noted that the decision to include such provisions in the codes also depends on other factors such as the public interest of the countries in which the company operates in preventing corruption and the determination of management to establish strict rules of conduct to preserve its image. Moreover, the development of capitalism and industrialization, with the birth of mass production, determined the need to ensure better working conditions, with reference to wages, vacations, place of work and welfare.[500] Therefore, in the third phase of the codes, there is the insertion of rules aimed at guaranteeing these aspects, now considered central. These issues became even more relevant in the fourth generation of corporate codes, and the question of respect for the environment started taking on great importance. In fact, disasters such as Bhopal have serious economic consequences for companies: direct due to the high compensation for damages, and indirect deriving from the damage to reputation. Finally, the fifth model of codes of ethics focuses on respect for human rights in the states in which the company invests or produces. This is the result of concerns about the effects of globalization and the "race to the bottom" phenomenon.[501] Additionally, in this context is it is significant that international organizations play a role in drafting and promoting the diffusion of model codes, a diffusion which is supported by the growing demand of developing countries for multinationals (MNCs)

opinion started producing economic loss, multinational retailers and brands started taking steps to set up their internal codes to apply to their suppliers."

[500] Weaver (1993) (emphasizing that these aspects produce a great social impact and are more controllable).

[501] *See* Ferro and Nobili (2003); Solimene et al. (2012).

that want to establish themselves on their territory to adopt such codes.[502] The MNCs themselves import their codes into the countries in which they operate, sometimes differentiating them or trying to adapt them in light of the concrete context. They proclaim to prohibit the exploitation of labor and child labor, to reject all forms of discrimination, and to support union association and collective bargaining. The aim is also to avoid accusations of indirect support, through economic investments, to regimes that do not recognize human rights. Although already discussed in the previous two chapters, it is worth reiterating here, as the importance in these predictions is demonstrated by the Nike case. In the 1990s, the company was accused of exploiting labor in its Indonesian factories. The consequences had been such that the brand, now associated with "slave wages, forced overtime and arbitrary clauses", had plummeted and led to the adoption of a very detailed code of ethics to overcome the criticism. In fact, Nike establishes rigid standards of conduct for the companies in its production chain that seems more like a contractual document than an expression of values and objectives. Similar provisions are set by other codes of conduct of textile supply chains in developing countries that serve to show "the foundation for ongoing evaluation of a factory's employee practices" and the commitment "to develop monitoring systems to assess and ensure compliance."[503] The major problem these rules pose lies in the difficulty of their application and enforcement. Nike itself, with reference to the years 2005-2006, notes that its monitoring procedures had not led to significant changes in working conditions nor to a systematic and large-scale change. For this reason, MNCs now seek to enforce compliance with codes not only on their suppliers, but also on those who contract with them through clauses to that effect.[504]

As Benatti (2014) highlights, codes of ethics are introduced in developing countries in essentially the same way, with meanings and nuances that still vary according to culture and economic reality. Such form of "legal transplant" thus reflects the dynamics of globalization and underlines how society's expectations of corporate behavior change over time and vary by region. From an early model of codes, where only compliance with laws was enforced, the content has expanded to first cover areas closely related to the activity of society and then third-generation rights.[505] This is due to the increasing importance attributed to CSR. In fact, on the one hand, codes represent the setting of standards to be followed in each sector (as can be seen

[502] *See generally* Gragg (2000).

[503] Maryanov (2010).

[504] Benatti (2014).

[505] *See* Stohl, Stohl, and Popova (2009). *See also* Grasso (2012).

in those drawn up by international organizations) and, on the other, they are a best practice. Among their purposes, they function to align company strategic planning, key performance indicators, and execute the values that hold the cooperative structure of a private firm together.[506]

Accordingly, the corporate scandals that plagued every decade spanning from the 1960s into the 2000s have contributed to the development of a global culture—both corporate and societal—that is more aware of (and sensitive to) business practices in conflict with today's socio-economic principles and standards. And as the reach of this culture expands, the adoption of codes of ethics as a so-called institution has circulated from America throughout common law countries[507] to reach Europe, and even Asia and Africa.[508]

With regard to Western culture in developing countries, in 2006, the European Commission released a Communication to the European Parliament (entitled "Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility"[509]) stating that globalization has brought about great economic advantages, but also that the European business community must demonstrate its commitment to sustainable development and step up CSR undertakings, including via cooperation with other stakeholders.[510]

Reasons for circulation

If one of the topics of study of comparatists is *why* legal transplants happen, then the circulation of codes of ethics as self-regulatory models is interesting given the relative speed at which they spread and their reach.

An instrument's efficacy has been noted as a reason for adoption of a foreign legal tool. In this sense, it is significant that codes of ethics have been adopted to prevent or limit reputational

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[506] Benatti (2014).

[507] Namely, Australia, Canada, and the UK.

[508] On the globalization of codes of ethics, *see* Stohl, Stohl, and Popova (2009). On the factors that contributed to the introduction of codes of ethics in developing countries, *see* Benatti (2014) 22-26. On codes of ethics in the USA, Austria and China: Brasile and Cattaneo (2019). On current CSR practices around the world: Idowu (2021).

[509] COM(2006) 136 final.

[510] Benatti (2014).

damage caused by the association of a brand with illicit conduct such as corruption, conflict of interest, insider trading or excessive risk-taking. In the fashion industry, illicit dumping of waste or other unlawful and environmentally detrimental acts must be added, as well as any behavior directly or indirectly associated with violation of workers' rights and use of child labor. Accordingly, if a brand is perceived as "ethical", it is more likely to benefit from improved profits, making codes of ethics an efficient marketing tool. In other words, negative public opinion about unethical practices caused legislators and market regulators alike to enact policies aimed at compelling businesses to establish some form of self-regulation. And the social and legal pressures combined had the effect of gradually producing a trend such that having a code of ethics became the rule, and *not* having one became the exception.[511]

Although efficiency is certainly one reason, there are many reasons one model might be preferred over another. The writings of Antonio Gambaro emphasize the role of the scholar in the western world to advocate that the shift in intellectual leadership is less attributable to efficiency and prestige than to ways of thinking about law; the so-called "legal mentality".[512] For instance, in very basic terms, it appears America "imported"[513] the notion of industry codes in around the early 20th century. In the 1960s and 1970s, it passed several important and groundbreaking laws in favor of more sustainable development (although it cannot be ignored that this pattern started in the 1950s and lasted until about the first decade of the 2000s), and during that time (and especially in the 1980s) some important theories about corporate governance and corporate interest developed. On a related note, it is also interesting to observe that much of the discourse on business ethics occurred in the doctrine and that "legal scholarship is the least inherently parochial of 'legal formants' and is therefore the most

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[511] Reference is made to the entire period from the 1970s through the early-2000s, although Benatti (2014) notes that much of the "codes craze" occurred during the 1980s, consistent with the era's nickname as "The Age of Ethics".

[512] On legal mentality, *see* Gambaro (2004); Sacco and Rossi (2015). *See also* Grossi (2006); Nacci (2014) (referring to canon law); Husa (2015) (referring to Japanese legal culture and Nordic legal thinking, respectively).

[513] It appears more appropriate to assert that America imported (rather than Europe exported) because, while it is evident that the practice of sector regulation though codes (recall the guilds of the medieval period) was already present in Europe, it is not as clear that European scholars actively promoted the circulation of such codes prior to their "rebirth" in America after World War II. Additionally, the history of business ethics in America appears to suggest that an intellectual process was happening at the time, similar to that of the Enlightenment Period in Europe, in the sense that widespread system abuse and scandal led to public mistrust in certain (types of) institutions and the notion that a broad reform was necessary to compel business to behave ethically and in favor of public interest. In this context, it is possible to note in the doctrine the discussions about failed states and obligations of market forces.

efficient means to diffuse legal ideas abroad... It is more likely, in other words, that foreign scholars become interested in the legal culture of a given country when they are persuaded that this culture plays a leading role in shaping a legal system which they admire."[514]

At the same time, the influence of being part of the same legal "family" also cannot be ignored. Indeed, according to Benatti (2014) codes of ethics first circulated in countries traditionally inspired by the American system, such as Australia and Canada[515], before making their way to Europe, Asia and Africa.

On this last point, Cerchia & Piccolo (2019) are in agreement with Benatti (2014) when they note that "[m]uch of the relative success of the spread of codes of ethics may be attributed to the efforts of international organizations, which not only support and encourage companies to respect internationally recognized standards of conduct, but aid their spread[516] into developing countries." As Benatti (2014) points out, codes of ethics have proved a useful model for combating exploitation and corruption in developing countries, as well as regulating different hypotheses. In this sense, the codes adopted today (which are indisputably significantly more detailed than the ones in the 1960s, '70s or '80s) are the product of globalization and, as has been said with reference to contracts, "one can grasp the subversive force of this soft law with

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[514] Mattei et al. (1994) 208.

[515] *See* Helin and Sandström (2007) (providing a brief literature analysis on the influence of American codes of ethics on the content of Australian and Canadian codes).

[516] For instance, by putting pressure on producers to require compliance with such codes by their suppliers and other third-party affiliates. In 1919, the ILO established the first internationally binding convention on worldwide labor rights, and in 1998 the ILO adopted the "Declaration on the Fundamental Principles and Rights at Work" that ties all ILO member countries. The Fair Labor Association (FLA), Social Accountability International (SAI), Worldwide Responsible Accredited Production (WRAP) and Worker Rights Consortium (WRC) are third party organizations that monitor compliance with company codes of conduct in foreign countries. Canopy also works with fashion brands and their suppliers to protect against deforestation; CARE International strives to improve gender equality and achieve social justice; the Clean Clothes Campaign is dedicated to improving working conditions for textile and garment laborers; the Fairtrade Foundation works to promote fair trading conditions; the Fair Wear Foundation strives to improve working conditions for garment workers; TRAID is a charity working to stop unwanted clothes from being thrown away. *See* "Key Organizations" (n.d.) (providing a non-exhaustive list of organizations involved in changing the fashion industry).

Additionally, private, independent organizations conduct factory inspections and publish findings, the ILO regulatory reports on corporate compliance with international labor principles, and social media keeps an increasingly close eye on industry practices. Indeed, the fashion industry has been marked by the launch of startup fashion companies promoting up cycling of old garments or re-using alternative materials to create new trends. *See generally* Lipton (2019); Toprak and Anis (2017).

respect to individual territorial geo-rights, which see their own boundaries of force annihilated and their own sources enriched and renewed by foreign linguistic and juridical material."[517]

Above all, however, Benatti (2014) notes three factors have facilitated their circulation: (1) structural and state market failure; (2) an inability of the State to remedy negative consequences of such market failure[518] (providing an opportunity for businesses to determine standards of conduct, often through voluntary codes); (3) supervision by large corporations of various aspects of a more-or-less long supply chain comprised of companies that do not belong to the same corporate group.[519]

As concerns the first point, already in 1973 Arrow[520] highlighted that an inefficient free market produces socially undesirable consequences as companies tend to transfer costs to consumers. Additionally, an inefficient market may be characterized by considerable information asymmetry between companies and consumers/workers regarding safety in the workplace and product quality. In this context, codes of ethics were therefore proposed as more ductile and less onerous regulatory tools. As a bonus, they were also perceived to remedy a problem and shield companies from intrusive public intervention.

On the second reason for codes' success, as Benatti (2014) points out, the argument that adoption of voluntary codes is possible when states are unable to correct the negative externalities of market failure, resulting in businesses stepping in to determine the rule of conduct, appears to be logically inverted given that the market is nothing more than the set of economic operations recognized and protected by the legal system. Indeed, this is what separates a licit market from "organized crime". Therefore, if every failure of the market corresponds to a failure of the legal system, for Benatti (2014), blaming the market or blaming the State is a tautological redundancy through which the same "failure" is indicated from two different perspectives. Furthermore, just as it is obvious that market failures are state failures, it should be equally obvious that the legal system must, in any case, limit the discretion to those who control economic assets. Still, it has been questioned whether codes of ethics are better able than legal rules to control the exercise of companies' behavior. In common law traditions, where legal reasoning has been refractory to "slippery generalities," ethical codes are assumed

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[517] Guarneri (2012).

[518] Vogel (2005).

[519] *See generally* Doorey (2011).

[520] Arrow (1973). *See also* Chemical Week (1981); Stone (1975).

to be better than nothing.[521] In the civil law tradition, their efficacy is more doubtful given that their legal value is not so different from the ethical afflatus already well-represented in general clauses such as good faith.

Regarding the third and last point, the adoption of codes of ethics/conduct by large corporations at the head of long supply chains comprised of supplier companies (i.e., not part of the same corporate group) is primarily aimed at ensuring compliance with quality standards, but has also extended to ensuring respect for human rights and the environment. In such a complex reality, self-regulation seems to be the only possible form of control. Accordingly, in an increasingly globalized economy – and especially as concerns the fashion industry – this last point explains why most multinational companies today have adopted a code of ethics. Indeed, it cannot be ignored that businesses operate in a world of mass media communication in which the creation of shareholder value is a slogan that arouses applause, but so does the call for business ethics. And the latter is desired by consumers and pursued by businesses (for the sake of consumers) despite the evident implication of an undertaking to satisfy much broader interests than the former, and therefore requires a different type of effort and conduct.

Functions and application in the fashion industry [522]

Codes of ethics may be described as a sort of company "constitution".[523] They are a form of self-regulation that normally contain general principles to guide behavior (e.g., that the company is committed to providing safe working conditions, that it does not use child labor, and that it undertakes to protect the environment). Unlike codes of conduct, traditionally, codes of ethics neither outline specific behaviors required or prohibited as a condition of employment, nor provide practical details to ensure compliance with other codes or guidelines in force within a corporate structure. At the same time, events such as those mentioned in Chapter 1 have encouraged some companies to make their codes of ethics more detailed. In fact, a growing number of companies do not limit themselves to merely establishing the guiding principles of

[521] Benatti (2014).

[522] Note that a significant portion of this section, only partially edited, has already been published in Cerchia and Piccolo (2019).

[523] Nieweler (2014).

behavior, but actually “spell out” how such principles must be respected,[524] and may even “link” their codes of ethics to other internal resources and/or guidelines, such as employee handbooks (or behavioral codes of conduct).

In other words:

> “Codes of ethics are corporate documents that express the general principles and moral ethos by which a company operates; they are to businesses what the Constitution is to a country. Often, corporate codes of ethics also outline basic workers’ rights and establish the minimum standards to be observed by the company, its employees, and third parties who enter into contract with the company (e.g., suppliers). Codes of conduct, on the other hand, tend to be more detailed and outline specific behaviors required or prohibited in accordance with principles expressed by a code of ethics or similar statement; they are to codes of ethics what national laws are to a country’s Constitution. Although these two documents are, in principle, fundamentally different, their shared function appears to induce scholars and companies alike to use these terms interchangeably. In any case, codes of ethics/conduct vary in length and degree of detail, ranging from single-page documents that may be posted on suppliers’ premises to highly detailed sets of provisions that suppliers are contractually required to comply with. This is especially, but not exclusively, true in the case of suppliers operating in developing countries, where the company may be subject to greater reputational risk. Additionally, these codes not only help to raise awareness and encourage fashion companies to com- ply with basic standards, but they may also be a guide for legislators.”[525]

Therefore, as far as their purpose is concerned, codes of ethics are multifunctional. From a structural point of view, they represent (and enhance) a company’s culture and values. From an organizational perspective, they may cause a company to establish a specific department dedicated to corporate social responsibility, for example, or compliance and/or monitoring. Depending on how a particular code is implemented, it might affect operational costs[526] or support codes of conduct applicable to a company’s directors. When it comes to human resources, codes of ethics may be instrumental in attracting certain talent or employees with

[524] For example, if a company’s code of ethics states that all employees shall abide by the law, a more detailed code might list specific applicable law, procedures, and/or standards.

[525] Cerchia and Piccolo (2020b).

[526] Whether because it is more costly to monitor compliance or because requiring compliance from the entire supply chain requires relying on more expensive suppliers, which are typically more expensive due to the increased operation costs associated with ethical business practices.

particular traits. In the fashion industry, significant (corporate) value is given to codes of ethics used to portray messages about a certain brand to the public.

As such, an analysis of the codes of ethics of some of the industry's top brands is warranted to better understand how they could become a tool to convey the brand's values.[527] This method was chosen because, if it is generally true that companies respond to market demands, and new generations of consumers "want brands to step up on sustainable lifestyles,"[528] then—from the moment a significant percentage of consumers demand ethical business practices—the adoption of increasingly specific codes of ethics is a corporate response to a more ethics-conscious consumer. Thus, if the adoption of codes of ethics represents one of the ways ethical (or at least "ethics-conscious") consumers may better gather information about the fashion industry,[529] then the structure, language used, and attention given to each issue within each single company code of ethics provides insight into the primary concerns of fashion producers.

In the fashion industry, in response to various industry-wide issues, one reason brands have adopted codes of ethics is to address problems ranging from inadequate labor standards, to corruption and bribery, to environmental protection. Consequently, it is advisable to review the codes of some of the industry's trendsetters[530] to identify some of the issues that might be perceived as challenges.[531] In other words, by studying the structure, language, and attention

[527] Overall, despite select fashion companies make express efforts to ensure environmental safety and become "greener", the main themes throughout the codes of ethics analyzed are employment and workers' rights (including equality and discrimination issues), labor safety standards, bribery and anti-corruption, and counterfeiting and unfair business practices. It appears that events that have been directly traceable to a specific fashion company drive the direction of company codes of ethics, while environmental protection is still a secondary industry concern. Specifically, a dedicated section on environment and sustainability was not present in all the codes we analyzed. Of the codes announcing a commitment to improving the environment, Gucci, Louis Vuitton, Nike. *See* Nike "Code of Conduct" (2017), and Adidas had the most detailed sections on commitment to the environment. Nonetheless, we cannot exclude that any company has a separate, parallel program in place to improve sustainability and reduce its environmental impact of production. For instance, Phillips–Van Heusen is noted for having an extensive CSR program, which includes efforts to preserving the environment. Phillips–Van Heusen (2018). Still, all codes concentrate heavily on labor standards and workplace safety.

[528] Townsend (2018).

[529] For an in-depth discussion on the creation and evolution of codes of ethics in business, *see* Benatti (2014). *See also* Bartley (2005); Wisner et al. (2016).

[530] Gucci, Armani, Prada, Fendi, Louis Vuitton, Ralph Lauren and Polo, Levi Strauss, Nike, Adidas, Phillips–Van Heusen (owner of Tommy Hilfiger and Calvin Klein, among others), and Gap (which includes Old Navy, Banana Republic, Piperlime, and Athleta).

[531] The research focused on a small group of fashion brands with global presence to reveal the likely trends of a larger group. To do this, we randomly selected fashion companies from a broad group of brand names, including enterprises associated with both the "fast" and luxury fashion markets. It is interesting to show how

given to each issue within the ethical codes of a sample of market leaders, it has been possible to determine the key issues of the global fashion industry.[532]

For example, most of the companies surveyed explicitly stated their codes of ethics are legally binding for all employees, collaborators, and suppliers (the "addressees"), no matter their position, type of employment contract, or role within the company.[533] Some firms have expressly linked their codes of ethics to the primary supplier–buyer agreement,[534] which remedies the code's enforceability problem connected with its clearly "accessory" (or collateral) nature. In this way, a violation constitutes a breach of the main contract (for services or procurement of goods), meaning suppliers are more likely to behave ethically due to the real threat of termination for breach. Other fashion companies might have different "versions"[535] of codes of ethics[536] (one aimed at the company as a whole, and one specifically for suppliers), or a single code with multiple sections for specific addressees.[537] This setup illustrates a top-down organizational structure, as the company managers (who make the decisions and give

industry issues have been incorporated into the Code of Ethics for companies, and how companies can use a different language to give different weight to each issue, depending on the perception of importance or its corporate culture/dedication to a given topic. Consequently, the numerical data are not significant for the purpose of this contribution, which—it should be reiterated—is to hypothesize whether such regulatory instruments can be perceived as marketing tools and/or documents that consumers might rely on when making purchasing decisions. Our research, in fact, was aimed precisely at the relationship between codes of ethics and the ethics-conscious fashion consumer.

[532] In addition to what has been stated above in notes 489-490, it is important to mention that all codes concentrate heavily on labor standards and workplace safety.

[533] Of the company codes surveyed, only Ralph Lauren states that its code does not constitute a contractual commitment to the company (Ralph Lauren 2016, stating: "[T]his Code does not constitute a contractual commitment of the Company"). On the other hand, it establishes that actions that are not unlawful may still result in termination, clarifying that unlawful actions may additionally result in civil or criminal proceedings.

[534] "Armani requires all Suppliers Armani contractually engages in business with to adhere to the following standards and requirements. The Supplier Code of Conduct is referenced in Armani's Terms and Conditions so as to hold Suppliers legally accountable to this Code" (Armani 2017). *See also* Ralph Lauren (2016) (referencing separate Fair Employment Practice Policy and Anti-Harassment Policy contained in employee handbook). Nearly all other brand codes of ethics contain a similar or equivalent phrase.

[535] These may be called codes of conduct or employee/supplier handbooks or guidelines.

[536] For instance, Ralph Lauren has a separate Code of Ethics for Principal Executive Officers (Ralph Lauren 2016).

[537] Levi Strauss distinguishes between internal principles of the firm, practices applied toward partners, and guidelines to assess supplier countries (Levi Strauss 2019; Levi Strauss n.d.). Similarly, Phillips–Van Heusen's code of ethics is divided into general principles guiding the firm's activities and guidelines for suppliers and subcontractors (Phillips-Van Heusen 2018; Phillips-Van Heusen 1995). Likewise, Nike and Adidas also have a set of rules for the enterprise as a whole, and another for suppliers (Nike 2017a; Nike 2017b).

orders to the suppliers) must be ethical, while the producers receive more detailed instructions on how to behave within the organization, and must execute behaviors in line with principles that—due to various cultural contexts—may or may not be shared.

From a legal perspective, in so much as a code of ethics constitutes a sort of contract—whether because the code itself establishes it is directly binding or because it is an accessory to another agreement (between a company and its addressees)—codes of ethics tend to oblige third parties to adhere to the buyer's principles. This has two practical effects: first, it means the buyer assumes a greater risk for third party behavior and, where codes are sufficiently detailed, increases the chances the buyer will effectively terminate the business relationship in case of breach. Thus, by enforcing a code of ethics that establishes rules of conduct to support the principles upon which the code is based, companies with more detailed codes are more likely to contribute to an increasingly sustainable industry.[538] Second, it effectively results in a sort of "exportation" of laws from developed countries into the developing world. Indeed, all codes state that addressees must abide by all applicable national and international laws. However, since this ultimately would result in merely promoting suppliers to comply with national law (since international laws only apply in rare circumstances), all codes are additionally integrated by some wording to the effect of "and internationally recognized standards." For American and European buyers, this language means that American/European employees, collaborators, and suppliers are subject to American and European law, while non-US/EU producers must primarily respect principles. Legally, the requirement to respect different legal sources is significant.

> The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision … If two rules conflict, one of them cannot be a valid rule … When principles

[538] However, according to the 2019 Fashion Transparency Index, even companies that score relatively high on policy and commitments and governance (in the 51–60% and 41–50%, respectively), still fare poorly overall. Fashion Transparency Index (2019). Specifically, traceability, know, show and fix, and spotlight issues continue to be problematic. *See also* Thompson (2018). However, some companies might reduce their liability by expressly providing that "suppliers remain guarantors towards 'Company name' for work performed by their subcontractors and suppliers and guarantee respect by their subcontractors and suppliers of this Supplier Code of Conduct and relevant obligations (Louis Vuitton 2017). Indeed, in the case where the supplier of a subsidiary violates the Supplier Code of Conduct, this wording could be instrumental in alleviating the group of any liability for harm; instead, the company to which the supplier directly reports remains liable.

> intersect … one who must resolve the conflict has to take into account the relative weight of each.[539]

In other words, there are explicit penalties for failing to comply with American and/or European law: depending on the applicable law, there may be civil and/or criminal consequences for the company, as well as its managers (depending on the infringement). The American and European legal systems also provide detailed requirements, procedures, and minimum standards, as well as confer specific powers to courts in various jurisdictions to ensure such laws are respected. On the other hand, principles function as values upon which to base one's behavior, but they do not prescribe conduct in any meaningful terms, nor are they easily enforceable. Indeed, the effective structure of the supply chain, combined with the laws on jurisdiction, makes the execution and enforcement of principles complicated. Further, socio-cultural differences may hinder them from fully resonating in far off, non US/European countries: "[m]ost educated people have the idea that the laws in England form some sort of system, and that … in almost every part of the world which is thought of as a separate 'country' there are legal systems which are broadly similar in structure in spite of important differences."[540] Therefore, by requiring non-US/EU suppliers to comply with *principles*—rather than writing its own set of laws, for example by way of contract, fashion companies effectively allow their suppliers to continue "work as usual" without significantly raising the bar.[541]

At least half of the codes analyzed provide that, in cases where there is either no local law governing a topic, or there is more than one, the law with the most stringent standards applies,[542] but not all companies agree on which law or standard should be applied in business.[543] Furthermore, while some codes go so far as to list specific applicable laws,

[539] Dworkin (1967) 25-27.

[540] Hart (1961) 2-3.

[541] *See generally* Fashion Transparency Index (2019) (discussing the importance of transparency in the fashion business and analyzing the level of transparency of some of the industry's biggest brands). *See also* Slot (2017).

[542] Armani seeks to raise the standard in countries where it does business by "[possibly setting] standards that go beyond local legislation" (Armani 2017). *See also* Prada (2007). Phillips–Van Heusen is another example of companies that exceed industry standards.

[543] This topic will not be analyzed in the present discussion, but it is necessary to remember that the issue of working conditions in developing countries is controversial and the ILO approach it is not widely accepted as being the most ethical (just consider the neoliberal approach of "Doing Business").

conventions, or standards, those codes that remain more general use language that reflects the principles contained in relevant internationally recognized documents.

There are also companies that do not limit themselves to creating principles for addressees to follow. Rather their codes "[express values of ethical integrity] and [establish] the principles and rules of conduct deriving from them."[544] For instance, all companies surveyed promote principles such as loyalty, honesty and good faith, correctness, and integrity. Some companies go further by mandating that relations between employees, no matter their level, including between them and the third parties with whom they come into contact during the course of their work, "be marked by criteria of collaboration, loyalty, and reciprocal respect,"[545] that criteria of merit be adopted in order to valorize employees' skills and competencies, and that equal opportunities are guaranteed to all. By doing so, the code takes on a truly contractual nature as the object (or subject matter) of the "contract" is increasingly determinable. In line with ILO principles (adopted by every code of ethics surveyed), child and forced labor is prohibited across the board. However, the same companies that do not limit themselves to merely declaring principles by which to abide additionally require their "suppliers [to] implement a management system that verifies the age of each employee by review of legally accepted documentation"[546] and directly address the issue of abuse of apprenticeship/traineeship schemes to avoid the payment of wages or benefits.[547] Moreover, some fashion brands oblige their suppliers to implement a written disciplinary procedure.[548] Legally, this (at least theoretically) reduces the likelihood of groundless disciplinary action and gives employees a basis for any recourse in the event of wrongful dismissal or other illegitimate corrective/punitive measures. It is additionally significant that in order to combat undeclared or illegal work, the majority of codes of ethics surveyed require the issuance of pay slips each

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[544] Prada (2007). Levi Strauss even establishes specific criteria to assist those in charge of outsourcing in selecting suppliers (Levi Strauss n.d.).

[545] Prada (2007).

[546] Armani (2017). Nike also has a section dedicated to "proof of age" in its "Code of Leadership Standards".

[547] "Employment of trainees/apprentices both under and over the age of 18 shall be conducted in compliance with local legislation and this Code. Apprenticeship/traineeship schemes shall not be used to systematically avoid the payment of wages and benefits" (Armani 2017).

[548] Armani (2017); Ralph Lauren (2016).

pay period. As regards standards of pay (in line with expressed ethical principles based on ILO conventions), overtime is always contractually paid at a higher rate than normal pay.[549]

With regard to work hours, maximum work hours may vary but do not exceed 60 hours per week, including overtime, and establish at least one day of rest. What is more, all companies recognize workers' rights to refuse overtime, and some expressly recognize workers' rights to "be informed about overtime in advance and permitted to reject the overtime request without punishment or retaliation."[550] Along these lines, companies with more detailed codes tend to require their suppliers provide workers with a written copy of their employment contract, and that such contract must be in a language the worker understands. Not only do these provisions illustrate the influence of the company's home (western) culture on its business practices—in that western fashion brands, albeit in a limited fashion, export national labor law abroad—but they provide employees with greater legal security.[551] It is also interesting that, in addition to requiring suppliers provide workers with safe and healthy working/living environments, some companies list conditions that make such environments "safe and healthy"[552] or provide practical sections with "questions and examples to help apply the code." [553]

Moreover, due to the difficulty of monitoring compliance, the majority of codes appear aimed at compelling suppliers to implement a management system similar to that required by Italian Legislative Decree No. 231/2001 (with a relative grievance system), with specific personnel responsible for the management and implementation of the supplier social code, including

549 Notwithstanding all companies surveyed announce pay shall not be lower than the minimum standards required by applicable law, Phillips–Van Heusen and Adidas establish that "[e]very worker has a right to compensation for a regular work week that is sufficient to meet the worker's basic needs and provide some discretionary income" and that "[i]f the compensation paid does not meet the workers' basic needs and provide some discretionary income, our business partners are required to take appropriate actions that seek to progressively realize a level of compensation that does" (Phillips–Van Heusen 1995; Adidas "Workplace Standards" 2016). Additionally, Phillips–Van Heusen establishes that overtime must be paid at a premium, which implies a significant difference between regular and overtime pay (compared to those companies that merely establish overtime is paid at a higher rate) Phillips–Van Heusen (1995) 2. This provision is significant as minimum wage required by law is not always sufficient to guarantee the basic needs of workers (i.e., so-called "living wage"). We recall countries such as Bangladesh where minimum wage is $0.09/h. (Human Capital 2014). It is additionally significant that Nike implements a "fair wage self assessment" (Nike 2017b).

550 Armani (2017).

551 From an evidentiary standpoint, having a written agreement demonstrates an employer–employee relationship, and all the legal consequences that follow, and makes clear both parties' duties and obligations.

552 For instance, by "ensuring building and fire safety, machinery and equipment safety, access to potable water and suitable sanitary facilities, access to appropriate personal protective equipment and emergency care, and appropriate storage and handling of hazardous materials" (Armani 2017).

553 Gucci (2016). *See also* Gap (2012).

informing all workers and subcontractors of all applicable legislation and any changes to such. Part of this system includes ensuring the maximum dissemination of the code of ethics and educating addressees of its contents. Other codes, in addition to the above, provide anonymous reporting channels and identify a specific competent authority (such as the company's legal department) to field complaints. Therefore, given the similarities between certain codes of ethics and supplier codes of conduct, it appears many fashion brands seek to apply US/European law abroad through their contractual relationships with suppliers and subcontractors. In this respect, it also appears that a company's code of ethics has the potential to become a sort of "living document" where the addressees are not only responsible for its implementation, but also have a (at least partial) voice in the mechanisms adopted to achieve the company's goals. To use some legal terminology, these types of codes of ethics resemble a sort of "framework agreement" whereby, subsequent to feedback from the bottom up, top managers may decide to amend prescribed conduct and/or procedures from time to time in order to better reflect and ensure compliance with the overarching (ethical) principles established by the code.

Simply put, notwithstanding internal documents are not available for analysis, it appears that the more detailed the code of ethics, the less likely a company's principles will be violated for profit. And yet this is not true: codes of ethics *are* violated, and companies *do* benefit from such breach. Stories of human rights offenses or reports of the environmental impact (or *detriment*) are proof. The Rana Plaza Collapse and the KiK disasters are just two recent examples, but the fashion industry would not have such a bad reputation if these were the only ones. So, given a company's code of ethics is a powerful tool to communicate a commitment to issues consumers care about, one might wonder the extent of its concrete legal value and what, if any, remedies are available in case of breach.

Traditionally, the discussion has been encompassed by the general discourse on the legitimacy of CSR programs and a firm's obligations to a broader class of interests (not just shareholders'), which essentially revolves around the notion of "proximity" of beneficiaries to a company's operations. Now, although CSR is widely accepted as not just legitimate but also necessary, there is little discussion on the introduction of codes of ethics into a corporate governance structure. However, that does not imply corporate codes are not a source of contention in the doctrine. The debate is very much alive and focused on the evaluation of their effectiveness and ways to increase it.

II. Europe's Circular Economy.

As a union of member states, despite many national legal frameworks[554] that already establish several principles and provide protections that allow adoption of sustainability and CSR laws,[555] much of the direction in this field is done at the European level. Importantly, in the definition of socially useful behavior found in the 2001 Green Paper, it is possible to identify a close relationship between ethics and profit, thereby supporting the notion that although ethical business practices can be a strategic tool (or used to boost image and/or reputation) they are also economically beneficial. This is what Benatti (2014) calls "pragmatic ethics", an approach that is also manifest in the Commission Communications of 2002 and especially 2006, which reiterate that "by choosing the path of social responsibility, businesses of all sizes can contribute, in cooperation with their partners, to better reconciling economic, social and ecological ambitions." At the same time, it appears equally important that both companies and institutions have criticized the European model of voluntary regulation accompanied by legal obligations to compel ethical and sustainable behavior without providing clear standards or guidelines, for instance. Thus, in a 2011 Communication[556], the European Parliament defined CSR as "the responsibility of companies for their effects on society" characterized by the following three relevant aspects[557]: (1) Greater emphasis on the "smart mix" approach and, above all, on the role of public authorities, as a support aimed at providing guidelines, encouraging comparison between initiatives and fairer competition in the market; (2) Emphasis on self- and co-regulatory tools based on prior studies, which are considered more effective; (3) Affirmation of the intent to outline a new regulatory framework, especially with reference to the transparency of social and environmental information.

[554] In Italy, for example, these principles can be found in the Constitution, e.g., Articles 2 (principle of solidarity); 9 (environmental protection); 32 (right to health); 41 (social utility of enterprise); 46 (need to harmonize production with the subjective rights of workers). Although it cannot be ignored that there are also more detailed laws adopted at the local level, as well as national legislation in certain CSR-related areas.

[555] On current CSR practices in Europe: Idowu (2021) (describing practices in France, Germany and Italy at pages 121-193, 213-238, respectively). *See* Testa (2019) (discussing CSR from a doctrinal perspective, including a historical reconstruction of the movement in America and Italy and its relevance for companies).

[556] COM/2011/0681 final.

[557] *See* Di Pascale (2011).

Hence "in 2013 the EU Commission adopted a package[558] introducing common methods to measure and communicate the life cycle environmental performance of products and organisations,"[559] followed by the first Circular Economy Action Plan (CEAP) in 2015 and the new CEAP in 2020.

Definition(s) and aim(s)

As regards the legal definition, it is important to highlight that – like "sustainability" – there are several definitions of "circular economy". Indeed, already in 2017, Kirchherr et al. (2017)[560] had identified 114 codified definitions of the term. In the European panorama, the first Circular Economy Action Plan (CEAP) defined the model as one in which "the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimized."[561] In other words, circular economy is a multi-dimensional concept that entails prolonged use of goods and products to avoid (unnecessary) future extraction of raw materials and waste production. Thus it "presents different fields of action: first, the order of priority in waste management, which sees landfill disposal as an extreme ratio; secondly, the enhancement of by-products and the connection of waste with the production and use of new raw materials (end-of-waste); thirdly, the attention to the production phase and the transition to a sustainable bioeconomy model in which the raw materials obtained from renewable sources replace raw materials obtained from non-renewable resources, such as fossil fuels, in order to abandon the model of linear economy 'production-use-abandonment.'"[562] In this sense, the circular economy focuses on waste. However, waste as an asset rather than as a liability. And given the amount of textile waste produced each year, it could be argued that implementation of the circular economy model is fundamental for the sustainable fashion movement.

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[558] The package comprised the Communication COM(2013) 196 final "Building the Single Market for Green Products" and the Recommendation 2013/179/EU on the use of common methods to measure and communicate the life cycle environmental performance of products and organizations.

[559] Jacometti (2019) (noting "the Product Environmental Footprint (PEF) pilot specifically addressed leather, footwear and t-shirts and the Organisation Environmental Footprint (OEF) pilot also addressed the retail sector").

[560] Kirchherr, Reike, and Hekkert (2017).

[561] COM (2015) 614.

[562] Jacometti (2019).

Thus, it seems appropriate to start the discussion with some observations about the legal framework of waste management systems. As Masieri (2018)[563] points out, there were already several European initiatives aimed at rendering the economy more circular and reducing waste production prior to the Circular Economy Action plan. In Italy, for instance, Articles 6(16), 178-bis(1)(e) and 179 of the Environmental Law (*Codice dell'ambiente*, Legislative Decree No. 152/2006**)** focus on preventing waste production, albeit without going so far as to implement a circular economic model.[564] Similarly, although efforts are moving in this direction, a truly circular approach is still largely lacking in European legislation.[565]

According to Masieri (2018), starting with COM(2014)0398 final/2, the European Union has shown increasing interest in implementing the circular economy model aimed at achieving improved resource efficiency by framing "waste" as a resource rather than something to be discarded. To do this, the Communication envisaged, on the one hand, establishing various definitions within a conceptual framework, as well as minimum requirements for producer responsibility schemes, and, on the other hand, allowing member states a certain degree of discretion on movement of waste. The aim was to realize a system characterized by minimum standards and a degree of party autonomy that would efficiently exploit waste treatment technologies. Following a resolution[566] by the European Parliament, a second communication[567] (commonly known as the first Circular Economy Action Plan (CEAP))

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563 Masieri (2018).

564 Masieri (2018) notes, for example, that Art. 178 of the Environmental Law states "La gestione dei rifiuti è effettuata conformemente ai principi di precauzione, di prevenzione, di sostenibilità, di proporzionalità, di responsabilizzazione e di cooperazione di tutti i soggetti coinvolti nella produzione, nella distribuzione, nell'utilizzo e nel consumo di beni da cui originano i rifiuti, nonché del principio chi inquina paga. A tale fine la gestione dei rifiuti è effettuata secondo criteri di efficacia, efficienza, economicità, trasparenza, fattibilità tecnica ed economica, nonché nel rispetto delle norme vigenti in materia di partecipazione e di accesso alle informazioni ambientali" (*Waste management is carried out in accordance with the principles of precaution, prevention, sustainability, proportionality, accountability and cooperation of all parties involved in the production, distribution, use and consumption of goods from which waste originates, as well as the polluter-pays principle. To this end, the management of waste is carried out according to criteria of effectiveness, efficiency, cost-effectiveness, transparency, technical and economic feasibility, as well as in compliance with current regulations on participation and access to environmental information*).

565 In par. 2.1 of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a circular economy: A zero waste programme for Europe, for instance, it states "*Some* EU policies and instruments already provide tools and incentives in line with the circular economy model" (emphasis added). COM(2014)0398 final/2.

566 European Parliament resolution of 9 July 2015 on resource efficiency: moving towards a circular economy (2014/2208(INI)) (referring to waste specifically in points 6, 15, 34-47).

567 I.e., COM(2015) 0614 final of 2 December 2015.

aimed to remove market barriers to the circular economy by amending current waste legislation and providing for facilitation of the use of secondary raw materials and the adoption of measures related to producer responsibility. In fact, several references to the circular economy were made in the proposal[568] for a directive amending Directive 2008/98/EC that accompanied the 2015 Resolution. The proposal, now approved in the form of Directive 2018/851 amending Directive 2008/98/EC (the Waste Framework Directive), requires all national legal frameworks to be, in turn, amended in accordance with the new provisions on the collection, transport, recovery and disposal of waste.[569] That is, measures must be taken such that waste in national economies is treated as an asset rather than liability.

In this context, then, it is significant that the reform introduces a series of definitions and establishes a conceptual framework for implementation of rules at the national level while, at the same time, addressing the need to set quantitative targets. With regard to the new terms and definitions introduced, Masieri (2018)[570] highlights how the language of the amended Waste Framework Directive supports national legislation modeled to urge consumers and businesses to change the way they conceive "waste", viewing it as a "valued resource" capable of "[creating] important opportunities for local economies and stakeholders" and "[bring] benefits to the environment…and to the economy" (recital 2). There is a strong sense of "materials management" (recital 1) and a focus on re-use ad recycling efforts to transition from a linear to a circular economy (recital 3). In fact, Directive 2018/851 amended Art. 3 of the Waste Framework Directive such that it is possible to identify various categories of waste (e.g., non-hazardous waste, municipal waste, construction and demolition waste, bio-waste, food waste). It also inserted and defined new terms such as "material recovery" (commonly known as "urban mining", i.e., the recovery of raw materials by reprocessing existing goods), "backfilling" and "extended producer responsibility scheme", as well as end-of-waste criteria[571] to specify when waste ceases to be waste and becomes a product (a "secondary raw material").

For the purposes of this contribution, it is relevant that the new definitions included in the Waste Framework Directive by virtue of Directive 2018/851 establish that "'material recovery' means any recovery operation, other than energy recovery and the reprocessing into materials

[568] I.e., COM(2015)0595 - C8-0382/2015 - 2015/0275(COD), later amended by the Parliament on March 14, 2017.

[569] *See generally* Ministry for the Environment (2017).

[570] Masieri (2018).

[571] Art. 6(1) and (2) of the Waste Framework Directive.

that are to be used as fuels or other means to generate energy. It includes, *inter alia*, preparing for re-use, recycling and backfilling" and "'extended producer responsibility scheme' means a set of measures taken by Member States to ensure that producers of products bear financial responsibility or financial and organizational responsibility for the management of the waste stage of a product's life cycle". As concerns the targets, the Union has set goals to reduce certain categories of waste by set amounts and by certain deadlines. Therefore, if the prominent model of circular economy is "shaped by the 3R (reduce, re-use, recycle) principles that should be applied throughout the whole cycle of production, consumption and return of resources"[572], then the European version is strengthened by an extra "R". That is, the EU Waste Framework Directive is based on the 4R framework: reduce, re-use, recycle, *and recover*.[573]

Waste management [574]

In a recent article dealing with, in part, circular fashion and waste, it was stated:

> "The limits of the linear economy model appear clearly in the garment sector, where the need to move to a circular economy model is also highlighted by industry experts and practitioners. In fact, it has been highlighted how the circular economy is one of the strategic areas of innovation for the future development of the textile and clothing sector in Europe and beyond.
>
> In the fashion sector, a circular vision involves promoting the extension of the end of life of textile and clothing products, their recycling and re-use for other production cycles, on the one hand, and the use of ecological and sustainable raw materials, on the other. In other words, circular fashion aims to minimize waste and keep materials within the production and consumption loop as long as possible." [575]

Given the large quantities of textile waste produced each year, it is therefore important to highlight that the quantitative waste reduction goals set by Waste Framework Directive (which clearly aims to transfer environmental risks back to companies in accordance with the polluter-pays principle) require Member States to establish a separate waste collection system for

[572] Koszewska (2018) 337-47.

[573] Kirchherr, Reike, and Hekkert (2017) 221-32.

[574] Note that, unless expressly stated otherwise, much of the information and discussion in this section either comes directly from or is inspired by Jacometti (2019).

[575] Jacometti (2019).

textiles by 2025.[576] More specifically, textiles must be collected separately "to avoid waste treatment which locks in resources at the lower levels of the waste hierarchy, increase preparing for re-use and recycling rates, enable high-quality recycling and boost the uptake of quality secondary raw materials."[577] Furthermore, since textile waste falls within the meaning of municipal waste, as such it is subject to the activities aimed at recycling 55% of municipal waste by 2025, 60% by 2030 and 65% by 2035.[578]

At the same time, "the Directive establishes, among other things, that Member States should make use of economic instruments and other measures to provide incentives for the application of the waste hierarchy such as those specified in Annex IV of the Directive, which includes several measures that can apply to the textiles and clothing sector, such as charges and restrictions for the landfilling and incineration of waste, 'Pay-as-you-throw' schemes for waste producers, sustainable public procurement to encourage better waste management and the use of recycled products and materials, fiscal measures to enhance recycle and re-use, incentives for local authorities to promote waste prevention and intensify separate collection schemes and extended producer responsibility schemes." Therefore, its relevance for the fashion industry depends both on the definitions provided by the new framework and the concrete measures taken at the national level to exploit any opportunities of implementation of the circular economy model.

In this context, attention must be given to the meanings attributed to terms such as "waste", "by-product" or "secondary raw material", and "end-of-waste" to the extent that, depending on the definition, waste management policy can have different economic impacts on the budgets of Member States.

Prior to implementation of Directive 2008/98/EC, the European Court of Justice (ECJ) interpreted the term "waste" by attributing significant weight to the intent of producers or holders to dispose of an object or substance, regardless of their capacity to be re-used.[579] Consequently, there were no grounds to hold that waste management laws "apply to goods, materials or raw materials which have an economic value as products regardless of any form

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[576] Jacometti (2019).

[577] Recital 41, Directive (UE) 2018/851.

[578] Art. 11(1)(a)-(c) Waste Framework Directive as amended by Directive 2018/851.

[579] *See* joined cases C-206/88 and C-20788, Vessoso and Zanetti, [1990] ECR I-1461, paragraphs 7 and 13.

of processing and which, as such, are subject to the legislation applicable to those products."[580] Yet the ECJ favored a broad interpretation of waste "to limit its inherent risks and pollution" and therefore held "the reasoning applicable to by-products should be confined to situations in which the re-use of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to re-use and as an integral part of the production process."[581]

Now, however, due to the codification of various definitions and use of language that conveys a changing perception of "waste" – from a liability to a resource – it is possible to discuss "the transition to more sustainable material management" rather than mere "waste management". Specifically, it is noteworthy that in 2014 only some EU policies and instruments were compatible with the circular economy model.[582] By 2018, Directive 2008/98/EC had been amended to further define existing concepts of waste and introduce new categories according to an established hierarchy. Art. 5 of Directive 2008/98/EC, for instance, defines a by-product as a substance or object (1) produced as an integral part of a production process, (2) that can certainly be used in the future, (3) lawfully and (4) without further processing other than normal industrial practice, and additionally establishes an obligation for Member States to take measures to ensure recognition of substances or objects meeting such definition. "i.e., the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts."[583] Art. 6(1) of Directive 2008/98/EC, on the other hand, governs end-of-waste status "to ensure that waste which has undergone a recycling or other recovery operation is considered to have ceased to be waste" if it complies with the conditions set forth therein. According to recital 17 of Directive 2018/851, the end-of-waste status is intended "to provide operators in markets for secondary raw materials with more certainty as to the waste or non-waste status of substances or objects and to promote a level playing field." However, there is

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580 *See* case C-9/00, Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän halitus, [2002] ECR I-03533, paragraph 35.

581 *See* case C-/9/00, Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän halitus, [2002] ECR I-03533, paragraph 37.

582 Communication COM (2014) 0398 "Towards a circular economy: A zero waste programme for Europe", paragraph 2.1.

583 Recital 16, Directive 2018/851 amending Directive 2008/98/EC. On the legal and theoretical approaches to industrial symbiosis in a circular economy, *see* Steemans et al. (2017).

no provision on "Certain specified waste" and under the new formulation of Art. 6 of Directive 2008/98/EC, waste ceases to be such if:

> "(a) the substance or object is to be used for specific purposes; (b) a market or demand exists for such a substance or object; (c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and (d) the use of the substance or object will not lead to overall adverse environmental or human health impacts". Furthermore, Article 9 establishes minimum requirements for waste prevention measures to be taken at the national level. In detail, Member States shall: "(a) promote and support sustainable production and consumption models; (b) encourage the design, manufacturing and use of products that are resource-efficient, durable (including in terms of life span and absence of planned obsolescence), reparable, re-usable and upgradable; (c) target products containing critical raw materials to prevent that those materials become waste; (d) *encourage the re-use of products and the setting up of systems promoting repair and re-use activities, including in particular for electrical and electronic equipment, textiles and furniture, as well as packaging and construction materials and products*; (e) encourage, as appropriate and without prejudice to intellectual property rights, the availability of spare parts, instruction manuals, technical information, or other instruments, equipment or software enabling the repair and re-use of products without compromising their quality and safety; (f) reduce waste generation in processes related to industrial production, extraction of minerals, manufacturing, construction and demolition, taking into account best available techniques; (g) reduce the generation of food waste in primary production, in processing and manufacturing, in retail and other distribution of food, in restaurants and food services as well as in households as a contribution to the United Nations Sustainable Development Goal to reduce by 50 % the per capita global food waste at the retail and consumer levels and to reduce food losses along production and supply chains by 2030; (h) encourage food donation and other redistribution for human consumption, prioritising human use over animal feed and the reprocessing into non-food products; (i) promote the reduction of the content of hazardous substances in materials and products, without prejudice to harmonised legal requirements concerning those materials and products laid down at Union level, and ensure that any supplier of an article as defined in point 33 of Article 3 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council (6) provides the information pursuant to Article 33(1) of that Regulation to the European Chemicals Agency as from 5 January 2021; (j) reduce the generation of waste, in particular waste that is not suitable for preparing for re-use or recycling; (k) identify products that are the main sources of littering, notably in natural and marine environments, and take appropriate measures to prevent and reduce litter from such products; where Member States decide to implement this obligation through market restrictions, they shall ensure that such restrictions are proportionate and non-

> discriminatory; (l) aim to halt the generation of marine litter as a contribution towards the United Nations Sustainable Development Goal to prevent and significantly reduce marine pollution of all kinds; and (m) develop and support information campaigns to raise awareness about waste prevention and littering." (emphasis added)

Finally, in line with the policy to compel businesses to internalize the costs of production an operation from the design phase to a product's end of life, Directive 2018/852 introduced – with Articles 8 and 8a of Directive 2008/98/EC – provisions on extended producer responsibility. As highlighted by Masieri (2018), extended producer responsibility is a controversial aspect of the European reform because, unlike its voluntary application under the previous regulations, Directive 2018/851 made transposition mandatory. In other words, since extended producer responsibility schemes' "effectiveness and performance differ significantly between Member States. It is necessary therefore to set minimum operating requirements for such extended producer responsibility schemes, and to clarify that those requirements also apply to extended producer responsibility schemes established pursuant to other legislative acts of the Union."[584] However, whereas the OECD defines extended producer responsibility as "a policy approach under which producers are given a significant responsibility – financial and/or physical – for the treatment or disposal of post-consumer products. Assigning such responsibility could in principle provide incentives to prevent wastes at the source, promote product design for the environment and support the achievement of public recycling and materials management goals," Masieri (2018) observes European sources often use terms which are misleading (e.g., liability). More precisely, Masieri (2018) stresses that the producer's burden should equate to some sort of fault. Rather, it is a true *responsibility* in the sense of an onus to be borne by the producer as part of the cost of production and disposal of a product that such producer introduced in the market. In fact, recital 22 of Directive 2018/851 states "general minimum requirements should…contribute to the incorporation of end-of-life costs into product prices and provide incentives for producers, when designing their products, to take better into account recyclability, reusability, reparability and the presence of hazardous substances." Reference is made to previous directives, such as Directive 75/442/EEC on waste and Directive 94/62/EC on packaging and packaging waste. In this context, the extended producer responsibility scheme was intended to involve producers in schemes for the management of packaging waste, albeit implicitly. With Directive 2000/53/CE, Directive 2006/66/CE, and Directive 2012/19/EU, the scope of extended producer responsibility was

[584] Recital 21, Directive 2018/851.

gradually broadened to encompass, respectively, end-of-life vehicles, batteries and accumulators, and electrical and electronic equipment. Then, in 2018, it was finally introduced in the Waste Framework Directive. Again, it is important to note that all Member States must necessarily transpose the minimum requirements on extended producer responsibility set forth in the Directive, and that the producer's economic burden pursuant to Art. 8 of Directive 2008/98/EC should reflect the durability, reparability, reusability and recyclability of the product. From this perspective, the extended producer responsibility scheme adopted by the Waste Framework Directive reinforces the traditional "polluter pays" principle by requiring those who generate or hold waste as a result of a product's use to ultimately incur the disposal costs.

In practice, however, textile manufacturers and fashion brands (generally, the producers) become responsible for waste management, including activities aimed at collection, sorting and treatment of textiles. This is evident if one considers the private waste prevention initiatives in place.[585]

VAT regime

It is common knowledge that governments use economic and trade policy to shape and control internal markets. Protectionist policies (e.g., tariffs, quotas, subsidies, standardization) aim to limit foreign goods in the marketplace to promote domestic traders and boost GDP. Tariffs and quotas, for example, are employed to reduce demand for imported goods. Tariffs do so by actually increasing the price of imported goods; while quotas, or "non-tariff trade barriers",

[585] Jacometti (2019) notes that, as of 2019, France was the only Member State to introduce an EPR system for the textile sector; in other EU Member States, private organizations, NGOs and individual brands are primarily responsible for collection. Still, it is important that, in France, "The French EPR system for textiles in operation since 1 January, 2007 is based on the EPR principle codified in Article L. 541-10 of the *Code de l'Environnement*. On the basis of this principle, in 2006 the French legislator introduced a new Article L. 541-10-3 that established that all natural or legal persons who place on the national market in a professional capacity new clothing textile products, footwear or household linen intended for households are required to contribute to or provide for the recycling and treatment of waste from these products. These subjects are therefore requested to either financially contribute to a collective system or to set up an individual system for the recycling and treatment of these kind of waste. In the system currently in place, the various producers pay a financial contribution to the subject authorized by the Public Administration, Eco TLC, for the management of a collective collection system." This is significant because, in 2014, Eurostat statistics identified the top ten producers of textile waste in the EU as: Italy, Germany, the UK, Poland, Belgium, France, Spain, Netherlands, the Czech Republic and Portugal. Of these countries, textile waste production in Poland, Belgium and Germany increased by 229%, 70% and 55% respectively compared to 2004 numbers; the other countries' textile waste decreased in the ten-year period.

restrict the volume of imports of a particular commodity (product or service), thereby increasing prices and hence reducing demand. Subsidies are government tax credits in favor of certain producers. Standardization, instead, requires products on a certain market to possess specific characteristics set out in relevant laws or guidelines. In the fashion industry, all of these practices have been used at some time or another. For instance, the United States' quota system protected textile workers' jobs until such system was abandoned in the 1980s. The United States' cotton industry has traditionally received huge subsidies. Now, private insurance schemes (i.e., crop insurance) can also fill such role. Although the EU prohibits subsidies due to the negative impact on free trade and a liberalized single market, this does not mean protectionist policies are not in place. European value-added tax (VAT) is a prime example.

A value-added tax (also "goods and services tax" (GST) or "consumption tax") is an indirect tax levied on the price of a product of service, similar to a sales tax, and paid to the government for the provision of services and infrastructure funded by such government and its taxpayers. Although VAT is a common practice in OECD countries, its rates vary from country to country. In Europe, pursuant to Directive 2006/112/EC (the VAT Directive), Member States must set VAT at a minimum standard rate of 15%. Consequently, VAT within the European Union is around 20% (e.g., in Luxembourg it is 15%, in the UK it is 20%, and in Italy it is 22%). In countries such as the United States and Australia, VAT is 10%. These numbers are relevant because, if transitioning from a linear to a circular economy requires consumers to change their lifestyle habits, making it more expensive to consume certain products must be part of the circular economy action plan.

Indeed, given the threat to the domestic fashion industry and traders posed by an increase in online sales from producers and distributers in far-off markets (i.e., non-EU countries), from July 2021, all goods imported in the EU will now be subject to VAT.[586] Although the Commission has framed the policy as "making life simpler and fairer for all", it is clear that the underlying rationale is to close the tax gap so that it is no longer convenient to purchase products abroad just because they are less expensive. As an added bonus, by imposing this broad border tax, the EU is implicitly shortening the production chain, decreasing transportation expenditures and reducing the environmental impact of industry—especially the fashion industry. In fact, "the new provision applies to everyone: suppliers and deemed suppliers, EU and non-EU sellers, consumers in the EU, and third territories and third

[586] European Commission (n.d.) "VAT for e-commerce, Taxation and Customs Union".

countries." Importantly, however, is the expectation that large online trading companies such as Amazon and eBay will be most affected by the new law.[587]

Therefore, if a circular economy also depends on wise consumption, by making it more expensive to purchase unnecessary products or by incentivizing domestic consumption, the European legislator is supporting a more responsible value chain in all sectors—but fashion in particular.

In the Fashion Industry [588]

The preceding paragraphs highlight how the circular economy model is characterized by the so-called "Rs" of sustainability: reduction, re-use, recycle (and, in the European context, recover). European policies modeled with the "polluter pays" principle in mind push businesses in the direction of reducing (or rethinking) pollution and resource exploitation.[589] Indeed, waste management is central to the circular economy model. Local consumption is also an important policy agenda to achieve sustainability as it provides increased revenues for companies so that they can, in turn, invest economic resources required to transition to a circular economy. In this context, it is possible to affirm that instruments such as the amended Waste Framework Directive and relevant changes to economic policy drive Europe's plan to be a global leader in sustainable development. And, to date, formal acts aimed at compelling producers to internalize the costs of production all the way to a product's end life appear to create strong incentives for brands to re-use and recycle existing products.

However, logic suggests that achieving circularity also depends on *circular design* (often implying the introduction of new technologies to support circularity in a life science sense and/or facilitate recovery of usable materials) and the introduction of new business models.[590] A circular economy means designing products for long-term use and not a "throwaway society". It means creating products that can be deconstructed and divided by parts or material, then selected according to future usefulness (if any) or recycled to create another product or

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[587] Mizrachi and Tal (2022).

[588] Note that, unless expressly stated otherwise, much of the information and discussion in this section either comes directly from or is inspired by Jacometti (2019).

[589] For a thorough discussion on the "green policies" until 2013 in the United States and Europe, including a historical reconstruction, and relevant legal analyses, *see generally* Pozzo (2013).

[590] Mizrachi and Tal (2022).

enhance an existing one. All this with minimal depreciation and emissions. And, finally, a circular economy means supporting business models based on a collaborative approach, or use without ownership. Put simply, "[a] circular economy approach in the field of fashion addresses design strategies which include reduced utilization of virgin raw materials, efficiency, recycling, reuse, and remanufacturing, new business thinking, avoiding textile waste, slowing down consumption. It also embraces new business strategies which include renting, sharing, swapping, and borrowing, while at the same time increasing sustainable fashion consumption."[591]

As concerns the former, some fashion brands have already begun investing in eco-friendly materials to offset the environmental impact of operations.[592] For example, the sustainable fashion movement has been promoting textiles made from hemp fibers for years.[593] Hemp is incredibly versatile, it grows fast and requires very little water. It is also antibacterial, durable, and flexible, in addition to not requiring herbicides, pesticides, synthetic fertilizers or GMO seeds. Until recently, many people probably thought it was "the" sustainable alternative to cotton. In fact, many well-known brands (such as Adidas, Quicksilver, and Patagonia) have added products made from hemp to their collections, helping to popularize hemp as a clothing fiber.[594]

While the benefits of hemp fibers are well-known, scientists and designers have started exploring innovative and alternative uses of food waste. In particular, there is a tendency to use residual material from certain fruits (such as coconut shells, pineapple, citrus, and banana) to create sustainable, biodegradable, durable and flexible fibers. It is also possible to spin thread from the nettle (Ortica) plant, bamboo, spiderwebs, crab shells, beer, and cork, to name a few.

For the ready-to-wear industry, some of the advantages of these materials include the following:

[591] Mizrachi and Tal (2022).

[592] *See generally* Na and Na (2015); Nayak et al. (2015); Rajkishor (2020).

[593] For an overview of the legislative framework when it comes to hemp production, *see generally* Giupponi et al. (2020).

[594] Preuss (2010).

Coconut is potentially an extremely valuable resource because it reduces dependence on synthetic materials. It is particularly suitable for sportswear due to its moisture resistance and high strength.[595]

Piñatex is an innovative, sustainable and natural fabric made from pineapple. Its advantage is that it is like leather, but without the toxic environmental effects of leather production. Additionally, production of Piñatex is said not to create any waste and can be used to make shoes, accessories, clothing, bags and automobile upholstery. In extreme synthesis, pineapple leaves (instead of being discarded) are stripped of their fibers and, through a preservation process, become more malleable and ready to be made into fabric. No additional water or fertilizers are required for this process and all waste may be used as a fertilizer in agriculture, for example. Moreover, pineapple leaf fiber is strong, soft, durable and available in different thicknesses, finishes, colors and applications. Importantly, it is considered a low-cost material, making its use more feasible and increasing likelihood that companies will use it in the transition to a more sustainable industry. Indeed, some companies, including Puma and Camper, have already created prototypes for products such as shoes, bags, hats, and accessories for smartphones.[596]

Citrus is another food that has potential for being processed into sustainable and innovative new materials.[597]

MycoTEX is a threadless fabric made from fungus root and a 3D modelling technique, making it a completely biodegradable alternative to conventional fabrics. Additionally, it can be easily mended and, depending on the structure of mycelium, can take on various textures and shapes. However, perhaps its greatest quality is its sustainability: it returns to nature as a compost additive at the end of its life. Moreover, it is laboratory-produced, meaning it does not require farmland for agriculture nor are "crops" affected by weather conditions. It also requires less water and no chemical pesticides are needed to keep it healthy during fabrication. Finally, its versatile cultivation conditions reduce economic and environmental costs associated with shipping.[598]

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[595] Martins and Sanches (2019).

[596] Perris et al. (2020).

[597] Devi and Saini (2020).

[598] *See* MycoTEX, https://www.mycotex.nl/

Nettle has been used for textile purposes since the Bronze Age. For instance, during the Napoleonic era, thousands of soldiers' uniforms were woven in nettle. Additionally, in Europe, nettle was used as an alternative to cotton thread (which had become unavailable) during the first and second World Wars. Indeed, given nettle fiber is soft, strong and breathable like linen, yet shiny like silk, it can be used for a variety of purposes. As a perennial herb, it is naturally available year-round, completely biodegradable and the remnants/scraps from the processing into thread can be used as natural pesticides.[599]

Bananatex® is a new material made from banana fibers to create a durable, waterproof, light and elastic fabric suitable for bags and chairs, among other uses. Banana plants, which are widely produced and abundant natural resources in tropical and subtropical countries around the world, are one of the most useful plants due to the utility of almost every one of its parts (e.g., fruit, peel, leaf, pseudo-stem and inflorescence). In Japan, for example, bananas have been used for hundreds of years to make a light-weight fabric similar to cotton ("Jusi", still used today), which is used to package Kimonos.[600]

Spider silk is another natural resource which use – although for practical reasons remains limited to artistic creations – dates back to the 18th century.[601] However, due to several practical challenges of mass producing and using the material for every-day wear, the practical value of the dress lies in the fact that it prompted a further experiment and the research aimed at creating materials that mimic the properties of spider webs.[602] Specifically, the AMSilk industry has developed Biosteel—a highly resistant, completely biodegradable and eco-friendly material created from a method of fiber production that simulates the composition of spider webs. The product is the result of intensive research in the field of genetic engineering. Without going into significant detail, it is sufficient to note that Biosteel is made by combining

[599] Perris et al. (2020).

[600] Perris et al. (2020).

[601] Francois-Xavier Bon de Saint Hilaire made an outfit from spider silk for Louis XIV in 1709, thanks to a spinning system invented by a French Jesuit, Jacob Paul Camboue, capable of collecting the precious raw material. There is also news of a fabric made of spider silk presented at the international exhibition in Paris in 1900 (Perris et al. 2020).

[602] Fabric from spider silk was created in Madagascar after 7 years of research by American designer, Nicholas Godley, and English art and textile historian, Simon Peers. The threads used to weave the dress displayed at the Victoria and Albert Museum in London came from the work of 1.2 million Goldon Orb spiders, collected in the highlands of Madagascar using long bamboo poles, and the efforts of about 80 researchers. The dress took a good five years and the work of 80 master craftsmen to assemble (by hand). Therefore, due to the very high production costs and the fact that the fiber is altered by washing, it is obvious that the material cannot be used for industrial purposes (Perris et al. 2020).

spider genes with sheep DNA, which is extracted from sheep milk, purified, dried, dissolved in solvents and transformed into microfibers ready for final processing. Spun fibers are 7-10 times stronger than steel fibers of the same weight and can stretch 20 times without losing their physical properties. The material also has high temperature resistance, maintaining properties between -20°C and 330°C. The yarn is 100% natural, biodegradable, hypoallergenic and soft to the touch. Thus, the uses of Biosteel are potentially unlimited. In the textile and apparel industries, Biosteel has already been commercialized following the 2016 agreement between AMSilk and Adidas to produce biodegradable shoes for the Futurecraft Biofabric line. Indeed, Biosteel can replace synthetic fibers by providing garments with better properties, fully recyclable and therefore more eco-friendly. [603]

Bamboo fiber is made by either mechanically or chemically processing the fatty part of the Bamboo plant. Regardless of how it is processed, however, bamboo is a very versatile clothing material because it is breathable, hygroscopic, soft, biodegradable and antibacterial. For these reasons, it is mainly used to make bath and hand towels and bathrobes, swimwear, underwear, T-shirts, and children's clothes.[604]

Crabyon is obtained by transforming the shells of crabs, lobsters and squid. Essentially, these shells are crushed and processed to create a fiber suitable for the manufacture of products such as underwear, sportswear, household linen, and so on. One drawback of Crabyon is that it cannot be synthetically manufactured, and thus may only be obtained from the food industry, posing some doubts about its overall sustainability and therefore practical use for the ready-made-garment industry. In any event, Crabyon has a high moisture absorbing property, maintains skin hydration without unpleasant odors, prevents skin irritation and is safe and comfortable even for delicate or hypersensitive skins such as children or the elderly.[605]

Beer was used to make a wedding dress (the “Dress Beer”) in Perth, Australia, by Nanollose; the dress was officially presented at the Milan Expo in 2015. The Dress Beer was made using a textile fiber derived from the natural microbial fermentation of beer. The process involves placing the beer in a large container together with a bacterial culture, which produces a kind of vinegar. The bacteria (*Acetobacter*) – which are completely harmless and non-infectious –

[603] Perris et al. (2020).

[604] Perris et al. (2020).

[605] Perris et al. (2020).

consume the beer and convert it into a solid fiber, creating a fabric that is completely odorless, very flexible and practically identical to cotton (but without all the environmental costs).[606]

Suberis comes from the union of cork with another natural material, and then cut into very thin sheets that are subsequently coupled with different media (such as cotton, linen, silk and microfibers). The sheets of cork, after being laminated and smoothed, are subjected to a special treatment that uses only natural components. So worked, suberis becomes a soft material (resembling suede) with a consistency similar to tassel, meaning it is easy to work. Generally, suberis is a material that can be used as an alternative to leather, with the fundamental difference that it is a "vegetable skin" and therefore ecological.[607]

From an industry perspective, if biodegradability is "the ability of a produced material to degrade completely into basic inorganic molecules, without the need for external intervention, in the presence of natural agents such as microorganisms, sun and oxygen, in a reasonable amount of time,"[608] then biodegradable and compostable products[609] appear to offer a positive solution to the fashion industry's sustainability problem. From a sustainability perspective, however, it is paramount to consider both the legal definition of biodegradability and the technical and scientific aspects of the process. Indeed, there appears to be a tendency to oversimplify the benefits that potential substitute materials offer for the fashion industry and sustainability in general. In this context it is possible to observe a problem involving the translation of scientific and technical definitions into legal ones.[610]

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606 Perris et al. (2020).

607 Perris et al. (2020).

608 Pellizzari and Genovesi (2021).

609 *See* Camusso (2021); Perris et al. (2020).

610 And this problem seems to be rather general, often impeding the effective circulation of models and solutions. On the problems of legal translation, *see generally* Gambaro (2007) 51-71; Gambaro (2012); Pozzo (2011); Pozzo (2007); Pozzo (2012); Pozzo (2014); Pozzo (2019).

According to the European Commission[611], as stated in EN 14046[612] (also published as ISO 14855[613]) a product is biodegradable if it has reached a level of biodegradation equal to at least 90% within 6 months. However, it is also important to note that a product's ability to dissolve into simple chemical elements varies depending on its material characteristics (molecular size, mixtures, additives, etc.). In 2018, Science Learning Hub prepared and disseminated a list of material types, also indicating the respective periods required for biodegradation. Cotton, for example, takes 2 to 6 months, while synthetic fabrics, such as nylon, polyester, and lycra, take much longer (i.e., up to 30-40 years). CIC Compostable, promoted in 2006 by the Italian Consortium of Composters[614], also works to facilitate the identification of those materials that objectively meet the requirements set by the European Standard.

Moreover, although "biodegradable" is often connotated with "compostable", these two words do not appear *technically* synonymous. More specifically, "compostability" is the ability of an organic material to be transformed into compost through a process of composting (i.e., a biological process characterized by the use of oxygen). In Europe, EN 13432[615] provides a standard of reference by establishing the characteristics that a material must possess to be classified as "compostable". In particular, the product must: degrade at least 90% in 6 months when subjected to a carbon-rich environment; be in contact with organic materials for a period of 3 months and the mass of the material must consist of at least 90% fragments less than 2 mm in size; not adversely affect the composting process; have a low concentration of heavy metal additives to the material; and have pH values, salt content, concentrations of volatile solids, nitrogen, phosphorus, magnesium, and potassium below established limits. Compared to the process of biodegradation (which allows for a simple decomposition of the material in

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[611] European Commission (n.d.) "Biogradability".

[612] UNI EN 14046: 2003 "*Packaging - Evaluation of the ultimate aerobic biodegradability of packaging materials under controlled composting conditions - Method by analysis of released carbon dioxide.*" The standard specifies a method for evaluating the ultimate aerobic biodegradability of packaging materials based on organic compounds of controlled composting conditions by measuring the carbon dioxide released at the end of the test.

[613] *See* UNI EN ISO 14855-2:2018 "Determination of *the ultimate aerobic biodegradability of plastic materials under controlled composting conditions - Method of analysis of carbon dioxide developed - Part 2 Gravimetric measurement of carbon dioxide developed in a laboratory test.*" The standard specifies a method for determining the ultimate aerobic biodegradability of plastic materials under controlled composting conditions by gravimetric measurement of the amount of carbon dioxide developed.

[614] Consorzio Italiano Compostatori (CIC) is a non-profit organization that deals with promoting and enhancing the recycling activities of urban waste by-products to produce compost and biomethane.

[615] UNI EN 13432: 2002.

the soil), the composting process allows for a further result: the formation of a mixture of nutrients for the soil. Therefore, the difference between biodegradation and compostability lies precisely in this further step. From a sustainability perspective, it is not enough for a product to be biodegradable; it must also be compostable. Furthermore, the process of biodegradation is not without negative consequences for the planet. Namely, the decomposition of synthetic substances release microplastics (which take over a century to decompose completely) into the environment. And, in general, despite any advantages of post-consumption waste reduction (i.e., instead of throwing old or tattered clothes in landfills, they can be composted and returned to nature) and reduced natural resource consumption, consumers and brands must be mindful that production with more sustainable materials is not a license for increased consumption. That is, the benefits of more sustainable materials are potentially lost if consumers do not change their consumption patterns and/or the number of fashion items in circulation is not curtailed to a degree.[616]

Furthermore, while it is unequivocal that private sustainability efforts represent one market response to growing conscious consumer demands, they also appear urged by the current legal framework and the various compliance obligations of a firm. In this sense, it is imaginable that the European circular economy model sets the stage for conformity in other jurisdictions, thereby "exporting" best practices in sustainable development. More precisely, if much of the industry's key players are European and operate via an intricate and long global value chain, then for logistic and organizational purposes uniformity of practices is necessary to achieve efficiency. Therefore, European fashion companies set higher production and sourcing standards from the lead; they introduce practices and invest in technologies that "trickle down" the value chain until, ultimately, all companies involved adopt the same, uniform praxis.[617]

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[616] It is worth noting that biotech companies, in addition to the advancements already mentioned above, are also working on sustainable silk by using molecules. 3D printing technology can also be used to make materials that can harvest and store electricity *and* fulfill fashion demands. Although this topic will not be discussed here, the various legal challenges are important to note, especially for industry professionals.

[617] According to one source, in 2021, the 39 most ethical and sustainable clothing brands for women's style include: Reformation, Levi's, Stella McCartney, Alternative Apparel, Kitx, Everlane, Zavi, Cuyana, Amour Vert, People Tree, Pact, Thought, Misha Nonoo, Baum Und Pferdgarten, Tradlands, Eileen Fisher, Patagonia, Athleta, Able, Outerknown, Boden, Mara Hoffman, Kotn, Sezane, Monsoon, Outdoor Voices, United By Blue, Girlfriend Collective, Gabriela Hearst, Boyish Jeans, Collusion, Salt Gypsy, Spell and The Gypsy, Edun, Fair Trade Winds, Rue Stiic, Browns Conscious Edit, Petite Studio, and Morphosis (Ro 2022). Another source adds Wholesome Culture, Christy Dawn, Saye, The Classic T-shirt, SassySpud, Samara, Tove and Libra, Wolven, Plant Faced Clothing, Afends, Veja, BEEN London, Faithful the Brand, and Mila Vert to the list (Wong 2021). The New York Post also lists brands such as Cuyana, Smash + Tess, Na-Kd, Summersalt, Ninety Percent, Warp + Weft, Asket, Pact, Outerknown, and Cozy Earth as top sustainable brands. There are even

With regard to the latter (i.e., new business models), it is noteworthy that collaborative fashion consumption (CFC) and fashion libraries have gained popularity. According to Iran & Schrader (2017)[618], "CFC embraces fashion consumption in which consumers, instead of buying new fashion products, have access to already existing garments either through alternative opportunities to acquire individual ownership (i.e., swapping or second hand) or through usage options for fashion products owned by others (i.e., renting or leasing)." Thus, with sustainable fashion growing in popularity, the market has witnessed a rise in new business models based on such alternative consumption schemes, from one-time to subscription rental options, to swapping platforms to so-called "recommerce".[619]

When it comes to rental, some of the principal fashion rental services include: By Rotation, Rotaro, Onloan, Endless Wardrobe, Nuuly (Urban Outfitters), Rent the Runway (RTR), My Wardrobe HQ, Byrdie, Hurr Collective, FashionPass. In Italy: DressYouCan, Drexcode, Twinset's Pleasedontbuy, Rent Fashion Bag. These often offer both one-time rental and subscription rental options.

Peer-to-peer exchange platforms encourage the second-hand market and keep textiles out of landfills. Sometimes these platforms are even sponsored by brands themselves. For instance, Rachel Comey's Recurate platform, Vestiaire Collective, and FlueMarket are independent peer-to-peer marketplaces for resale of (secondhand) fashion merchandise. Indeed, some second-hand shops and consignment stores rebrand responsible consumption practices as trendy "vintage".[620] And then there is always the appeal of getting good a deal on well-cared for apparel at "regular" second-hand stores, or merely "swapping" one old rag for another.

Buy-back programs serve a dual purpose. On the one hand, they encourage consumers to "turn in" their old garments (often for vouchers that can be applied towards new fashion items) so that brands can recycle, upcycle or reuse unwanted items. On the other hand, brands capitalize on these efforts by offering second hand, "pre-loved" merchandize for resale. Programs include, for example: Levi's SechondHand, Arc'teryx's ReBird™ and Used Gear, Blizzard &

new lines of sustainable clothing for children, such as Firebird Kids, Cubbiekit, Finn and Emma, and Primary (Cannon 2022). The point is, the list seems to be growing, giving consumers more ethical and sustainable fashion choices.

[618] Iran and Schrader (2017).

[619] For a general overview on some of the economic and marketing aspects of CFC models, *see* Rinaldi (2019).

[620] It is relevant that vintage can be second hand while second hand is not necessarily vintage. In any event, both have both become popular, for various reasons (which are outside the scope of this paper).

Tecnica's Recycle Your Boots, The North Face Renewed, Patagonia Worn Wear, Lululemon's Like New, A.P.C. "RECYCLING", Eileen Fisher's Renew, REI's Good & Used, ReUpp, and Outerknown's Outerworn. Intimissimi offers vouchers to loyalty card holders for used garments, and H&M accepts old textile items from any brand, in any condition, for re-use or textile recycling. Similarly, J. Crew (in partnership with Blue Jeans Go Green) and Madewell offer $20 for any brand of jeans. For Days "turn trash to cash" and Noah NY "Not Dead Yet" programs pay for consumers' old clothes.

Although that these practices are not novel, now society has the technology and interest to take collaborative consumption outside friends and family relationships. And, online platforms make it possible to promote used fashion items to a broad market of users at reduced transactions costs. Accordingly, CFC offers opportunities to a broad spectrum of market players (e.g., programmers, platform managers, brands, etc.). No matter the specific scheme (business-to-consumer or peer-to-peer), what CFC activities have in common is that they redistribute used products so that they can be used by multiple users without changing ownership.

Therefore, CFC potentially reconciles the long-standing dichotomy between fashion and sustainability. It is environmentally sustainable because it limits exploitation of finite resources. It is democratic because it allows more users to benefit from high fashion items at a fraction of the cost of owning such item. Linked to this, CFC satisfies consumer demand for constant change and "refreshing" of wardrobe. Finally, it generates significant revenues for fashion brands that design products to last. That is, according to a recent Bain & Company report[621], renting an item 20 times potentially generates a 40% profit margin. For this reason, Bain & Company predicts that rental could represent 10% of revenue for luxury brands by 2030.

At the same time, fashion rental programs likely have high environmental costs due to reliance on shipping and transportation channels. Supply could also be a problem. That is, less developed or progressive markets might not offer rental services in a specific territory. Or choice may be poor. Thus, given lack of supply, consumers must ultimately choose between polluting because they purchase a new item, or polluting because they contribute to increased shipping by renting clothes from geographically distant providers. In this context, buying second hand or "vintage" seems like a smart and sustainable solution. But even then, one might

[621] D'Arpizio et al. (2021).

wonder how end-of-life costs should be built into products that potentially have an infinite number of users—assuming the cost of consumption should be fair and balanced among beneficiaries. Furthermore, while buy-back programs reduce municipal waste, it must be considered that the European Environment Agency estimates 80% of textile waste cannot be recycled[622] (and similar figures are reported by the United States Environmental Protection Agency[623]). Thus, it is unclear whether the above-mentioned efforts alone will effectively achieve circularity. Changes must be made to the design and production phases so that waste is reduced from the get-go, *and* consumption models must also be aimed at reducing waste by maximizing product usefulness. Moreover, it is important for legislation and science to be closely (if not perfectly) aligned to avoid treating as synonymous phenomenon that are technically distinct (e.g., biodegradability and compostability); fashion brands transitioning their product offer must give adequate attention also to the science behind circular economy regulation to avoid trading one type of waste for another and the European legislator must be mindful not to incentivize practices that appear sustainable without addressing the root of the sustainability problem. Indeed, these are some of the criticisms of the circular economy model.

III. Challenges

Over the years, the practice of "ethical business" has become increasingly relevant, not just from a scholarly perspective, but also for the law. Themes such as fairness, transparency and workers' rights are central to regulatory efforts and legislation aimed at introducing "ethical" disciplines.

In America, initiatives such as the Clean Air Act of 1963; the National Environmental Policy Act of 1969 (which led to the creation of the Environmental Protection Agency of 1972 aimed at protecting the environment); the Federal Water Pollution Control Act of 1972; and the Toxic Substances Control Act of 1976 required businesses to rethink production processes, including the substances used in production, as well as waste disposal practices.

The Equal Pay Act of 1963; the Age Discrimination in Employment Act of 1967; the Occupational Safety and Health Act of 1970; the Employment Opportunities for Disabled

[622] European Environment Agency (2019).

[623] United States Environmental Protection Agency (n.d.) "Textiles: Materials-Specific Data".

Americans Act of 1986; the Family and Medical Leave Act of 1993; and the Americans with Disabilities Act of 1990 have also affected a range of corporate (human resource) policies.

As concerns laws to improve transparency and deter unethical business practices, the Foreign Corrupt Practices Act (FCPA) of 1977; the 1991 Federal Sentencing Guidelines for Organizations (FSGO); and the Sarbanes-Oxley (SOX) Act of 2002 illustrate a trend to promote an organizational culture of compliance and ethical behavior. In particular, the FCPA outlawed bribery of foreign government officials by US corporations. The FSGO – as an extension of the Sentencing Reform Act of 1984 – describe the elements of a corporate ethics program required to benefit from a reduced sentence if convicted of criminal activity, and the SOX introduced codes of ethics as a requirement for publicly traded companies. Moreover, it is significant that the Federal Sentencing Guidelines for Organizations were amended in 2004 to entail effective compliance and impose more stringent requirements.

In response to consumer complaints about greenwashing, the Federal Trade Commission revised its so-called "Green Guides" (or "Guides for the Use of Environmental Marketing Claims"), which essentially interpret Section 5 of the Federal Trade Commission Act (FTC Act) as applied to environmental marketing. Many states have also enacted laws to protect consumers from deceptive or misleading business practices, and common law generally recognizes greenwashing claims as part of a fraudulent misrepresentation and/or breach of warranty claim.

Likewise, in Europe, the process of legislative reform in favor of more responsible business practices apparently began with protection of the natural environment and workers' rights. For example, French *Loi* Nos. 61-842 of 2 August 1961 and 64-1245 of 16 December 1964, and the French Water Act No. 92-3 of 3 January 1992; the German Technical Instructions on Air Quality Control (TA Air), 1964, Federal Immission Control Act (BlmSchG), 1974, and the German Sustainability Code of 2011; and the UK Clean Air Act 1968, the Environmental Protection Act 1990, the Clean Air Act 1993, the Environment Act 1995, the Waste Minimalisation Act 1998, and the Pollution Prevention and Control Act 1999 focused on protecting air and water quality. Currently, Regulation (EC) No. 1907/2006 (REACH) aims to improve human health and the environment by restricting the use of certain types of chemicals.

As concerns workers' rights and labor law, the German Act on Collective Agreements of 25 August 1969 (last amended 29 October 1974) improved labor guarantees already recognized under the German Constitution of 1949. Additionally, French *Loi* No. 73-4 of 15 August 1975

and Italian Law No. 300/1970 (the Workers' Statute) generally provided protections against dismissal and discrimination in the workplace and recognized other relevant workers' rights; the French "Auroux Laws" of 1982–1983 recognized workers' collective bargaining power, and Italian Laws Nos. 108/1990, 223/1991 and 125/1991 have improved protection of workers' rights against unfair dismissals. Furthermore, in the UK, the Contracts of Employment Act 1963; the Redundancy Payments Act 1965; the Equal Pay Act 1970; the Trade Union and Labour Relations Act 1974; the Employment Protection Act 1975; the Employment Acts of 1980, 1982, 1988, and 1990; the Trade Union Act of 1984; and the Modern Slavery Act of 2015 provide significant examples of a heightened sensitivity to workers' rights issues.

Bribery and corruption also became a public concern. Beginning in the 1990s, the European Commission adopted the first European anti-corruption standards and conventions (e.g., Art. 83 TFEU recognizes corruption as a "euro-crime," and the 1997 Convention on fighting corruption involving officials of the EU or officials of Member States). More recently, the 2003 Framework Decision[624] on combating corruption in the private sector prohibits both active and passive bribery, and EU Directives 2015/849 and 2018/843 were adopted to fight against money laundering.

Similar to the Sarbanes-Oxley Act, European Directive 2006/46/EC introduced codes of ethics as a requirement for publicly traded companies, and the act of greenwashing is (at least indirectly) governed by Directive 2005/29/EC and various national consumer codes. The 2011 Green Paper on Corporate Governance and the EU Action Plan on Human Rights and Democracy 2015–2019 also collectively require European corporations to significantly consider stakeholder interests when carrying out business operations, including when choosing business partners. Finally, related to reporting issues of CSR initiatives and the risk of greenwashing, Directive 2014/95/EU regulates how public companies should disclose nonfinancial information (such as efforts made in compliance with CSR programs, often included in or linked to corporate codes of ethics) in their annual reports.

The international community has additionally been instrumental in promoting more responsible business practices through various agreements, treaties, conventions, guidelines, and standards. To name a few: The Universal Declaration of Human Rights, numerous ILO conventions, the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for

[624] Framework Decision 2003/568/JHA.

Multinational Enterprises, the UN Global Compact, and various ISO standards (including ISO 26000, ISO 45001, and ISO 9001).

In a nutshell, there is an apparent trend to compel businesses to be more values based.

At first blush, the above efforts appear to have successfully driven corporations to consider stakeholder interests as part of the general corporate interest. Indeed, phrases such as "doing good by doing well" and the "triple bottom line" have become popular slogans. However, the strategies adopted by policymakers differ. Namely, America appears to prefer the laissez-faire approach to regulating industry, while Europe is more hands-on. The following paragraphs will address some of the legal challenges to each.

Corporate codes as regulatory tools [625]

Codes of ethics represent one of the ways businesses express their commitment to issues consumers care about[626] and have undeniably become part of "business as usual." For instance, failure to adopt a sufficiently detailed code could result in denial of access to credit and/or funding as rating agencies consider both financial and nonfinancial factors (including management and corporate governance attributes) when determining a company's default risk and credit profile.

Still, voluntary codes do not appear to have eradicated the occurrence of corporate misconduct or made industry more sustainable. Rather, news of corporate malice and/or negligence – such as the August 2006 shipping disaster (in which chemical waste was discharged around Abidjan, Côte d'Ivoire); the BP Deepwater Horizon oil spill in April 2010 (in which 4 billion barrels of oil hemorrhaged over a period of 3 months in the Gulf of Mexico); the Tazreen fire in 2012; the Dhaka fire and Rana Plaza disaster in 2013; and the Tamboco and MultiFabs factory fires in 2016 and 2017 – suggests that the ethical problems associated with uncontrolled business that urged Western legislative reform from the 1960s through the 2000s have simply moved abroad.

If it is true that Western legislation is more-or-less effective at deterring offenses on national soil, efforts to hold corporations accountable for ethical violations becomes more complex in

[625] Note that a significant portion of this section, only partially edited, has already been published in Piccolo (2021).

[626] Cerchia and Piccolo (2019).

situations where the "links" of the supply chain are located in foreign jurisdictions. More specifically, the doctrines of separate legal personality and the *forum non conveniens* often bar claimants from suing companies in their home jurisdiction for indirect involvement in transgressions occurring abroad. And even in cases where jurisdiction is assumed by a foreign court, according to the rule of *lex loci actus*, the applicable law will often be the law of the country where the harm occurred. Consequently, in the particular context of global supply chains, remedies actually available to aggrieved parties tend to be inadequate.[627]

Problem of legal value

The challenges surrounding holding multinational enterprises liable for violations of corporate codes have induced part of the doctrine to construct self-regulatory instruments as more than mere governance tools. For instance, some argue that the prevalence of corporate governance codes suggests the emergence of a system of non-state law that requires compliance with the provisions set out therein.[628] This view highlights the prevalence of codes of ethics, the impact of model codes, and the affinity for standardization of code content as well as the wide-spread incorporation of international and specific industry standards. Moreover, to the extent that adoption of a code of ethics represents a "best practice," in the event of an inadequate or absent code of ethics, courts may establish liability based on the contents of the codes of other companies operating in the same sector or having the same characteristics.[629]

It has also been submitted that corporate codes create binding obligations under contract law for the party to whom the code of ethics is attributable, whether because the provisions of the code relate to a company's commercial practices[630], because they create reasonable expectations regarding products' characteristics, or because they essentially constitute unilateral promises to the public in general and third-party beneficiaries[631] in particular.[632]

[627] *See generally* Viarengo (2016).

[628] Teubner (2011); Beckers (2018) 26, nt. 110. *See* Herberg (2008); Backer (2007); Backer (2008). *See also* Teubner (2017); Teubner and Collins (2011).

[629] Benatti (2014) 249.

[630] For simplicity, these situations are referred to as the "easy case".

[631] These three hypotheses relate to when codes constitute public declarations (e.g., published on corporate websites or because they contain specific provisions on a specific topic, such as workers' rights) and are referred to herein as a "difficult case".

[632] Beckers (2018); Revak (2011).

However, as establishment of a contract depends on a variety of factors – including intent to be bound, consideration, and reliance, the interpretation of which are influenced by the specific formulation of the provisions and the manner in which the code is implemented – corporations may successfully address issues that are important to consumers without employing language that might be construed as intent to create contractual relations. Alternatively, a corporation may adopt a detailed code of ethics that goes unenforced or is ineffective. In this case, weak monitoring mechanisms could undermine a third-party's reliance on commitments pledged within a corporate code.

In any event, the discussion on whether a company can be held liable under contract law for codes of ethics violations illustrates how doctrine systematically attempts to reinterpret existing private law to protect diverse interests. For instance, Beckers (2018) observes that compliance with a commercial partner's code of ethics is also often incorporated in contractual agreements[633] such that respect for the provisions set out in the relevant code become an express contractual obligation. In this respect, Beckers (2018) highlights three types of contracts which tend to include reference to a commercial partner's corporate code: supplier contracts, customer contracts, and contracts on social environmental compliance (discussed below).

With reference to sub-contracting agreements, the incorporation of partner codes of ethics/conduct in supplier agreements has the effect of rendering compliance with such codes an express contractual obligation. Beckers (2018) emphasizes that this is an increasingly frequent phenomenon: "As a matter of fact, large companies frequently incorporate their own corporate policies into supplier contracts, often in the form of a separate policy term that requires the business partner to follow the corporate policy of the company…A common phrasing of such a term is to make adherence to this corporate code an explicit obligation of the supplier. This obligation is normally linked to several other provisions in the contract, which specify the right of the company to monitor compliance in the form of conducting audits. In addition, the contract can also contain agreements concerning remedies that apply in an event of non-compliance, such as the obligation to set up an improvement plan or to participate in an employee and manager training and, in severe cases, the right to terminate the contract." Therefore, it is easy to see that – by incorporating company policies (or a code of ethics) in a supplier contract – adherence to the corporate code becomes a binding contractual obligation

[633] Beckers (2018) 48-9; McBarnet and Kurkchiyan (2007) 59-92; Vytopil (2015).

for the supplier and breach of any such obligations entitles the buyer to agreed remedies and/or those established under contract law. Against this background, it seems significant that the majority of US and European corporations have adopted public codes of ethics, and current research suggests there are at least 100,000 parent company MNEs operating worldwide, with more than 890,000 subsidiaries and millions of suppliers.[634] However, it must also be stressed that these provisions are usually one-sided, creating an obligation only for the supplier without creating a duty by the buyer to monitor or enforce compliance.

As concerns the incorporation of respect for a specific corporate code in agreements with customers, Beckers (2018) notes that, although such incorporation is increasingly common, this tends to happen when buyer parties are public bodies, non-profit organizations or businesses themselves. And such obligation tends to be aimed at guaranteeing a specific quality of a product or service, such as when a buyer has an interest in ensuring materials are sourced in a socially or environmentally responsible manner. Furthermore, it is imaginable that compliance with ethical/sustainable principles can constitute an obligation for both the supplier and the buyer. For instance, the European Court of Justice[635] and the European legislator have frequently intervened in the field of public procurement law as concerns admissible criteria in public procurement procedures. Procurement contracts represent one example of how parties (i.e., public bodies) use contracts to compel businesses to respect a code of ethics, especially when it comes to obligations to respect social and environmental standards. "In fact, the use of procurement contracts has become a widely used tool by governments, either as an alternative or as a complementary policy measure to top-down regulation that aims at furthering social and environmental engagement by companies."[636]

It is also important to highlight that this same instrument may easily be applied in the private sector. In the fashion industry, reference can be made to what was discussed in Chapter 2 in relation to the subcontracting and/or sub-subcontracting agreements. Indeed, in 2012, the University of Wisconsin Madison filed a breach of contract claim against Adidas, its general sponsor and supplier of university apparel and sportswear, for failing to comply with an express contract term (i.e., compliance with the university's labor code of conduct). Without going into

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[634] Jaworek and Kuzel (2015).

[635] Beckers (2018) 50 nt. 13.

[636] Beckers (2018) 50. *See also* McCrudden (2007) (discussion the strategy of governments to include respect for ethical/sustainable principles in procurement contracts); McCrudden (2004) (providing rich empirical evidence that public procurement is a traditional policy tool to achieve a social outcome).

significant detail, it is noteworthy that Adidas subcontracted production to a supplier (i.e., PT Kizon) in Indonesia, who in turn failed to abide by the relevant code of conduct. Thus, respect for codes of ethics/conduct can also become a contractual term in sponsoring contracts and supply contracts.[637]

Finally, as concerns compliance with voluntary social and environmental standards, Beckers (2018) comments that membership contracts and certification between companies and civil society groups or local communities directly provide for compliance with certain such standards (listed in codes of ethics/conduct). "In these agreements, the [contract] specifies compliance with a code of conduct as a binding obligation of the company that becomes a member and is often also combined with extensive rights of the certifying organization to inspect factories and remedy non-compliance. The agreement usually refers to the social and environmental code of conduct of the particular certifier as an obligation for members, but also requires the company to reconcile its own corporate policy with this code. Prominent examples from the apparel industry are the Fair Labor Association and the Fair Wear Foundation…In exchange for this contractual obligation…*participating companies are entitled to advertise their membership with the logo of the association*."[638] (emphasis added). International Framework Agreements provide a further example of how voluntary codes can become contractual obligations.

At the same time, if the above examples represent relatively "easy cases" of enforcement of codes of ethics, the same cannot be said for instances in which compliance obligations are referenced in ancillary documents such as general terms and conditions or framework (or "umbrella") agreements;[639] and even less so when commitments are generally published on corporate websites, for example (representing mere "declarations" of values and/or respect for [often vague] principles). More specifically, incorporation of adherence to a commercial partner's corporate code as part of the general terms and conditions of an agreement may result in a "battle of the forms", which occurs when contracting parties each have their own set of different general terms and conditions. In these cases, whether the obligation to comply with one party's code versus the other party's code depends on how such battle is disciplined under national law. In English law, for example, priority is given to the last set of terms and

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[637] Beckers (2018) 108-110 (providing a summary of the proceedings).

[638] Beckers (2018) 51. *See* Cafaggi (2013). For a comparison between the mandatory requirements of different certification programs: O'Rourke (2003).

[639] *See* Vytopil (2015); Mitkidis (2014).

conditions, as such introduction into the terms and conditions of the relevant contract is considered a counter-offer (and not acceptance of the first set of terms and conditions).[640] This is the same approach adopted by the Italian legislator (*cfr.* Art. 1326 It. c.c.); according to Trimarchi (2011) "se invece proposta e accettazione, così interpretate, non sono conformi l'una all'altra, il contratto non sorge neppure: si ha *dissenso*" (*if, on the other hand, the proposal and acceptance, so interpreted, do not conform to each other, the contract does not even arise: there is* dissent)[641]. Conversely, in Germany (although initially favoring the approach taken under English and Italian law) in 1957 the Federal High Court of Justice (the *Bundesgerichtshof*, BGH) set the stage for a prevailing approach which requires party consent for any competing terms and conditions to be deemed incorporated in the relevant agreement.[642] Thus, if irreconcilable competing terms are knocked out and substituted by gap-filling default rules, then only companies with similar (reconcilable) corporate codes will be legally bound by incorporation of the same; irreconcilable terms are not subject to contractual enforcement under German law.

Regarding framework agreements (in Italian: *accordo quadro*),[643] it is significant that, although setting rules for the formation of future contracts, these arrangements are not *per se* enforceable contracts. It follows, then, that whether incorporation in a framework agreement of respect for a code of ethics constitutes a binding obligation depends on the degree of specificity of the subsequent contract (entered into pursuant to the framework agreement). According to Beckers

[640] This is based on the "mirror image rule" and the requirement set out in *Hyde v Wrench* (1840) 3 Beav 334 that a contract is only established when the offer matches the acceptance. *See Brs v Arthur v Crutchley Ltd* [1968]1 Loyd's Rep 271. *But see* Butler Machine Tool Co Ltd v Ex-Cell-O Corp [1979] 1 WLR 401 405 (highlighting the dissenting opinion of Lord Denning that "the terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If the differences are irreconcilable—so that they are mutually contradictory—then the conflicting terms may have to be scrapped and replaced by a reasonable implication") (Beatson, Burrows, and Cartwright 2016).

[641] Trimarchi (2011). *See* Torrente and Schelsinger (2017) ("*proposta e accettazione costituiscono dichiarazioni di volontà individuali; quando alla proposta segue l'accettazione allora si ha l'accordo: proposta ed accettazione – come metaforicamente si suole dire – si fondano in una volontà unica, la volontà contrattuale"*).

[642] *See*, for example, BGH BB 1957, 728; BGH NJW 1973, 2106, 2107f; BGH WM 1974, 842, 842.

[643] Framework agreements are used to govern general aspects of a long-term contractual relationship yet, due to lack of specificity, they do not constitute a contract per se. They are beneficial to the extent that they afford parties flexibility of determining concrete obligations from time to time, within the limits established under the general framework agreement. For example, in supplier arrangements, a framework agreement might establish a minimum guaranteed order amount or floor-price for production, but the actual product order constitutes the relevant contract in case of dispute.

(2018) "from [*Bair Textile Holdings Ltd v Marks and Spencer*[644]] it can be concluded that English law sets high threshold requirements for assuming that direct obligations are already created on the grounds of such a preliminary agreement…in the event that the umbrella agreement remains less informal, is made in writing and contains more specific terms, it is thus. More likely that the courts would interpret the terms of the umbrella agreement as a contract."[645] Instead German law, Beckers (2018) notes, treats umbrella agreements (*Rahmenvertrag*) as binding between the parties when such accord is sufficiently specific. In this sense, these general and preliminary agreements are classified as a contract *sui generis*[646] without, however, giving rise to an obligation to conclude a future contract (in performance of the obligations set out in the framework agreement),[647] just as the de-facto existence of a long-term relationship does not give rise to the existence of obligations under contract law.[648] From this perspective, under German law, a code of ethics can give rise to contractual obligations if the provisions contained therein are sufficiently specific.

This leads the discussion to address the legal challenges surrounding the enforceability of provisions contained in corporate codes that, although publicly available, are not incorporated in a formal contract between the company that drafted them and the presumed intended beneficiaries. If the above examples were "easy cases" of enforcement, framing public declarations as contract terms represents a "difficult case" of enforcement.[649]

The famous case *Doe v. Wal-Mart Stores* [650] provides a first example of how courts and/or the doctrine have attempted to reinterpret contract law to frame codes of ethics as unilateral promises in favor of stakeholders such as consumers or code beneficiaries. Specifically, Wal-Mart required suppliers to comply with its code of ethics by incorporating such duty in specific supplier agreements (i.e., the "easy case"). Among the terms of the supplier agreement there was also Wal-Mart's right to inspect factories and its right to terminate contracts in the event of breach of the supplier agreement (e.g., if inspections revealed failure to comply with the

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[644] *Bair Textile Holdings Ltd v Marks and Spencer* [2001] CLC 999.

[645] Beckers (2018) 57. *See* Mouzas and Furmston (2008).

[646] BGH NJW 1979, 1782, 1783.

[647] BGH NJW-RR 1992, 977, 978.

[648] BGH NJW 2002, 3695, 3696 (ruling on whether a banking contract may be construed from a long-term relationship).

[649] For a more in-depth analysis of the "difficult case", *see generally* Beckers (2018).

[650] *Doe v. Wal-Mart Stores, Inc.*, 198 W. Va. 100, 479 S.E.2d 610 (W. Va. 1996).

code). Importantly, Wal-Mart's code contained "standard" language whereby the company expressed, for example, adherence to minimum working standards (established in the code), to respect local law and industry standards regarding remuneration and working hours, and not to discriminate or use child labor. Moreover, the company's code was publicly available.[651] Based on these facts, the claimants asserted that such public declaration created an obligation for Wal-Mart to effectively ensure such conditions were met, thereby improving work standards. To support their argument, the claimants submitted four theories: (1) the claimants were third-party beneficiaries of the performance of obligations set out in the supplier contract (i.e., adherence to a code that set minimum standards and stated respect for minimum workers' rights); (2) the right contained in the supplier agreement for Wal-Mart to inspect supplier facilities established a duty of care in favor of such third-party beneficiaries to ensure compliance with the code; (3) the supplier contract defined conditions of employment and therefore made Wal-Mart a joint employer; (4) Wal-Mart was unjustly enriched by its public declarations at the detriment of workers.

Both the District Court and the Court of Appeal ultimately dismissed[652] the case, sparking a lively scholarly debate and discussion about whether a buyer can be held liable for the offenses of its supplier despite the supplier contract expressly excludes such liability. And, more specifically, whether such liability may be founded on the contractual obligation to comply with the buyer company's code of ethics/conduct. Beckers (2018) has identified two primary arguments in favor of holding buyer companies (or "lead" companies) liable for the offenses of the "links" in the supply chain. First, it has essentially been argued that in the buyer-supplier relationship contracts are not effectively negotiated at arm's length; buyers have significant power over their suppliers, which justifies the establishment of a duty of care with respect to

[651] For example, in Walmart's Global Statement of Ethics, it is stated that the "vision of Global Ethics is to promote ownership of Walmart's ethical culture to all stakeholders globally" and that "we must all act ethically in regards to environmental issues to further our goal of helping people live better and ensure a better world for generations to come". The company has a very comprehensive ethics policy (the Global Statement of Ethics is 37 pages) that focuses on "Leading with Integrity in Our Workplace", conflicts of interest, wage & working hours, inappropriate conduct, discrimination and harassment prevention, personal relationships with suppliers, etc. (Walmart n.d.). *See* "Ethics & Compliance" (2021).

[652] The Court of Appeal held Wal-Mart could not be a joint employer in the absence of day-to-day control over suppliers' working conditions. Additionally, it rejected the claim that Wal-Mart had a duty of care to inspect the facilities based on the lack of clarity that Wal-Mart had any actual intent to inspect factories. Finally, the Court found Wal-Mart lacked control over suppliers and therefore it also rejected claimants' theories based on negligence.

the entities it controls.[653] Second, advocates of improved corporate accountability highlight that it has become the *status quo* for "companies [to] present themselves to the public as actors that seek to improve social and environmental standards worldwide and to assist their contractual partners with achieving compliance with the code. Yet, they nevertheless seek to avoid putting their own commitment in the legally binding form of a bilateral contract. Instead, the actual corporate code that contains the commitments of the company to act in a socially responsible manner is only part of an informal policy that is made available to the public. Hence, a major reasonable ground for the discomfort of scholars that assessed the ruling in Doe v. Wal-Mart is the concern that, by rejecting any responsibility of the company for its publicly declared code, the law appeared to have approved this Janus-faced strategy. Consequently, it marginalized 'the commitment of one of the world's largest private employers to afford minimum labour standards to their contractual suppliers' employees'. Or, to put it differently, contract law as used here by the Court seems to be insufficiently prepared to look beyond the actual contractual agreement and to take into consideration other forms of unilateral commitments by private actors."[654]

A different decision was reached in *Does I v. Gap* [655], where control was deemed adequate to establish a Rico claim.[656] In fact, the company had used its "power through contracts, oversight, and economic pressure" to obtain advantageous prices even at the expense of working conditions. The case is interesting in that great emphasis has been placed on both the code of conduct and the monitoring programs in place. It has been pointed out that the Court based its reasoning on the fact that: "despite the power of MNCs to enforce their codes of conduct, they directly cause, or aid and abet, suppliers to continue sweatshop conditions by paying an unreasonably low contract price, requiring unreasonably short manufacturing deadlines and

[653] *See*, *inter alia*, Collins (1990); Cafaggi (2008); Teubner (2011). *See also* Gereffi, Humphrey, and Sturgeon (2005); Lin (2006); Lin (2021).

[654] Beckers (2018) 62-63.

[655] *DOES I v. GAP, INC.*, Case No. CV-01-0031 (D.N. Mar. I. Dec. 17, 2002).

[656] RICO stands for Racketeer Influenced and Corrupt Organizations Act of 1970 (18 U.S.C. §§ 1961-1968), a US law originally intended to stop organized crime (e.g., the Mafia). Currently, private citizens can file a claim in federal court against a corporation, business, private person, or political group for a violation of RICO (i.e., a RICO claim). A RICO claim requires proof of 4 elements: (1) the existence of an enterprise affecting interstate commerce; (2) that defendants were employed by or associated with the enterprise; (3) that the defendants participated, directly or indirectly, in the conduct or affairs of the enterprise; and (49 that the defendants participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts as set out at 18 U.S.C. § 1961 (i.e., predicate acts such as murder, kidnapping, gambling or extortion, as well as drug offenses, obstruction of justice, obscenity and securities fraud).

demanding last-minute order changes. MNCs profit from sweatshop conditions and cause investment injuries by using those profits to perpetuate the arrangement with codes of conduct and monitoring systems that discourage involvement by stakeholders to improve labor conditions."[657]

In this context, it is relevant how contract law treats ambiguous public statements (such as codes of ethics), especially considering transactions with consumers – while they tend to be characterized by a strong reliance on a company's public statements – are not normally carried out based on a written contract nor do they tend to include an explicit reference to a company's code.

Some corrective actions: (re)interpretation of private law and legislative intervention

In Italy, it has been asserted that the public declarations contained in company codes constitute "public promises" (*promessa al pubblico*, pursuant to Art. 1989 It. c.c.)[658] in that they "una determinazione unilaterale, ma giuridicamente vincolante del grado di buona fede e diligenza che la società si obbliga a praticare" (*a unilateral, but legally binding determination of the degree of good faith and diligence that society is obligated to practice*).[659] According to Benatti (2014), although apparently supporting the thesis that corporations should be held accountable for their public declarations, this is fine for the specific reference to commitments to respect the right to health and respect for the environment, but it is not a general rule for all commitments contained in the code (e.g., the general commitments to "contribute to the progress of society").[660]

Another part of the doctrine argues that publicly declared company codes, to the extent they constitute an integral part of a company's CSR program, establish an obligation on the part of the company based on the theory of social contract.[661] Another still categorizes them as third-party contracts[662] when codes establish criteria regarding working conditions to which all suppliers must also adhere. According to this reconstruction, the company would thus be

[657] Maryanov (2010) 424.

[658] Senigaglia (2013).

[659] Irti (2003). *See also* Libertini (2008).

[660] Benatti (2014) 180-181.

[661] *See* Dunfee (2006); Sacconi (2004); Sacconi (2007); D'Orazio (2009). *Contra* Denozza (2012).

[662] Benatti (2014) 179-182.

contractually committed to the supplier to secure a benefit for the employees, who could then take legal action directly against the company. This approach has not been accepted by US case law because of the difficulty in identifying "intended beneficiaries" in employees; clauses granting the company the right to carry out checks to verify compliance with certain standards have not been held sufficient to establish the existence of a right of employees. Nonetheless, this approach has been criticized for policy reasons. The Nike case in the early 1990s is one example of how the public might react if it perceives a company uses its corporate code as an abdication of responsibility for sweatshop conditions in supplier factories.

From this perspective, it appears abstractly possible to equate codes of ethics with atypical unilateral promises (*promesse unilaterali atipiche*) based on the relationship of trust that such codes engender in the public. This is because the code communicates information on the company's activities and causes the stakeholders who come in contact with such company to rely on such information. Therefore, companies should be subject to the general principles on inconsistent behavior (or the principle of [*non*] *venire contra factum proprium*) which – according to Art. 1.8 of the Unidroit Principles – state that "a party cannot act inconstantly with an understanding that it has caused the other party to have and upon which that other party has reasonably acted in reliance to its detriment". And the importance of enforcing ethical declarations is no doubt even more important in the developing countries where multinational companies often operate. In other words, in countries where formal safety standards are low or non-existent and/or fundamental rights enjoy only limited protection, the CSR activities performed or boasted by a company creates a public reliance from which corporate liability can arise (*responsabilità da affidamento*). In these contexts, it would not be "fair" to the allow a self-imposed limitation (i.e., code of ethics) go unenforced to the benefit of corporate interests. At least theoretically, a company could be liable for pre-contractual, contractual or for reliance (*responsabilità da affidamento*). Accordingly, it is additionally noteworthy that under Italian law the advantage – even purely reputational, but not only – received by a company for adopting a code of ethics or code of conduct can be the source of a legal obligation under Art. 1174 It. c.c., which does not require the correlation between performance and the economic interest of the creditor. The performance of the debtor (in this case, the company) must only be susceptible to economic evaluation. Furthermore, in accordance with Art. 1411 It. c.c. and because of the principle of responsibility for reliance, a contract in favor of the third party must be found to exist if the latter (the *stipulans*) has a strong interest in the performance of the service in question. In the context of codes of ethics, there is no doubt that nowadays the

public has a strong interest in an effectively more ethical business conduct. In America, an obligation may arise if "[f]irst, the code must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement."[663]

As far as concerns consumers, for the most part, there is an inclination to frame the question in terms of the characteristics and quality of a product. That is, if a company presents itself as being environmentally and/or socially responsible, with ethically sourced products, for example, consumers expect the products they buy from such company are effectively responsibly sourced and conform to the expectation created by the company's marketing.[664] The argument is based on Directive 2019/771[665] and advocates the necessity for the law to consider publicly declared corporate codes "in order to react to the changing expectations of consumers that pay increasing attention to the social and environmental performance of a company and the way in which such commitments shape the expectations concerning the products that they buy."[666] Related to this point, it is imaginable that failure to respect one's own code of ethics could constitute an unfair commercial practice, given the apparent

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[663] *Duldulao v. St. Mary of Nazareth Hosp. Center (1987)*, 115 Ill. 2d 482 at 490, 505 N.E.2d 314 at 318. *See Harrell v. Montgomery Ward & Co., Inc.*, 545 N.E.2d 373, 377 (Ill. App. 1989) ("[G]eneral statements of company policy or procedures which are discretionary in nature have been held too indefinite to constitute a clear promise which could reasonably be interpreted as an offer."); *Doe v. First Nat. Bank of Chicago*, 865 F.2d 864, 873 (7th Cir. 1989) (handbook providing that supervisors are expected to adhere to certain disciplinary guidelines was insufficient to constitute a promise clear enough that an employee would reasonably believe that an offer for continued employment had been made); *Lee v. Canuteson*, 573 N.E.2d 318, 322 (Ill. App. 1991) (handbook stating that progressive discipline approach may be used to communicate to employees what work habits and skills are expected of them was insufficient to constitute a promise clear enough that an employee would reasonably believe that an offer for continued employment had been made).

[664] *See* Wilhelmsson (2002); Wilhelmsson (2004); Kocher (2002); Glinski (2007); (2008).

[665] Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC. In Italy, consumers enjoy several protections under the *Codice di Consumo* (Legislative Decree No. 206 of 6 Sept. 2005). *In the United States, The Federal Trade Commission generally oversees consumer protection matters; in California, there is also the California Department of Consumer Affairs which avails of forty regulatory entities. The Uniform Deceptive Trade Practices Act is another relevant law.* In English law, this provision is substantially contained in section 14 of the Sale of Goods Act 1979. In German law, the agreed-upon properties (*Beschaffenheit*) of goods falls within the scope of § 434 I 3 BGB.

[666] Beckers (2018) 64. *See* Cerchia and Piccolo (2019). *See also* Wilhelmsson (2002); Wilhelmsson (2004); Glinski (2007); Kocher (2008).

marketing value of ethical behavior and statements in this sense.[667] Indeed, nowadays it is undeniable that corporate codes play a significant role in the formation of consumer choice and the everyday operations of a company. In the American context, reference can be made to the Nike case[668] already discussed in Chapter 2 in which Marc Kasky sued the company for deceptive advertising. In Italy, this case is abstractly governed by Art. 27-bis of the Italian Consumer Code, according to which "business and professional associations or organizations may adopt, in relation to one or more business practices or one or more specific business sectors, appropriate codes of conduct that define the behavior of professionals who undertake to comply with these codes with an indication of the responsible party or body responsible for monitoring their application." Therefore, a breach of these rules would constitute an unfair commercial practice as long as the commitment is firm and verifiable, such as the provisions contained in publicly available codes of ethics. Still, accountability is limited given only consumers could bring an action against a company for violation of its code of ethics. Accordingly, despite legal action in and of itself is a powerful deterrent, consumer actions do not appear sufficient to protect the intended beneficiaries of corporate codes.

And finally, it cannot be ignored that an increasing number of institutional stakeholders consider whether a company has a code of ethics in place when evaluating creditworthiness. In Italy, such consideration is also at least partially due to the introduction of Legislative Decree No. 231/2001. However, it is also undeniable that ethical practices appear to be required, at least formally, in an increasing number of sectors and contexts. Simply put, codes of ethics have reached a point of relevance for companies, investors, and consumers alike such that they can no longer be considered "voluntary" (as discussed below), meaning that the statements contained therein should be binding. And yet, this is not the case.[669]

Despite the apparent inapplicability of contract law in cases in which damage arises in connection with a violation of a corporate code of ethics, invoking the principles of tort law may be useful to establish when the dominant party in a business relationship owes a duty of care to third-parties. Still, this is not a straightforward task. Traditionally, in English law,

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[667] *See* Cerchia and Piccolo (2019).

[668] Nike, Inc., et al. v. Kasky, 539 U.S. 654 (2003).

[669] For reasons related to lack of specificity and freedom of commercial speech, these arguments do not appear accepted by courts. Furthermore, Beckers (2018) notes at p. 67 nt. 78 that the rules on contract interpretation and supplementation have not been discussed in detail as regards the debate on corporate codes and environmental standards. In her note, she provides references to some of the more relevant and authoritative doctrine.

whether such a duty exists has depended on the three-stage test, which is set out in *Caparo Industries plc v Dickman* [1990] 2 A.C. 605 (HL); in particular, the foreseeability of harm, the degree of proximity between the parties, and whether the imposition of liability may be considered fair, just, and reasonable. *Chandler v Cape Plc* [2012] EWCA Civ 525 is a landmark case recognizing that courts have discretion to consider a variety of elements that might provide grounds for the establishment of a duty of care. However, notwithstanding contractual arrangements (e.g., the requirement to adhere to a buyer's code of ethics) and material facts (e.g., the percentage of a supplier's sales that derive from its relationship with a specific buyer) could become relevant in determining whether a duty of care may be established, it could be difficult to apply the doctrine in polycentric corporations where different legal entities exercise control functions. Such challenge is apparent from the case law, which highlights a general reluctance of courts to impose a duty of care without clearly defined legal rules.

In the United States, beginning in 1980 with the seminal decision *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), US courts began interpreting the Alien Tort Statute (ATS) to hold corporations liable for their foreign activities. Since *Filartiga*, however, the application of the ATS has been controversial. *Nestlé USA, Inc. v. Doe I,* et al., 593 U.S. (2021) and companion case *Cargill, Inc. v. Doe I*, 593 U.S. (2021) illustrate the tendency for US courts to narrow the application of the ATS as well as a general reluctance to pierce the corporate veil or create clear criteria for establishing liability. Similar actions have been brought in the UK (e.g., *Connelly v RTZ Corporation Plc* [1998] AC 854; *Lubbe v Cape Plc* [1998] CLC 1559 (CA); [2000] 1 WLR 1545 (HL)). Recently, in *Vedanta Resources PLCA and another v Lungowe and others* [2019] UKSC 20 April 2019, despite that the UK Supreme Court affirmed the potential liability of English parent companies in relation to the activities of their subsidiaries (noting that liability depends also on the extent of and manner in which the parent controls, supervises, or advises on the relevant operations of the subsidiary), the action could not ultimately proceed due to application of the doctrine of *forum non conveniens*. A recent decision (*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5) of the Supreme Court of Canada could, however, represent a turning point. Specifically, the Supreme Court of Canada ruled that: "as a result of the doctrine of adoption, norms of customary international law...are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law...[and]...like all common law, no legislative action is required to give them effect" (par. 94). This Court also implicitly responded to arguments that corporations are not subject to international law, noting that some rules of customary international law "prohibit conduct regardless of whether the perpetrator is

a state" (par. 105) and therefore concluded "it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under customary international law from direct liability for violation of 'obligatory, definable, and universal norms of international law,' or indirect liability for their involvement in ... 'crimes of complicity'" (par. 113). Nonetheless, to the extent *Nevsun Resources Ltd. v. Araya* is applicable outside of Canada, it hardly resolves procedural or culpability issues in civil law jurisdictions.

Within this framework, the law does not appear to have adapted to social expectations or the changing perspective of corporate responsibility, thus requiring a more decisive legislative response to public demands. Indeed, various governments have enacted legislation that could be instrumental in imposing a duty of care throughout supply chains.

For instance, in the United States, the California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43 imposes disclosure requirements on manufacturers and retailers regarding monitoring of supply chains for potential human rights abuses. In 2010 and 2012, through the Dodd-Frank Wall Street Reform and Consumer Protection Act and Section 1502 of the US Securities and Exchange Commission (SEC), respectively, companies were required to perform due diligence on their supply chains in compliance with annual and quarterly disclosure requirements for externalities and corporate activities impacting stakeholders. In July 2019, a bill of the Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019 was introduced in the US House of Representatives. If passed, publicly traded companies will be required to provide the SEC with information on human rights risks and impacts, as well as details of human rights due diligence.

In the European context, Directive 2014/95/EU and national reforms occurring between 2016 and 2017 (e.g., the 2016 Italian Action Plan on Business and Human Rights; the 2016 German National Action Plan for Legislative Reform; the 2017 French National Action Plan) appear connected to the March 2017 proposal by the UK Parliament's Joint Committee on Human Rights to pass legislation that would impose a duty of care on all companies to prevent human rights abuses and allow for civil remedies against the parent company in the event of abuse,[670] as well as the 2019 German Draft Law on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains, the French *Loi* No. 2017-399 of 27 March 2017 (the "Duty of

[670] House of Lords (2017).

Vigilence" law) and the 2019 French "Pacte Statute."[671] Finally, on 23 February 2022, the European Commission adopted a proposal for a directive on corporate sustainability due diligence aimed at fostering sustainable and responsible corporate behavior.[672] The new rules will be applicable to European companies with value chains even outside Europe. However, only for large EU limited liability companies (i.e., single corporations or groups of corporations with more than 500 employees and combined net turnover of at least €150 MM) and companies with at least 250 employees and a combined net turnover of € 40 MM operating in high-impact sectors (e.g., textiles, agriculture, minerals extraction). It is also significant that the Directive will go into effect from 2025 for large companies and 2027 for medium-sized companies operating in high-risk sectors. Thus, given the urgency of the sustainability problem, combined with the long lag-time for entry into force, as well as the fact that small and medium-sized enterprises (SMEs) are the "backbone" of Europe's economy[673] (representing 99% of European businesses, accounting for more than half of the Union's GDP and employing around 100 million people), the proposed directive risks being largely ineffective. In other words, the European Union has taken a bold step toward requiring corporate accountability, but only for 1% of European businesses.

As concerns the fashion industry, in October 2021,[674] a bill for the Fashion Sustainability and Social Accountability Act (FSSA, or "The Fashion Act")[675] was introduced to the New York Senate and Assembly. If passed, the FSSA will require fashion brands with at least $100 MM in revenues (e.g., Armani, LVMH, Nike) doing business in New York to map at least 50% of their supply chain (including raw materials sources, factories and shipping companies) and to disclose information related to social and environmental impacts therein. Thus, under The Fashion Act, companies will have to disclose total volumes of materials production (e.g., how much cotton or leather they sell) for the purpose of conveying their environmental impact

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[671] Note that the European Coalition for Corporate Justice has compiled a list of corporate due diligence legislative proposals in Europe (ECCJ 2022).

[672] *See* European Commission (2022).

[673] For more information on the importance of SMEs in the European economy, *see* European Commission (n.d.) "Entrepreneurship and small and medium-sized enterprises (SMEs)". Note, also, that according to Statistica SME industry sectors Italy, 19% of SMEs in Italy operate in the retail industry, and a report by the Luiss Business School reveals that the fashion and apparel industry in Italy has a turnover that exceeds € 80 billion euros and employs almost 500 thousand people, representing 12.5% of the employment of the Italian manufacturing industry (Business Intelligence Group n.d.).

[674] The bill was announced in a press conference held on Friday, January 7th, 2022.

[675] Assembly Bill A9352.

reduction strategy. As concerns workers' rights, brands will be required to disclose median wages and measures in place to implement responsible business conduct in their policies and management systems. Moreover, noncompliant companies that do not remedy a harm within three months from receiving notice (aside from being entered in a register of noncompliant companies compiled and published annually by the New York attorney general) will be fined up to 2% of their annual revenues (i.e., $2 MM), which will be then allocated to a Community Fund for environmental justice projects in New York. From this perspective, The Fashion Act represents a potential "game-changer" for holding brands legally accountable in an industry where commitments to human rights and the environment are typically voluntary.

However, just like the above EU proposal for a directive on corporate sustainability due diligence, the New York Fashion Sustainability and Social Accountability Act is not without criticism. For instance, by requiring mapping of only 50% of the supply chain, it is imaginable that companies could "cherry pick" which companies they report on and which they opportunistically do not. There is also no due diligence policy that defines abusive behavior or provides examples of behaviors that are explicitly prohibited (meaning it is unclear which risks must be addressed and disclosed),[676] nor does the proposed legislation mention which (if any) remedies are available for aggrieved parties in case of corporate abuses or harm. Furthermore, it is obvious that mere disclosure legislation does not actually drive corporate accountability or protect human rights in the environment because mandatory disclosure legislation does not require companies to identify, mitigate or account for adverse environmental or social impacts. In other words, disclosure laws that are not coupled with additional requirements to effectively *change* operations or remedy any harm caused therefrom are useful only to the extent they allow policy makers and civil society to collect information without directly translating to concrete or direct improvements for stakeholders who come into contact with fashion brands. Simply put, there needs to be clear civil liability like France's Duty of Vigilance Law, and such liability must be joint, in line with the California Garment Worker Protection Act (SB62), to hold brands, retailers and manufacturers accountable for violations of minimum wage standards. It is not sufficient to rely on "good faith efforts" – when a law lacks "teeth", it is not much more than a smokescreen for prioritizing corporate interests. Moreover, without clear a disclosure policy, the FSSA relies on brands and retailers to set their own reporting targets, which may be self-serving. From this perspective and conceding that industry professionals are

[676] As regards how disclosures should be made, reference is made to standards such as the Paris Climate Accords and the UN Guiding Principles on Business and Human Rights.

the most adept at setting regulatory standards, it could be more effective to involve industry experts without a direct interest in the company, such as labor organizations or NGOs, to provide more objective proposals for effective regulation of the fashion industry.[677]

In this context, one might wonder whether the European approach to sustainability is more effective. However, as will be discussed below, the challenges of achieving circularity through increased legislation are also not indifferent.

Challenges of the Circular Economy Model in the Fashion Industry [678]

As seen above, the concept of circular economy is growing in popularity amongst politicians, businesses, and scholars. However, it is not without critics and challenges. The following section summarizes some of the main arguments of its detractors, including lack of strategic guidelines and standardization, challenges related to achievability and desirability, and weaknesses in the social dimension.

Lack of standardization, incomplete information, and economic barriers

When thinking of the circular economy, words such as "revolution" and "innovation" might come to mind. However, as discussed in Chapter 1, the idea of reconciling economic and environmental concerns (i.e., sustainable development) was already widespread by the time the Brundtland Report was drafted in 1987. Nonetheless, to the extent circularity entails refurbishment rather than exploitation of virgin materials, the various strategies presently aimed at prolonging resource use offer some newness. Such perception of novelty is partially attributable to the fact that over a hundred definitions of circularity have been inventoried. Accordingly, circularity can assume a different meaning depending on who is called to implement it (e.g., policy makers, businesses, consumers) and the relevant field of application.[679] In fact, implementation varies by product and market.

[677] On the critical aspects of The Fashion Act, *see generally* Green (2022); Remake (2022); Brudney (2022).

[678] *See generally* Backes (2017). Note also that although circular design and relevant directives are certainly important for the discussion, they will not be addressed in this section or in this contribution. For a legal analysis on these topics see, *inter alia*, Giudici (2016); Varese and Barabino (2016); Ricci (2021); Mazzesi (2021); Bandera, De Angelis, and Rosati (2021).

[679] Kirchherr, Reike, and Hekkert (2017) 221-232.

At a policy level, absence of a uniform definition of circularity is additionally significant because it means there is currently no single set of criteria or specific guidelines for actions to support implementation of the circular economy. In a nutshell, there is no ISO standard on circular production in the textile and ready-made garment industries.[680] On the one hand, the need for individualized or sectoral approaches makes it difficult to provide general guidelines. On the other, the heterogeneity of definitions makes it difficult to pinpoint what circularity is actually about, and therefore which strategies are most efficient for improving circularity.[681] This problem appears to be compounded by the fact that, according to Corvellec, Stowell, & Johansson (2022)[682], the circular economy literature[683] ignores much established knowledge, including the thermodynamic aspect (i.e., matter cannot be destroyed or created; all resources eventually dissipate into the environmental system somewhere).[684] They note, in particular, that "the term 'circular' can be misleading if it evokes industrial systems modeled according to an understanding of nature as a circular system that is stable, closed, and zero waste" because "even cyclical systems consume resources and create wastes and emissions."[685] From this perspective, a future without waste is impossible. And, in any case, implementation of a circular economy model not only requires renewable energy sources, but also acknowledging and fully addressing the complexity of waste in such a system. Hence, lack of a uniform approach creates conceptual fragmentation[686] which undermines the model's paradigmatic strength[687] and augments the risk that whoever is called to determine a circular economy policy or practice might neglect to consider all three dimensions of sustainable development.[688] So, assuming it is possible to create a "one size fits all" circular economy model, the establishment

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[680] There are ESG objectives, but these are flexible. This could be positive, however, for growth as a traditional argument against strict regulation is that fixed criteria do not afford the flexibility needed for diverse industries to tailor tools as needed for both growth and achievement of non-economic goals. On how ESG factors are measured, see generally: Dal Fabbro (2022). Instead, on the impact of ESG factors on business, Rolli (2020), provides a thorough analysis of the incorporation of sustainability principles within Italian company law.

[681] Corvellec, Stowell, and Johansson (2022).

[682] Corvellec, Stowell, and Johansson (2022).

[683] For a systematic literature review, *see* Nikolaou, Jones, and Stefanakis (2021); Ki, Chong, and Ha-Brookshire (2020).

[684] Giampietro and Funtowicz (2020); Pearce and Turner (1990).

[685] *See* Korhonen, Honkasalo, and Seppälä (2018); Korhonen et al. (2018).

[686] *See* Blomsma and Brennan (2017); Korhonen, Honkasalo, and Seppälä (2018); Korhonen et al. (2018).

[687] *See* Inigo and Blok (2019).

[688] *See generally* Rizos et al. (2017).

of standardized strategic guidelines is stifled in part by lack of a uniform definition of circular economy.

In the European panorama, it is additionally important to recall that where no detailed rules for the uniform application of terms is established at the EU level, relevant criteria may be set by individual Member States. These issues have somewhat already been noted in Masieri (2018) and Jacometti (2019) in relation to waste management systems. Furthermore, where Member States pursue their own agendas, standards could be so diverse as to translate to an effective increase in transaction costs, with the probable outcome of industry self-regulation to streamline cross-border production and operations. Consequently, even if all roads eventually lead to Rome, lack of uniform standards, criteria and guidelines stifles progress. Add this to the fact that – as Corvellec, Stowell, and Johansson (2021)[689] observe – the EU circular economy strategy focuses on manufactured flows rather than existing stocks, resulting in a business environment characterized by multiple players each having their own competitive strategy about how to implement the general concept of circularity without addressing issues related to products currently on the market. That is, there seems to be inadequate alignment between theory and practice, and objectives are not evenly prioritized. This, according to Corvellec, Stowell, and Johansson (2021), increases the probability of a rebound effect (called the Jevon's paradox) by which any progress made on the manufacture side may be offset by increased consumption and usage of materials, essentially yielding a mere substitution of exploited resources and not effectively solving the sustainability problem. Moreover, it is imaginable that – as discussed above in relation to the Waste Framework Directive – reframing waste as a resource rather than a liability could actually have the inverse effect of creating demand for waste rather than reducing it.

Another implementation challenge centers around lack of knowledge, awareness, and engagement of market participants on the complexity of waste management itself. When it comes to knowledge about recycling practices, consumers seem to be more knowledgeable about the need to deal with end-of-life glass, paper, or plastics than they do about garments and textiles. "The lack of consumer interest is a common problem for green offerings. However, in difference to, for example, switching fuels from fossil oil to biofuels, the circular economy requires a radical reformulation of the consumer role — from consumer to user. Hence, replacing traditional ownership with dematerialized services may neither appeal to consumers

[689] Corvellec, Stowell, and Johansson (2022).

nor always be feasible, and with so many information commodities consumers might not be willing to spend the time to read, scroll, and share."[690] When it comes to lawmakers, the previous observations on the difference between degradability and compostability highlight a degree of disaccord between law and science—especially as it concerns the fashion industry. And it is possible to take this argument a step further. Consider, for example, the issue of recycling toxic wastes (such as dyes) that cannot be recirculated. Energy waste is also not factored into recycling practices or policy visions on the same. Moreover, "[d]espite efforts by some players, as much as 12 percent of fibers are still discarded on the factory floor, 25 percent of garments remain unsold, and less than 1 percent of products are recycled into new garments. Given these metrics, action is an imperative and an inevitability…few decision-makers are under any illusion about the scale of the challenge."[691] This may be why the European Commission, in its first attempt to frame a Circular Economy directive, set long term recycling objectives at only up to 70% (because the remaining 30% is considered non-recyclable). Finally, the EU requirement to implement separate collecting and sorting systems for textile and clothing waste does not adequately address the fact that, for reasons linked to the post-production care of garments, their durability, feel and whatnot, much fashion apparel is made from blends of different fibers. In fast fashion, these blends are also usually low-quality. So, if deconstructing blended materials is difficult in mid- to high-fashion products, it is imaginable that the lower quality the product, the more complex and demanding the recycling process. Indeed, only a fraction of textile waste is recycled, compared to recycling rates for other products, such as packaging (98% in Germany and 79% in Belgium).[692] Thus, although there are certainly several technical and scientific aspects that affect putting the circular economy model into practice, perhaps one of the most challenging aspects of transitioning from a linear economy has to do with the "practical difficulties of connecting waste streams to production and of substituting secondary goods for primary goods."[693]

[690] Corvellec, Stowell, and Johansson (2022).

[691] Lee and Magnus (2021).

[692] Koszewska (2018).

[693] Corvellec, Stowell, and Johansson (2022).

The role of corporate codes, labelling and campaigns, and sustainability-linked bonds

As concerns standardization problems, despite there is no uniform approach to sustainable fashion, it is plausible that corporate codes could offer a solution to the (lack of) standardization problem. That is, given certain objectives and legal requirements, it is likely that corporate managers will set specific (efficient) standards to implement throughout the corporate group and supply chain. Furthermore, to the extent such industry codes represent a best practice, smaller businesses will follow the standards set by the major players. Indeed, as illustrated above, there is an evident trend of convergence (both in content and structure) among the various corporate codes of major fashion brands. However, industry practices are only half the solution – consumers must be involved, too.

As stated in the context of waste management, consumers generally lack knowledge about the environmental effects of clothing production and usage. This means that, without information, consumers cannot make informed decisions. This is not new: information and transparency have long been a challenge of the fashion industry. Thus, certifications and labelling could improve consumer awareness concerning the impact of their purchasing decisions have on the environment. Additionally, since requirements for certification are regulated by private bodies, they could also (to an extent) contribute to standardization – at least within the relevant class or type of certification. Information campaigns are another way of educating consumers. In this sense, marketing of collective consumption models and buy-back programs, for example, facilitate the diffusion of information about the environmental impact of the fashion industry.

However, perhaps the most pressing issue is the fact that transitioning to a circular economy is an expensive endeavor. That is, even without the above conceptual or technical barriers to improving circularity and sustainability, it is difficult to get around the economic barriers and significant capital requirements necessary to transform a process that has existed since the Bronze Age (and in a mass production capacity since the mid-20th century). Industry players must make significant economic investments without certainty of return or profit. To put it into context, "[s]caling up innovations to make the fashion industry more sustainable will require between $20 billion and $30 billion every year for the next decade, according to a report by consultancy BCG and sustainable fashion hub Fashion for Good published [in 2020]."[694] Labelling and meeting certification requirements also require economic investments, as does running information campaigns or implementing strategies that both keep old clothes out of

[694] Kent (2021).

landfills and improve consumer awareness of sustainability issues in the fashion industry. Therefore, even willing companies might lack capabilities to implement the circular economy business model.[695] For this reason, few players successfully integrate circularity and sustainability into their offerings and practices.

If lack of liquidity prohibits companies from investing in the technologies and adopting various practices required to improve circularity, then it is noteworthy that "some governments are playing a direct role in encouraging and funding research. The EU is set to offer €21 million ($23.5 million) of funding to support sustainable bio-based textiles and circular business models. The US Department of Defense-backed Fibers and Textiles Manufacturing Innovation Institute is researching new technologies to impregnate fibers and yarns with integrated circuits, LEDs, solar cells and other capabilities."[696] However, such funds will only barely cover a year of the total bill. In this context, institutional lenders and/or investors could provide the needed capital to transform production and operations.

A first basic question is whether investors (institutional or otherwise) have a real interest in undertaking initiatives aimed at stimulating the adoption of sustainability-focused and ESG-linked policies by the companies they invest in, and in even more generally, in following investment strategies aimed at pursuing general objectives, such as the reduction of CO_2 emissions, the benefits of which are intended to fall not only on final investors but on the general public.[697] The answer appears affirmative: Over the past few years, companies have begun looking to sustainability-linked loans (e.g., sustainability linked bonds, social-impact bonds, green financing)[698] to finance projects, such as construction of energy-efficient warehouses, sustainable sourcing projects, and innovative materials research and development.[699] And stock exchanges are also starting to play an important role in driving

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[695] *See* Pieroni, McAloone, and Pigosso (2021). *See also* Khan, Daddi, and Iraldo (2021).

[696] BoF & McKinsey (2020).

[697] *See* Strampelli (2020).

[698] On sustainable finance, *see generally* Giráldez and Fontana (2022); Kerr and Avendano (2020); United Nations Environment Programme and Ministero dell'ambiente e della tutela del territorio e del mare (2017); Driessen (2021) (providing an overview in the European market); La Monaca, Spector, and Kobus (2019); Casertano (2021)

[699] Nanda (2021).

corporate sustainability affairs,[700] including through special purpose acquisition companies formed specifically for investment purposes.[701]

Sustainability-linked bonds are loans that are linked to the borrower's performance on environmental, social, and governance (ESG) issues, offering discounted rates (e.g., annual interest rate reductions) if borrowers hit fixed sustainability targets. For instance, a discounted rate might be linked to a firm's ability to reduce greenhouse gas emissions by 50% in a 5-year term. Unlike green loans, sustainability-linked loans offer a company increased flexibility on how to use financing; where green loans must be used for a specific purpose (e.g., investment in renewable energy, waste reduction or clean transportation), sustainability-*linked* loans can be used for just about anything, even non-sustainable activities provided the borrower achieves the set objective. Although not surprising given the above-described policies, it is important from a comparative legal perspective that these instruments were pioneered in Europe, and that their efficiency has caused them to spread to the United States and Asia. Moreover importantly, however, sustainability-linked financing is expected to grow in popularity as ESG issues become more pressing and involve an increasing number of stakeholders—even to developing countries, which generally lack financing to improve infrastructure and other general standards, sustainability aside. Such diffusion is facilitated by the fact that sustainability tools are broadly applicable to a variety of diverse sectors, meaning sustainability-linked loans represent a significant resource for traditional, linear industries to transition to a more circular business model.[702] At the same time, while these financing instruments are not unique to any single trader—they have also been used by fashion brands of all types (from Adidas to Chanel to H&M) to issue hundreds of millions of dollars in debt—they do not appear to be available for all market players. Some of the fashion brands that have availed themselves of sustainability-linked debt include Salvatore Ferragamo,[703] Prada,[704] Chanel,[705] and H&M[706]. Thus, such novel financing instrument appears limited to only certain types of borrowers: "there may be barriers

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[700] *See generally* Doherty (2021); Van Gansbeke (2022).

[701] E.g. the Sustainable Opportunities Acquisition Corporation (SOAC); ESG Core Investments; Sustainable Development Acquisition I Corp.

[702] Wass (2019).

[703] Zargani (2020).

[704] Wass (2019).

[705] Turner (2020).

[706] Turner (2021).

when it comes to expanding the product among smaller businesses, as it is far easier for large companies to have an ESG strategy, set meaningful targets, and assess performance." [707] On the other hand, together with new due diligence vigilance laws, the reporting requirements and verification procedures generally tied to institutional loans might mean that operations of such multinational corporations will be effectively monitored and borrowers will be motivated to cure supply chain problems, such as human rights' abuses and/or violations of corporate codes.

Other than loans, businesses can raise money through capital increases and the issuance of new stocks. Indeed, in recent years, enterprises operating in the world of luxury have attracted institutional investors, thereby creating new opportunities for fashion brands as stock acquisitions provide companies with liquidity without (normally) causing relocation. In this sense, acquisitions represent both a tool and opportunity for growth.

IV. Existing Tools for New Purposes: Extraordinary Transactions, Industry Collaborations and Antitrust Laws

Without discrediting the above-mentioned initiatives and tools, they are clearly not suited for all business. That is, it is unlikely that all small-to medium-size enterprises (SMEs) will attract a big investor, and many probably will not qualify for a sufficient bank loan. Thus, one might wonder how a small or medium-sized fashion company can grow sustainably.

Extraordinary transactions

Private equity funds [708]

Investments allow companies to undertake a serious expansion strategy that otherwise might be limited by their reduced market size (i.e., brands that primarily sell only within a specific country). It is clear, then, that investments (especially foreign) can put a company in a position to expand, grow and therefore increase their strength, their market positioning and ultimately the wealth of stakeholders. On this last point, it is important to remember that the fashion

[707] Wass (2019). *See* La Monaca, Spector, and Kobus (2019) (noting barriers to capital development).

[708] Except where indicated otherwise, information from this section either comes directly from or is inspired by Marchetti (2021).

industry is not comprised just of brands (e.g., Trussardi, Versace, Cavalli, Gucci), but also all those small or medium-sized companies that provide services or goods to fashion brands. Aside from being a very rich market, it continues to attract more and more interest from investors.

It is necessary to understand, however, what is meant by "international investors". A first category of investors are the so-called competitors. These are other fashion companies that have their own brands but are interested in the acquisition for any number of reasons, including the desire to achieve synergies. Another category of investors is investment funds, which have actually become the central players in the fashion industry. Generally, it can be said that investment funds are becoming major players in all industries with particularly high profitability. So many investment funds are attracted to the world of luxury precisely because fashion businesses have great growth potential. That is, at the moment of investment they might not enjoy a great profit margin, but the investors believe these margins can rise to very high percentages due to the relatively low costs of production. In the fashion industry, what allows the leap in quality is an idea. And that allows for more debt.

Private equity funds are particularly interested in investing in the fashion industry. Imagine that some people have €100,000 in the bank; those who have €100,000 in the bank have several possibilities: the possibility to invest it in more or less cautious instruments, or to invest it in a multitude of stocks or bonds. Private equity funds offer each client a different opportunity: not a parcelled out investment in many small shares, in many small bonds, but all the money in a single fund (i.e., a mutual fund), which will be managed by other subjects and the money (i.e., the savings of many clients) of this fund will be invested in companies. Obviously, these are much more risky investments than the others. As always, however, risk goes hand in hand with opportunity.

One benefit of this form of investment includes the fact that private equity funds help companies grow and they inject a lot of capital when they enter a market. A drawback, however, is that an over presence of private equity funds slowly risks killing the fashion sectors because the objective is to resell in a few years. This type of Copernican revolution has been occurring in Italy for approximately fifteen years, in the sense that private equity funds have been purchasing stock in Italian fashion companies (e.g., Valentino, Moncler, Cavalli, Versace, and most recently Trussardi) with the objective of driving growth within three-to-five years, and then getting out. At the same time, companies have also benefitted from these significant capital injections by exploiting brand potential, for example in other geographical areas or in new market spaces. Moncler is a paradigmatic case: Some private equity funds and an

entrepreneur had an instinct that Moncler could go from being a sports fashion brand to being a luxury brand, still linked to sports style but as *haute couture*.

The legal schemes to carry out such transactions may vary and are obviously not unique to the fashion industry. Typically, an international investor will execute a share/stock purchase agreement (SPA), and the purchase prices tend to be significant—in the millions. For this reason, it is rare for a private equity fund to acquire an interest in a company without recourse to debt. Typically, a company (e.g., Versace) is purchased by these private equity funds, which pay in part with investor capital and in part through debt (i.e., money lent by banks). However, a bank almost always requires a guarantee for the loan in case of default. For the fashion industry, this guarantee is usually represented by the brand (i.e., the most valuable asset a fashion company owns), which is given as collateral. Accordingly, the loan will include a foreclosure guarantee on the company's brand.

Leveraged buyouts [709]

Acquisitions structured in the above manner are complicated because there is the private equity fund that buys shares of a target company (e.g., Versace), and then there is the bank that wants to be a direct creditor of the acquired company. To do this, there must be a merger of the acquiring company into the target company, usually through a corporate acquisition whereby shares or quotas are transferred to the acquiring entity. Accordingly, the (indebted) acquiring company enters the corporate structure of the target company, consummating the merger. The problem, however, is that the target company takes on the debt contracted to acquire the business and not to develop it. Conceptually, this deal is a bit of a rip-off because the target company now carries the debt that the private equity fund needed to acquire it. This is typical in private equity transactions and is called a leveraged buyout (the phenomenon whereby the buyer offloads the debt incurred to purchase the target onto the target).

In the past, the legal doctrine debated the legitimacy of such an operation. At one time it was discussed whether it was legally possible. That is, whether it was lawful to assume debt to buy a company and then discharge the debt on the same company acquired. The debate took place in Italy and in Europe in general, and it was eventually accepted as legitimate. That is, the law reflects a certain policy choice on important macro issues. So, judges and legislators had to decide whether they would prohibit leveraged buyouts and kill the private equity market or

[709] Except where indicated otherwise, information from this section either comes directly from or is inspired by Marchetti (2021).

allow them and open the Italian market to private equity funds. This is because, from a policy perspective, leveraged buyouts can save a company from being destroyed. In an important industry such as fashion, ultimately, allowing them could mean the difference between corporate growth (or staying afloat) and layoffs and an increased unemployment rate. Thus, in the end, national European lawmakers and judges agreed that potential negative consequences of business failure and layoffs are greater than that of offloading the debt of the acquisition onto the target—and leveraged buyouts were considered lawful acquisition tools.

It is also important to note that the first instance of a leveraged buyout in Italy occurred in the case law and not because of foresight by the legislator. That is, the judicial debate preceded the 2003 company law reform that – by introducing Articles 2501 et seq. It. c.c. – expressly provided for so-called "mergers with debt". What is more, the reform was not aimed at merely introducing new legal tools for acquisitions through debt. Rather, the legislator wanted to provide protection for this type of operation. More precisely, in the drafting of these provisions, the legislator requires the board of directors to draw up a merger plan (or prospectus) in which it is illustrated how, if at all, the target company will be able to repay the debt that has been transferred. If such repayment is not, in the directors' business judgment, feasible, the leveraged buyout cannot take place.

From this perspective, the merger plan and the requirement to demonstrate the company can support the assumption of such debt is a bit diabolical as it is not easy to prove the company will have sufficient cash flow in the future. In the fashion industry, such demonstration is even more difficult because the success of a fashion brand also depends on something ephemeral or impalpable: the evolution of consumer tastes. At the same time, the business judgment rule protects such directors from liability for making a "bad" decision provided such decision is informed and in absence of a conflict of interest; in these circumstances, no director can be held liable for damages for not having made a profit or achieving cash flows indicated in the merger prospectus. This does not, however, mean a director cannot be held liable for incorrect predictions – liability must always be determined in accordance with the ordinary standard of care required to fulfil his office.

Special Purpose Acquisition Companies (SPACs) [710]

While special purpose vehicles (entities formed for a specific purpose, usually a single transaction) are a well-known tool, special purpose acquisition companies (SPACs) are less common in every-day jargon. SPACs have existed for decades, but their use had been relatively limited until recently; compared to the 59 SPACs that reportedly came to market in 2019, there were 613 recorded SPAC initial public offerings (IPOs) in 2021.[711] Since they are essentially a type of special purpose vehicle formed to raise capital through an IPO for the purpose of acquiring another company (and therefore do not engage in any commercial activity, frequently being referred to as "blank check companies"), one might wonder what makes them so special and appealing to investors. Unlike special purpose vehicles (which are destined to wind down after their purpose has been fulfilled), SPACs are potentially perpetual entities that pool funds from several investors for speculative purposes. In this sense, they are similar to private equity funds; however, SPACs can be publicly traded and, as such, are capable of earning returns more quickly than a standard private equity fund. Another advantage is linked to the fact that SPACs are not commercial operators when they issue their IPO, meaning they are not subject to the same lengthy IPO process as other companies and are not required to issue as many statements. Thus, such a simplified IPO process is quicker, but is also subject to risks at the detriment of inexperienced or inattentive investors. This is one of the reasons the SEC began monitoring SPAC IPOs more closely. But perhaps more concerning than trading without having warrants in order (i.e., one of the risks of not being subject to as many checks during the pre-IPO stage) regards the so-called "de-SPACing" stage, when the SPAC has identified and reached a merger deal with a target corporation (the "target IPO stage"). The potential risks at this stage center around the fact that SPACs benefit from more liberal merger and acquisition (M&A) rules; they are not subject to the same strict disclosure rules and are allowed to promote stock and make public projections, for instance. Thus, not being subject to the so-called "quiet period" that precedes a real IPO, SPACs have a considerable advantage because they have more opportunity to attract investor interest. Additionally, the more lenient M&A rules mean that SPACs may acquire private entities without, perhaps, providing all the necessary information to investors. For example, although SPACs are less expensive at the initial IPO stage, it is standard for founders to receive 20% in stock of the acquired company in exchange

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[710] *See generally* Coates (2021); SEC (2021); SEC (2020); Brewer (2021); Halbhuber (2022).

[711] Statistica Research Department (2022).

for promoting the merger; such fees can yield expenses for the SPAC that exceed traditional IPO costs, thereby diluting value for investors. For these reasons, the second IPO stage is sometimes referred to as a "reverse merger" (or "reverse takeover" or "reverse IPO")—a term used to describe the acquisition of a private company by an existing public company so that the former can bypass the traditional IPO process. Accordingly, the SEC is considering stricter regulation of these entities to offer more investor protection and a greater balance of interests.

In the fashion industry, these tools could be interesting in light of the recent financial strain on companies following the Covid-19 pandemic. Indeed, "[i]n 2019, the top quintile accounted for 200 percent of the industry's economic profit, while the remainder made a negative contribution, meaning they lost money. Some 34 percent of listed fashion companies were already showing signs of distress pre-crisis. During the early phase of the crisis, from March to September 2020, we witnessed a 'Darwinian Shakeout' with at least 20 major companies entering bankruptcy restructurings at a wide range of fashion companies."[712] Simply put, it is imaginable that, given the significant capital required to invest in more sustainable technologies, revamp processes and operations, and generally reorganize in favor of a more circular production model, existing fashion brands might pool their resources through mergers in order to collaborate on these initiatives. By doing so, companies could be in a financial position to make stronger and more meaningful commitments to sustainability than merely adhering to voluntary private agreements such as The Fashion Pact; a drawback, however, is reduced autonomy. At the same time, excessive consolidation of market players could raise doubts about legitimacy under competition law.[713] That is, companies must be mindful that any merger transactions do not effectively limit competition and/or harm consumers. For instance, it is imaginable that companies that collaborate on investments might collude on sales prices to recover capital expenditures, resulting in an oligopoly (whether formal or indirect).[714]

[712] BoF Team and McKinsey & Company (2020).

[713] Antitrust law regulates the conduct and organization of businesses to promote competition and prevent monopolies. Therefore, antitrust law and consumer protection are closely linked. In the United States, the main statutes are the Sherman Act of 1890, the Clayton Act of 1914 and the Federal Trade Commission Act of 1914. In Europe, antitrust policy is developed from the Treaty on the Functioning of the European Union (TFEU). Namely, Art. 101 (prohibiting anti-competitive agreements between two or more independent traders) and Art. 102 (prohibiting abuse of dominant position). In Italy, market behavior is overseen by the competition authority "*Autorità Garante della Concorrenza e del Mercato*" (AGCM) in accordance with applicable law. *See* "Tutela Della Concorrenza" (n.d.) (providing a list of relevant competition law in Italy).

[714] *See* Petit (2013); Hay (1982).

On a related note: shareholders' agreements [715]

It is also important to note that the introduction of new members to a corporate structure is usually met or followed by a shareholders' agreement to govern the relationships between the new member of the corporate structure (i.e., the investor) and the existing/previous shareholders. The investor can become part of the corporate structure either as a majority or minority shareholder; usually investors do not purchase 100% of the share capital at such an early stage of the relationship. And sometimes this is also a strategic move on the part of the investor, who wants to maintain a shared ownership structure to portray an image of continuity.

In any event, the entering of a new member gives rise to a number of complicated relationships between the majority and minority shareholders. The rules for designation and appointment of the board of directors is a prime example—and is also of central importance for operation of the company. As such, the provisions on board of directors are usually found at the beginning of shareholders' agreements. Then these rules are further included in the company's rules of operation through amendment to the governing articles.

It should be noted that shareholders' agreements are contracts, meaning any violation of the provisions contained therein is addressed by contract law and gives rise to an obligation between the parties of the agreement. In terms of remedies, the breaching party may be held liable for damages, but the aggrieved party is not entitled to specific performance on the part of the company. That is, the company is not obliged to respect the relevant shareholders' agreement and the damaged shareholder has no claim against the company for any breach of the agreement. The provisions of the articles of association, on the other hand, give rise to a so-called "real effect" and *are* binding upon the company. Accordingly, if the company does not adhere to the provisions of its governing articles, the aggrieved shareholder may be entitled to specific performance and/or can challenge any resolution passed in violation of those articles. And this is important because issues are often governed both in the shareholders' agreements and the company's articles of association.

This leads to the question that, if legal protection of articles of association is so strong, why not just write everything into the articles? The answer lies in the fact that the articles of association is a public document. Precisely for this reason, the articles tend to follow the schemes offered by the legislator; unlike shareholders' agreements (in which parties, in exercise of their party

[715] Except where indicated otherwise, information from this section either comes directly from or is inspired by Marchetti (2021).

autonomy pursuant to Art. 1322 It. c.c., can write in just about anything within the limits of the law), the articles of association tend to provide a little less. Nonetheless, the obvious and significant advantages in terms of remedies and protection have urged a trend for shareholders to attempt to include as many provisions as possible directly in the articles of association such that they are governed by both documents and are more likely to offer a satisfactory remedy for the aggrieved party in case of breach. Without going into detail about how voting is conducted within a corporation, it is sufficient to consider that decisions are usually taken by majority vote, and therefore the rules governing the voting process are important for protecting shareholders' rights (especially the minority).

Shareholders' agreements also tend to have exit provisions (i.e., when a shareholder wants to leave the company), such as "tag-along" and "drag along" clauses. Again, the details of these clauses will not be discussed since they do not pertain to sustainability, or tools for attracting capital. They are, in any case, important clauses to be aware of in the event of a change to corporate ownership structure because their purpose is essentially to protect minority shareholders who find themselves subject to the choices of the majority.

It is also worth highlighting that these clauses are much discussed in doctrine. Specifically, scholars debate whether there are legal grounds for the removal by one shareholder of another shareholder at any price. The majority opinion in the case law is that it is never possible to drag the minority shareholder down to a value lower than the withdrawal value. Relating back to the private equity fund example, this means that (assuming the private equity fund enters the company as a majority shareholder) the private equity fund cannot force the sale if the sale price is lower than the actual market value of the bonds for which it is obliged to sell. Substantially, case law indicates that precisely because the private equity funds have the obligation to sell, they may dump the shares at a price below market value to attract a buyer that, at normal market conditions, would not otherwise be interested or willing to pay market value. The doctrine, on the other hand, disagrees. In sum, the majority opinion among scholars is that while forcing someone to sell may be considered inconsistent with the law, there is no one forcing the minority shareholder to accept the drag along clause in the articles of association. Therefore, the protection clause with regard to the minority shareholder raises doubts in doctrine.

Lastly, there are also clauses in which the financial partner has the right to request the listing of the company (i.e., shareholders' agreements or even clauses in the articles of association which state that after a certain period of time the company must be listed on the market). Listing

the company basically means introducing oneself to the market (i.e., to the stock exchange) and offering the company's shares for sale to the financial market. The disadvantage of an IPO is that the sale is subject to the typical fluctuations of the stock market. The advantages, however, are also great. Thus, the decision will depend on the company's ultimate long-term goals and the capital required to achieve them.

The above is important for the discussion on circularity, the transition from a linear economy and the sustainability discourse in general to the extent that, as briefly addressed at the beginning of this section, companies may merge for a variety of reasons, including to acquire specific know-how or capture a segment of the market. From this perspective, it is interesting that recent years have witnessed an upsurge in special purpose entities for such acquisitions.

Industry collaborations and antitrust law

As discussed, fashion companies contribute a significant amount to the current sustainability crisis but have done, for the most part, relatively little to cause effective change. It has been hypothesized that smaller companies might not have the same economic resources as large enterprises to make the considerable (necessary) sustainability investments if required to act independently. Thus, for many companies, it is imaginable that transforming operations from a linear production model to a circular one will require collaboration. This could be to pool financial resources required to invest in new technologies and modes of operation or to create the critical mass needed to be truly effective. Regardless, partnering with other businesses could enable fashion companies to abandon traditional modes of production in favor of more innovative, sustainable and responsible practices. At the same time, if companies are to share knowledge and face sustainability challenges together, it is also likely that such collaborations and/or partnerships will be between competitors, posing some doubts about compliance with antitrust law.

Both the United States and the European Union have laws in place that prohibit anticompetitive practices and agreements that impact the free market. In the United States, § 1 of the Sherman Act[716] forbids agreements that restrict trade, and mergers and acquisitions that substantially reduce competition are unlawful under the Clayton Act[717]. Likewise, in the European Union,

[716] 15 U.S.C. §§ 1–7.

[717] 15 U.S.C. §§ 12-27, as amended.

Art. 101(1) of the Treaty on the Functioning of the European Union (TFEU) outlaws agreements and practices between competitors that potentially undermine liberal market competition. In a nutshell, if competition nourishes development and benefits consumers, then the law must be skeptical of agreements that undermine business rivalry – because, except in certain cases, the purpose of antitrust law is to protect *competition*[718] without reverence for moral or ethical considerations,[719] such as agreements to collectively combat environmentally detrimental effects of industry.

In the United States, for example, in 2019, the state of California and four major players from the automobile industry collaborated to pass a law that would set higher emissions standards than those established under federal law and indirectly reduce CO_2 levels.[720] This effort was significant within the climate change and sustainable development discourses because, on the one hand, transportation produces almost 30% of the United States' emissions (which, as a country, contributes to 15% of carbon emissions globally);[721] on the other hand, clear and reliable standards (i.e., not subject to changing political winds) allow manufacturers to project future production needs. From this perspective, such an agreement[722] – regardless of any collaboration between the state legislature and industry[723] – would produce positive effects for the public at large. Nonetheless, the Department of Justice (DOJ) launched an investigation to determine whether antitrust laws had been violated.[724]

Although the investigation against the automotive manufacturers was ultimately closed in February 2020,[725] it represents a significant and relevant challenge for big industries such as

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[718] *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) ("Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors…").

[719] *See National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) at 694-95; *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) at 421-22. *But see United States v. Brown Univ.*, 5 F.3d 658, 678-79 (3d Cir. 1993).

[720] Davenport and Tabuchi (2019).

[721] *See* "Global Greenhouse Gas Emissions Data" (n.d.); "Sources of Greenhouse Gas Emissions" (n.d.).

[722] Reference to an agreement is for mere argument's sake. No agreement was ever established and, for this reason, the investigation was ultimately closed in February 2020.

[723] Note that lobbying is not prohibited under antitrust law. Specifically, in the United States, lobbying is protected under the First Amendment by virtue of the Noerr-Pennington doctrine. The cases that established this doctrine are: *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, Inc., 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). Any enactment of law further falls within the scope of the state action immunity doctrine established in *Parker v. Brown*, 317 U.S. 341 (1943).

[724] Tabuchi and Davenport (2019).

[725] Davenport (2020).

fashion industry in light of current sustainability concerns. Namely, despite the fashion industry is recognized for contributing to the climate change phenomenon, current legal frameworks may prohibit many brands from taking effective, collaborative action to combat it.

At the same time, it is important to distinguish between "conscious parallelism" (or "tacit collusion") and anti-competitive agreements with or without procompetitive justifications. The former exists when firms move simultaneously without an explicit agreement. A classic, textbook example is represented by the case where two gas stations on opposite sides of the intersection watch each other's price changes and react accordingly to align strategy. This is not illegal and reflects the "copy-cat" game whereby market leaders set the pace and smaller designers follow suit. The latter, however, can be difficult to ascertain. For this reason, courts might examine communication opportunities between parties, the level of complexity of any engagement, and whether conduct is motivated by reasons of efficiency. Furthermore, while "some information sharing, like collaboration on research and development, or use of an unbiased organization to set industry standards, is typically permitted,"[726] for the fashion industry, the line between permitted collaboration and anticompetitive practices could be fine and – moreover – unclear.

Take, for example, pacts by large operators to set minimum wage and/or safety standards. Considering the prevalence of subcontracting and sub-subcontracting arrangements within the supply chain, the establishment of living wages at the source is likely to increase costs significantly throughout the distribution network – even beyond the established minimum wage – with the result that suppliers unable to pay augmented costs will eventually close. From a moral or ethical perspective, such a result could be the "fair" solution. From a legal standpoint, however, it becomes significant that such increased production costs are usually passed on to the consumer (via price increases) and reduce market competition via eliminating market traders. Thus, it is clear how such an agreement could be viewed as anticompetitive and may be why agreements only provide loose commitments (e.g., the Accord on Fire and Building Safety and the *Alliance for Bangladesh Worker Safety*). In fact, this scenario resonates with the facts of *United Mine Workers of America v. Pennington*[727] in which small coal mine operators claimed an amendment to labor law (supported by the larger coal mine operators' union)

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[726] Koga (2020) (citing Scott 2016).

[727] *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

establishing a minimum wage would indirectly raise costs and exclude smaller operators from the market.[728]

Another interesting example is provided by *Parker v. Brown*[729] in which the United States Supreme Court upheld a California program that regulated the quantity and relative price of raisins that could be sold in that state. The case offers insight because, if over production in the fashion industry depletes natural resources and yields a sustainability problem, and establishing expensive standards and criteria undermines competition by indirectly excluding traders from the market, then one solution might be to limit production of textiles and clothing manufacture to sustainable levels. However, if this were imposed by the government it would resemble the central planning of production symptomatic of a communist or socialist regime. If production were voluntarily and democratically limited by industry – for example, *pro rata* – it could be deemed a violation of antitrust law despite any benefits to the environment without prejudicing existing market shares.

Therefore, against this background, it appears paradoxical that laws and market regulators pressure businesses to align production and operation models with sustainability principles yet permit actions that might facilitate change without going into debt or introducing new members into the corporate structure.

Koga (2020) notes that "some scholars have argued that antitrust analysis should include non-economic concerns that affect consumers. Professor Inara Scott argues that antitrust laws should be more flexible to allow for agreements that address important social issues, such as climate change…Alternatively, Neil Averitt and Robert Lande have led the push for a broader 'consumer choice' method to antitrust analysis instead of the traditional 'consumer welfare' method"[730] and that "other countries allow environmental considerations to factor into competition analysis."[731] In this context, it is noteworthy that countries such as Australia and South Africa use a public interest test to allow environmental and non-economic considerations in competition analyses. In Australia, the test resembles the United States' rule of reason

[728] It should be noted that the lower courts ruled in favor of the small operators. However, the Supreme Court reversed the decisions based on the Noerr-Pennington doctrine that protects lobbying under the First Amendment and therefore shields such activity and any derivative effects from allegations of antitrust violations. In the words of the Court: "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition" (Id. at 670).

[729] *Parker v. Brown*, 317 U.S. 341 (1943).

[730] Koga (2020).

[731] Koga (2020). *See also*, e.g., Hylton and Deng (2006).

analysis but with non-economic considerations. In South Africa, the test examines: (1) the effect of the relevant merger on industry; (2) employment; (3) effects on market participation and ownership by historically disadvantaged persons; and (4) national competitiveness in the relevant market.

Looking to the European framework, then, it is noteworthy that sustainability principles have constituted an integral part of European Treaties from the early 1990s. For instance, Art. 11 TFEU establishes a broad duty of the European Union to integrate environmental protection requirements in all its policies and activities. Such policy approach is reflected in Art. 101(3) TFEU, which allows some otherwise restrictive agreements or practices when they: (1) cause market improvements or efficiencies; or (2) promote technical or economic progress; *and* (3) produce a proportional benefit to consumers without (4) imposing unnecessary restrictions to or eliminating competition. However, it can be difficult to show consumer benefit – especially when agreements aim at producing long-term and/or intangible benefits. Consider, for instance, the difficulties in measuring ESG targets. In fact, perhaps for practical reasons, the EC takes a relatively narrow approach and measures the promotion of technical or economic progress according to short-term economic growth. Additionally, "consumer welfare 'efficiencies' require economic benefits to the consumer, such as lower prices or wider choice."[732] Thus, it does not appear that Art. 101(3) TFEU captures sustainability agreements among industry players aimed at providing long-term benefits to the public at large.

MacLennan (2021) highlights that Art. 101(1) TFEU offers some flexibility to the extent that it allows restrictions of competition via the "ancillary restraints" doctrine. That is, some anticompetitive practices are permitted when relevant agreements do not negatively impact competition, are instrumental in protecting the parties' legitimate interests, and pass a proportionality test. At the same time, these are undeniably vague provisions which enable member states to adapt local law more flexibly to concrete requirements, but at the cost of greater legal uncertainty. According to MacLennan (2021): "[t]he criteria for when an effects analysis must be applied under Art. 101(1), rather than an automatic assumption that an agreement is a 'by object' infringement, has recently been clarified by the EU Court ofJustice

[732] MacLennan (2021).

in Luxembourg (in the *CarteBancaire*[733], *Generics*[734] and *Budapest Bank*[735] cases).” However, it is not clear how such considerations should be factored into analysis of sustainability agreements under Art. 101 TFEU. The choice, apparently, is up to national legislators.

In this context, a recent reform proposal by the Dutch Authority for Competition and Markets (ACM)[736] illustrates how individual member states have the discretion to implement progressive pro-sustainable development laws aimed at supporting businesses effectively transition from a linear to a circular production model. Specifically, in July 2020, the Dutch ACM released the Draft Guidelines on Sustainability Agreements that offer a new way of interpreting sustainability agreements in accordance with public interest for sustainable industries. Essentially, agreements aimed at providing long-term benefits for consumers (such as improved environmental conditions) and which members do not exceed 30% of market share may be exempt from antitrust law. Therefore, by shifting focus in competition law from short-term benefits and pure competition in favor of a more collaborative, functional and solutions-oriented approach, the Dutch proposal potentially permits several small businesses to collaborate more closely on sustainable business initiatives. In the fashion industry, and especially in the European scene where SMEs make up a significant share of the market, such flexibility could be a game changer. Indeed, the European Commission may add a sustainability exception to competition rules in 2022.[737]

In the American context, Koga (2020) comments that “[w]hile the broad proposal from the Netherlands represents the most ideal solution, [U.S.] Congress could change the exemption in two ways that would be more consistent with current precedent and also limit the risk of cartel behavior.” First, environmental benefits could be used to evaluate the merit of an agreement. Second, Congress could limit exceptions to certain industries (e.g., ones that contribute disproportionately to environmental degradation and climate change).

Additionally, as concerns the fashion industry and drawing from Koga (2020), a reform similar to the Dutch proposal could overcome some of the current industry challenges posed by current U.S. antitrust law. That is, although a private industry agreement to increase product standards

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[733] Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission.*

[734] C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority.*

[735] C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others.*

[736] Hogan Lovells (2020).

[737] Hogan Lovells (2020).

would unlikely be illegal per se because it does not fix prices or reduce quantity, it would nonetheless almost certainly fail a rule of reason test or a quick look analysis because collaboration would not add a new product to the market. However, such agreements *would* be permitted under the Dutch proposed model. Furthermore, industry collaboration is likely to be more popular among the business community and therefore more likely to pass from a bill into law than placing additional restrictions or increasing business costs through improved standards that are costly to respect.

MacLennan (2021) also commends the Dutch approach and notes that:

> "Draft ACM guidelines provide examples of the kinds of sustainability agreements that will not fall under the prohibition in EU law and its equivalent Dutch legislation: these include participation in agreements to agree to certain foreign law environmental or social standards, or codes of conduct promoting certain practices in production methods or use of raw materials with certification labels (subject to certain safeguards). They then focus on guidance on the assessment of agreements that would normally fall foul of the Article 101 prohibition, but which include certain sustainability efficiencies – wider than purely economic consumer benefits that would potentially justify an exemption under Article 101(3). They single out agreements addressing environmental damage for a more permissive approach. Crucially, they make clear that the ACM will not impose fines if those initiatives are later found to have led to a formal infringement, provided participants have followed the guidelines in good faith."

MacLennan (2021) also cites a similar approach being taken by the Greek competition authorities, and comments that German, French and UK authorities additionally appear to be moving in the same direction within their respective existing frameworks. And Italy has even

recently amended[738] Arts. 9[739] and 41[740] of its Constitution to include sustainability initiatives and duties for companies. Thus, it appears that the Dutch – as well as other European member states – have fully embraced (or at least accepted) the notion that achieving sustainability and pursuing *sustainable* development will require action, collaboration and perhaps even a little sacrifice from all stakeholders: governments, legislatures, businesses, and consumers. And there is also hope that the recent change in U.S. Administration (from Trump to Biden) will yield important opportunities for global collaboration on sustainability issues.

So, although allowing sustainability agreements among competitors augments risk of cartel behavior, failing to take effective action on climate change could wipe out industry all together and there will be no companies (or people) to collude with. Thankfully, however, these recent developments – reforms, proposals, reinterpretations of existing private law instruments, new uses for old tools, and every other legal tool and market strategy we have discussed above – appear to suggest that *maybe* global leaders will finally start moving in a unified manner toward

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[738] *Cfr*. Constitutional Law No. 1/2022.

[739] Art. 1, Cost. L. 1/2022 reads: "All'articolo 9 della Costituzione è aggiunto, in fine, il seguente comma: 'Tutela l'ambiente, la biodiversità e gli ecosistemi, anche nell'interesse delle future generazioni. La legge dello Stato disciplina i modi e le forme di tutela degli animali.'" (*At the end of Article 9 of the Constitution the following paragraph is added: 'It protects the environment, biodiversity and ecosystems, also in the interest of future generations. The law of the State disciplines the ways and forms of protection of animals.'*)

Now, Art. 9 Cost. reads: "La Repubblica promuove lo sviluppo della cultura e la ricerca scientifica e tecnica. Tutela il paesaggio e il patrimonio storico e artistico della Nazione. Tutela l'ambiente, la biodiversità e gli ecosistemi, anche nell'interesse delle future generazioni. La legge dello Stato disciplina i modi e le forme di tutela degli animali." (*The Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation. It protects the environment, biodiversity and ecosystems, also in the interest of future generations. State law regulates the ways and forms of animal protection*).

[740] Art. 2, Cost. L. 1/2022 reads: "All'articolo 41 della Costituzione sono apportate le seguenti modificazioni: a) al secondo comma, dopo la parola: 'danno' sono inserite le seguenti: 'alla salute, all'ambiente'; b) al terzo comma sono aggiunte, in fine, le seguenti parole: 'e ambientali'." (*The following amendments shall be made to Article 41 of the Constitution: a) in the second paragraph, after the word: 'damage' the following words shall be inserted: 'to health, the environment'; b) in the third paragraph the following words shall be added at the end: 'and environmental'*).

Now, Art. 41 Cost. reads: "L'iniziativa economica privata è libera. Non può svolgersi in contrasto con l'utilità sociale o in modo da recare danno alla salute, all'ambiente, alla sicurezza, alla libertà, alla dignità umana. La legge determina i programmi e i controlli opportuni perché l'attività economica pubblica e privata possa essere indirizzata e coordinata a fini sociali e ambientali." (*Private enterprise is free. It cannot be carried out in contrast with social utility or in such a way as to damage health, the environment, safety, liberty and human dignity. The law determines the appropriate programs and controls so that public and private economic activity may be directed and coordinated for social and environmental purposes*).

a common goal. The future is promising, but only time will tell what is in store for humanity and the real fate of the fashion industry.

Conclusion and Final remarks

In consideration of the imminent climate change and sustainability crisis, as well as the fashion industry's role in the same, this dissertation aimed to study the particular framework within which the fashion industry operates, as well as some of the challenges it must overcome to transition from an unsustainable business to a (more) sustainable one. A comparative approach was used to identify which, if any, initiatives are more efficient at addressing the current sustainability problem, including select pertinent legal challenges of their implementation. Although the analysis primarily concerned the American and European markets, given the fashion system's global network, as well as the interconnected and multisectoral nature of the business, attention (albeit limited) was inevitably given to other relevant contexts.

It was first premised that, since becoming sedentary, humans have changed the environment to fit their needs. Over time, we have progressively transformed nature into vast agricultural land and urban areas. We have traded much of nature for industry and, in doing so, witnessed phenomena such as air pollution, water pollution and dying ecosystems. Over the past century, we have experienced dozens of industrial accidents and environmental disasters. And there is a strong correlation between industrial harm, irresponsible business practices and incessant consumption. Indeed, industrialization and mass production have facilitated the rise of consumerism and a "throw away" society characterized by overproduction and, consequently, unsustainable exploitation of natural resources. In a nutshell, humans have "developed" beyond Earth's planetary capacities and, according to scientists, the health and prosperity of future generations are at risk. When it comes to the fashion industry, the phrase "shop 'till you drop" epitomizes this concept: we have shopped and consumed so much that unless something is done, we may just drop – right off the face of the Earth.

For decades, the development discourse was driven by a notion of economic wellbeing: property, prosperity, free enterprise, and liberal markets. Governments have played a key role in supporting and even propelling a notion of wellbeing based on materiality and consumption. Relaxed incorporation laws have encouraged the establishment of businesses and stimulated market competition. Market competition has been said to foster innovation and encourage growth. Indeed, economic boom has typically been preceded by some sort of industrial revolution and/or increased commercial activity; it has also often been followed by some sort of disaster. It is in this context, during the early 1970s, that the notion of *sustainable* development became a globally recognized concept. At the same time, however, world leaders

have not been able to ignore the fact that any kind of development is impossible without industry. In other words, industry is both a driver of sustainable development and a root cause of the sustainability problem. For this reason, governments must – on the one hand – enact legislation to protect public interests from harm and – on the other – be mindful not to cause a "brain drain", disinvestment, or "flight" of business. That is, lawmakers must serve two masters, serving public interests on the one side, and business interests on the other.

The fashion industry makes a prime case study for several reasons, but chiefly because it represents the above-described development paradox: it generates trillions of dollars in revenues and provides jobs for millions of people, but it is also devastating the natural environment on multiple levels. It is additionally the subject of much public criticism by conscious consumers, embodies the significant doctrinal debate about corporate interests, and is thus impacted by a great deal of the recent legislative reforms aimed at compelling responsible business practices. Accordingly, it is possible to observe a profusion of private initiatives and voluntary regulatory tools, as well as more stringent regulations by governments. However, and perhaps more importantly for the comparativist, such an integrated and 360-degree approach also adds a significant layer of complexity to the sustainability problem. This enigma is aggravated by the fact that there are no uniform industry standards or international laws to regulate business. Therefore, in this context, we must ask ourselves how can lawmakers, enterprise and consumers work together to achieve the common goal of sustainable development?

If legal transplants have traditionally been motivated by prestige or imposition of a model, the fact that sustainability problems are shared by a variety of nations at around the same time means that now efficiency plays a key role in activating the circulation of statutory models. Against this background, once we have identified the problem, it is paramount to observe what others are doing to find the solution(s). Hence, within the context of the fashion industry, we have used a functional comparative approach to analyze opportunities and challenges presented by development strategies in the industry's two largest markets: the United States and Europe.

To do this, however, it was necessary to begin with an overview of the origins of the sustainable development movement in general, which began as an environmental movement on both continents and expanded into a social and economic sustainability movement.

Thus, in Chapter 1 we discussed the genesis of the movement in the United States following World War II, as the demand for consumer goods led to an economic boom. By the 1960s and

1970s, however, increased production was harming the environment and endangering public health. We discussed the numerous industrial accidents and disasters that occurred during this period of economic prosperity. By the end of the 1970's and early 1980's, after decades of mass production, society became acutely sensitive to industry's impact on the environment and the public at-large. This awareness rose as the result of many industrial accidents and disasters that occurred over essentially a 30-year period, with some causing more devastation than others. We chronicled some of the major disasters that were the impetus for change. There were oil spills in both the United States and Europe that decimated wildlife; each continent had its share of notorious disasters that produced noxious pollution, which, in turn, contaminated waterways and land, and even seeped into the food chain. For the United States, there was the infamous disaster at Love Canal, New York that was caused because the canal was used as an industrial chemical dumping ground for many decades prior to being turned into a housing development. For Europe, noxious pollution, oil spills and the dumping of hazardous waste occurred in the United Kingdom, France and Italy, similarly impacting wildlife, the food chain and the population where the disasters occurred. In addition, we noted that disasters were not limited to the United States and Europe. Japan, China, Russia, Poland, Canada, India, and areas in Africa experienced similar devastating events caused by expanded industrialization in those countries.

We proposed that, as the negative effects of industry became abundantly evident over time, public demand for more stringent environmental policies and statutory commands on polluting activities prompted lawmakers to impose greater limitations on business activities and development that threatened the environment or public health – such as legislation to promote clean air, to prevent oil spills, and to regulate the storage and disposal of hazardous materials. It seems the United States was first to respond with the following legislation: the Federal Water Pollution Control Act of 1948; the Air Pollution Control Act of 1955; the Resource Conservation and Recovery Act of 1959; the Clean Air Act of 1963; the National Emissions Standards Act of 1965; the Air Quality Act of 1967; the National Environmental Policy Act of 1969; the Clean Air Act of 1970; the Clean Water Act passed in 1972; the Endangered Species Act of 1973; the Safe Drinking Water Act of 1974; the Toxic Substances Control Act of 1976. In fact, in the early 1970's the United States went as far as to create a specific governmental agency devoted to regulating business development and safeguarding the environment – the Environmental Protection Agency.

Similarly, in Europe, legislation was passed aimed at protecting the environment, such as Directive 67/548/EEC (relating to the classification, packaging, and labelling of dangerous

substances); Directive 75/439/EEC (regulating the disposal of waste oils); and Directive 75/440/EEC (concerning the quality of drinking water in the Member States). France, Germany, the United Kingdom and Italy enacted forms of clean air and water laws starting in the early 1960s. Further, Europe witnessed the foundation of the Club of Rome and experienced the UNESCO declarations on cultural heritage in 1968. The First Action Programme of the EC was adopted in 1972 (based on the "polluter pays" principle), and a European body of environmental legislation began with the adoption of, among others, the Waste Framework Directive (1975), the Bathing Water Directive (1976) and the Birds Directive (1979).

By the 1970's, we saw the international community begin to mobilize and embrace the movement. In 1972 the United Nations held the Stockholm Conference, which was the first world conference on environmental issues. It was followed later by the first World Climate Conference in Geneva, Switzerland in 1979. Further, two important outcomes of the Stockholm Conference were the establishment of the United Nations Environmental Programme (UNEP), whose aim was coordinating and promoting initiatives related to environmental issues, and the adoption of the Stockholm Declaration. This Declaration, which contained a series of principles for management of the environment, was significant because it not only placed environmental responsibility at the forefront of the international community, but it also introduced the concept of world-wide sustainable development for the first time.

For the United States, we observed that the 1960s and 1970s were a time of strict government regulation, anti-corruption legislation, and greater consumer protection. And that, whether due to over-regulation or not, these decades were also plagued by inflation and unemployment. We discussed the deregulation movement that claimed a "free market" (a business environment free of government intervention) would curb inflation and promote economic growth. And while deregulation of industry and financial markets (which began in the 1980s and continued into the 1990s) may have stimulated the U.S. economy, we noted how such policies also lead to many scandals that plagued the U.S. during the 1990s and early 2000s, including an increase in unfair commercial practices, exploitation of labor resources, and corruption – all of which can be attributed to excessive risk-taking and fraud from the lack of government oversight and an overall lack of corporate financial and social accountability. Following these scandals, we discussed the legislation enacted to combat financial mismanagement, fraud, and unfair commercial practices. However, notwithstanding these efforts, we also observed the unfortunate by-product of the deregulation movement (i.e., increased globalization) – particularly the outsourcing of manufacturing to developing countries where labor was cheaper and foreign governments less restrictive. But, fortunately for the United States, as the corporate

exploitation of developing countries became more publicized (and hence evident to consumers), an anti-globalization movement was on the rise. A lack of corporate responsibility within and outside the United States resulted in increased tensions between public and corporate interests. By the end of the 1990s, perhaps at least partially due to the democratization of internet access, globalization included more awareness of business practices abroad and the revelation of a lack of accountability by companies for even potential damages. We saw more legislation aimed at promoting accountability and eliminating corruption both within and outside the United States. In addition, we noted that the business community responded as many U.S. businesses, in an effort to promote a more positive corporate image and stave off public criticism, began to recognize Edward Freeman's "Stakeholder Theory" (first advanced in the 1980s) that there is a need for accountability to stakeholders, not just shareholders. And, thereafter, corporate America began to adopt social responsibility programs often communicated to the public through a "code of ethics". As such, by the 1990s we saw that the sustainability movement consisted of three interrelated parts – the environment, the economy, and society.

For Europe, we also discussed the development of the corporate sustainability movement – with its origins in international principles (that evolved into detailed rules) and in response to global events. And, while the movement began in Europe much later than in the United States, it is noteworthy that Europe eventually surpassed the United States in terms of its focus on protecting the environment, while promoting sustainability and social responsibility. The European movement may be attributed to participation in several international gatherings, most notably the 1992 United Nations Conference of the Earth Summit in Rio de Janeiro, Brazil that produced documents setting forth numerous principles for sustainable development. The most significant principles were discussed briefly, as well as the action program for implementation of that development advocating for improved living standards and safeguarding the environment worldwide. But, even prior to 1992, European legislation was influenced by global events, including the 1984 Bhopal, India gas leak disaster and the 1986 Chernobyl, Ukraine nuclear disaster.

Following the 1992 Earth Summit, the Treaty on European Union included objectives that promoted environmental protection, human dignity, and sustainable development – while promoting free and fair trade, eradication of poverty, and economic growth. And, there were the numerous European directives, many of which were initially adopted to protect the environment (regulating the use of chemicals, emissions and pollutants) but, in time, were followed by anti-corruption standards, reforms and various directives aimed at combatting

unfair commercial practices. We noted how many these directives appeared to be inspired by U.S. laws enacted to combat the corporate corruption and financial mismanagement that had plagued the United States during the 1990s and early 2000s. Most notable: Directive 93/13/EEC (unfair contract terms in consumer contracts), Directive 2005/29/EC (pertaining to unfair commercial practices) and Directive 2019/2161 (pertaining to modernization). We also discussed how, by the late 1990s, European policy makers began to incorporate sustainability, particularly in the Sixth and Seventh Framework Programmes. During this period (i.e., early 2000s), government officials conceived environmental law and achieving sustainability differently. That is, more direction was focused on consumer and business behaviors to encourage consumer information, and eco-labelling took on great importance – guiding the consumer toward more sustainable and greener products. In addition, we observed how sustainable development included enactment of regulations aimed at promoting "green" measures and sustainable innovation. For example, we discussed REACH Regulation (No. 1907/2006), which requires any business exporting chemicals or chemically treated products to Europe to comply with its standards.

Therefore, what began as an environmental movement in the 1960's leading into the 1970's, turned into a call for "sustainability" on both continents by the 1990's – from an environmental, social and economic perspective. In the United States, absent government-imposed regulations, businesses adopted codes of ethics largely in response to market forces and widespread publication of abuses, scandals and corruption. Europe and its various Member States, however, took a different approach by enacting legislation and regulations to mandate sustainable business practices, including the advancement of social justice.

Regardless, and despite occurring over different periods and through different means, by the early 2000s, U.S. and European policies and practices converged. Both Europe and the United States had undergone (and perhaps continue to undergo) a transformation from exploitation of natural and human resources to business practices that are more compatible with preservation (for current and future generations) as well as ethical behavior. But, beginning in around 2005, we saw that the European movement was more expansive, incorporating into its rules and regulations the concept that accountability (and hence compensation) for environmental damage must become part of the cost of doing business. Further, we noted that, on the sustainability front, Europe has led the way in transitioning toward a more circular economy (one where products, materials and resources are maintained as long as possible to avoid the production of waste).

After considering the origins of the sustainability movement in Chapter 1 as an environmental movement, we noted that the concept of sustainability evolved to include economic and social aspects. In that regard, in Chapter 2 we examined the impact on sustainability for each of these "pillars" within the fashion industry.

To fully appreciate how this business has been impacted by and continues to impact the three elements of the sustainable development discourse, it was first necessary to provide an overview of the industry and some of its unique concepts or business models. While many equate the fashion business with manufacturing, it was explained that production is just one, relatively small part of this sophisticated industry. The global apparel business not only includes manufacturing, but also involves design, branding (licensing and intellectual property rights), materials engineering, market research and marketing, and distribution dispersed over an intricate global supply chain.

We then looked at the economic impact the fashion industry has and continues to have. And, as we considered the data, we noted this industry not only generates over a trillion U.S. dollars (billions of euros), it accounts for a significant portion of the Gross Domestic Product and the exports of many developing countries (primarily China, Bangladesh, India, Pakistan, Vietnam, Cambodia, Indonesia, Sri Lanka, South Korea, The Philippines). Annually, it employs an estimated 60 to 75 million people (both skilled and unskilled) worldwide – including in the United States (1.9 million, or 4% of the labor market) and in Europe (1.7 million and 6% of its manufacturing sector). Based on these staggering statistics, one reputable global consulting firm (McKinsey & Company) has suggested that if the global apparel industry were an individual country, it would make up the world's seventh largest economy.

As was further explained, these statistics were possible due to a complex supply chain based on "subcontracting" (which is essentially outsourcing stages of production and supply at multiple levels). The discussion thus included a review of some of the legal notions of "subcontracting", including those within the Italian legal system, and the origins of the fashion industry's supply chain. That is, to appreciate how this practice became so widely employed, we first looked at the evolution of the industry since the 1950s – similar to our review of the origins of the entire sustainability movement in Chapter 1.

More precisely, we observed how, following World War II, the 1950s marked a period in Western culture when consumerism emerged as a form of modern identity, when consumers developed a penchant for luxurious and lavish clothing following a period of conservation and ultraconservatism during the war era. We looked at some of the trends in fashion during this decade and surmised that the demand was further promoted by the establishment of

publications dedicated exclusively to fashion (*Vogue* for women, *Esquire* for men) and large department stores available to provide clothing. Despite the rise of the environmental movement during 1960s and 1970s, as we noted in Chapter 1, including increased legislation to combat the potential damage to the environment and public health from expanded production, these two decades were also a period of social turmoil that actually contributed to the rapid expansion of the fashion industry as these were times when people used fashion as a form of identity and expression. It is no wonder that, by the 1980s, demand and competition had increased, causing many businesses to look for ways to shift some or all production offshore – where labor and raw materials were cheap – thereby further contributing to globalization. And, as discussed in Chapter 1, this was actually a trend in manufacturing in general because overseas production basically translated to minimal, if any, government regulation. Like the United States, European fashion businesses were also expanding offshore manufacturing operations by outsourcing certain phases of production. Further, both American and European companies entered into business arrangements that shifted certain processes or just the assembly of products to developing countries. We looked at the subcontracting practices applicable in the fashion industry, which is where a business outsources various stages of production or design. In Europe, this type of "subcontracting" was primarily employed to gain partial or total relief from import duties and access cheap labor in less developed countries; while American counterparts employed the subcontracting model to escape government regulations and take advantage of that same cheap labor these poor countries offered.

We then discussed the detrimental effect of the subcontracting model on the contracting parties as well as the protections offered under Italian law, such as Law 192/1998, which actually promotes economic sustainability by requiring subcontracts to be in writing and in accordance with specific provisions of the Italian civil code. However, as we also attempted to apply other sections of this Law we discovered many of its vague provisions, which, depending on application or specific circumstances, can actually lead to potentially detrimental consequences for even sophisticated parties to the subcontract. We outlined other provisions of this Law that prohibit abuse of economically dependent relationships, which can be beneficial in the subcontracting model to prevent the dominant or more powerful party from acting in bad faith to the detriment of the weaker or more dependent party. However, despite the Law's intent to discourage bad faith conduct, we noted that many parties remain willing to submit to fiscally abusive relationships so as not to jeopardize important commercial undertakings.

Finally, we noted how the relatively inexpensive/economically feasible subcontracting model has led to the development of the "fast fashion" phenomenon. Traditionally, the fashion industry was based on seasonality – spring, summer, fall and winter. However, the outsourcing and subcontracting in the industry allowed for the design and production of inexpensive, "ready-to-wear" clothing at unsustainable rates in order to be meet rapidly changing consumer demands. Instead of four main seasons, the "fast fashion" system has 50 to 100 micro seasons annually, with new lines of clothing arriving in retail and online stores rapidly. This segment of the apparel industry has become highly competitive due to continuous product turnover with rapidly changing trends and cycles designed to artificially increase demand.

In terms of the social costs of outsourcing, or the subcontracting arrangement, there are many. That is, subcontracting has also led to further subcontracting arrangements (coined "sub-subcontracting"), which often do not include any written contractual arrangements – whether to maintain competitive advantage, to limit liability, to secure a certain profit margin, or due to a county's lack of regulation and oversight (in terms of minimum wage laws, minimum legal working age laws, and tolerance of inadequate working conditions). We explored how the more subcontractors required to produce a product, the worse off workers were in terms of wages, working conditions, and basic protections. Therefore, subcontracting models work to exacerbate many social problems already inherent in the fashion industry and often translate into employment of cost-cutting measures that typically lead to unsafe work environments. According to one report, even though many multinational companies have a presence in a developing country, such as India, for the vast majority of workers producing for the global market, wages have stagnated and working conditions worsened. We observed that contributing to the problem are the developing countries' unwillingness to adopt or enforce laws that could deter business. To illustrate this last point, we examined some of the more recent industrial accidents in Bangladesh and Pakistan that were due to inadequate building and safety standards in connection with the production of clothing for a global market.

Therefore, the subcontracting model – which has enabled the "fast fashion" business within the apparel industry to expand due to access to inexpensive supply chains, short lead times, and constantly changing styles and trends – has shifted what was product-based to what is consumer-driven, which translates to a consumption driven (or demand-driven) industry and which therefore leads to increased production. As we discussed, the more production increases the more it is likely to be outsourced to locations where laws are relaxed and labor is cheap. More importantly, this industry has created a cycle of overconsumption and overproduction, resulting in tremendous waste that poses significant environmental risks.

We also discussed how the social impact of the fashion industry is not limited to the developing world. As businesses moved production offshore, the U.S. and European manufacturing sectors shrank. Accordingly, the U.S. and European markets transformed to consumer markets, with retail jobs becoming prevalent. In this context, we discussed the modelling profession and related health concerns, and also the reactions of governments and industry associations to promote healthier body image both among models and those who follow them.

Finally, we looked at the environmental impact of the industry – from the excessive amounts of water it consumes to the amount of pollution and waste it produces. That is, in terms of its environmental footprint, the fashion industry is a very resource intensive, polluting industry. We reviewed some staggering statistics in that regard. For example 10% of all carbon emissions are due to fashion production; 85% of all textiles wind up in landfills because they cannot be recycled; the washing of clothing releases some 500,000 tons of plastic microfibers into the world's oceans annually (the equivalent of 50 billion plastic bottles and representing the main source of microplastics in the world's oceans); an estimated 60% of all garments contain fibers like polyester that do not break down either in our landfills or oceans; the industry manufactures about 100 billion garments per year of which 92 million tons of solid waste is created due to overproduction. In 2015 alone, the fashion industry used 80 billion cubic meters of fresh water and emitted a million tons of carbon dioxide. And, we noted that 20% of industrial water pollution is generated by the fashion industry due to the dyes and chemicals used to treat textiles. This widespread pollution is not limited to the environment as it also impacts the food cycle and, hence, humans as pesticides applied to cotton crops, for example, often wind up in the soil where they disrupt biological processes, destroy microorganisms, kill plants and insects alike. Further, microplastics are also absorbed into food sources which is then consumed by humans. Not only are the products themselves damaging to our environment, but the materials used to package them are typically not biodegradable and thus end up in landfills. And, contributing further to the waste problem of this industry we discussed the practice of some high-end fashion merchandisers (Burberry, Louis Vuitton, Nike, Zara and others) exposed for intentionally destroying unsold product to prevent its sale at discount prices (or even its recycling) in order to preserve the exclusivity of their brands – a practice which was unintentionally "rewarded" through governmental incentives that allow the recovery as business deductions or tax credits for unused or unsellable product (see, for example, Italian Presidential Decree No. 441/97 mandate 193/E of 23/7/98).

In terms of water consumption, we examined some drawbacks of manufacturing with cotton fibers, include the staggering amounts of water required. For example, cotton is the most

commonly produced natural fiber, used in about 40% of all clothing. However, the amount of water consumed to produce cotton products is alarming. It takes 700 gallons of water to produce a single cotton t-shirt, which is tantamount to giving a person 8 glasses of water a day for 3.5 years. To produce a single pair of jeans takes as much water (some 2,000 gallons) as one person drinks in 10 years. We noted what happened to the Aral Sea in Uzbekistan as a result of cotton farming. At one time, it was one of the largest lakes in the world; however, 50 years of cotton farming depleted it. And while production from synthetic fibers requires less water than cotton, synthetics also have their drawbacks. We considered the fact that the production of polyester (the most common of synthetics) consumes about 98 million tons of crude oil per year, or about 1% of the world's oil production. And, production of polyester itself emits three times more carbon dioxide than the production of cotton.

Although we discussed in Chapter 1 how many American businesses adopted more responsible policies and guidelines during the 1980s and 1990s. This form of corporate social responsibility is another aspect of the sustainability movement that developed and spread to Europe in response to international reports about unsustainable practices. It is not surprising to learn that many of the reports focused on practices within the fashion industry prompting large and small firms alike to reconsider their business guidelines. However, despite claims of environmentally-friendly products or ethical practices, we noted a lack of a uniform standards due to the absence of regulations in this area. And, the lack of regulations led to many false claims aimed at misleading consumers into believing the products they were purchasing were safe for the environment (a practice dubbed "greenwashing"). As a result, we considered some of the legislation, regulations and the lawsuits designed to address false and misleading business practices. For example, beginning in 1992, the U.S. Federal Trade Commission published guidelines to help businesses avoid "greenwashing"; numerous states within the United States enacted consumer protection laws to protect their residents from similar false claims. Finally, several lawsuits were prosecuted based on "greenwashing" claims and most notorious was the lawsuit brought against Nike in 1998 for unfair and deceptive practices that address and potentially help combat "greenwashing". Similarly, by 2005, a great deal of legislation in Europe was enacted to protect consumers, notably the European Unfair Commercial Practices Directive that was broadly drafted to address misleading commercial practices. And, in Italy in particular Legislative Decree 145/2007 was enacted to deal with "greenwashing" as well as misleading advertising.

Moving into the 2000s and the present, we discussed how social media has contributed to the dissemination of information to consumers about the "true cost" of their clothing, the harm to

the environment prompting some apparel companies to improve the sustainability of their operations through measures such as recycling materials, reducing textile pollution and waste, and growing cotton more sustainably. To that end, we looked at some of the "top-down" approaches (i.e., voluntary initiatives within the industry and relevant laws) in both the United States and Europe enacted to address pollution and proper labeling of clothing, as well as some "bottom-up" initiatives. The latter are largely the result of consumer demand for "greener" products to which the industry has responded, such as using "eco-friendly" materials as an alternative to cotton. These materials offer a positive solution to the fashion industry's sustainability problems because they can be produced without waste, excessive amounts of water, chemicals/pesticides, and, importantly are biodegradable.

We discussed the use of hemp, which is antibacterial, durable and flexible and, more importantly, does not require herbicides or pesticides; the use of certain fruits to create sustainable fibers, as well as plants, like bamboo, and cork. For the "fast fashion" industry, many of these materials' sustainability value is due to their ability to replace synthetic materials, cotton and leather. In addition to hemp, we noted other low-cost examples. Coconut has been found suitable for the production of sportswear because it is moisture resistant and produces strong fibers; materials made from pineapple are similar to leather, but without any of the toxic effects on the environment, and have been used to create shoes, accessories, bags, and other clothing. The fibers from pineapple have been discovered to be soft, yet durable, and available in many colors. MycoTEX, which is made from fungus root, becomes a threadless alternative to many conventional fabrics and, thus, biodegradable. Since it is produced in a laboratory, it does not require land, treatment with chemicals/pesticides, or cultivation with vast amounts of water. Bannatex®, which is made from banana fibers, becomes a durable, waterproof, light and elastic fabric suitable for many uses, such as chairs, bags and packaging materials. Finally, suberis is made from cork and treated with natural components so that it becomes a soft, subtle material similar to suede and as an alternative to leather.

Another "bottom-up" trend we discussed are certifications, of which we discussed primarily two: social certifications and environmental certifications. Social certifications are those that deal with protecting workers and supplies – fair payment, adequate hygiene, decent working conditions. Many of us are familiar with the "fair-trade" trademark, which is an example of such a certification. In fact, "fair trade" is associated with one of the highest forms of corporate social responsibility and sustainable business practices because it promotes entrepreneurial development within developing countries and supports farmers and workers who are socially and economically marginalized by ensuring fair trading practices, fair sales prices, fair labor

and working conditions, and promoting respect for the environment. Further, demand for fair trade practices in the fashion industry has grown significantly with the rise of various campaigns such as the Clean Clothes Campaign, the Ethical Trading Initiative, and Labor Behind the Label. Finally, we discussed the various certification organizations and the differences among them – some focus on producers' standards, others on "ethical sustainability" or human rights. Social Accountability International developed the SA 8000 standard based on the United Nations Declaration of Human Rights and other workers' rights and pertains to standards on health and safety, freedom of association, the right to bargain collectively, discrimination, working hours, child and forced labor, and fair pay. Further, this standard applies to the entire supply chain as it requires sub-suppliers to meet the same requirements as the certified company.

Regarding environmental certifications, the most widespread are those developed by the ISO, such as eco-labels. For Europe, the European Eco-Management and Audit Scheme (EMAS) and the EU Ecolabel set requirements similar to those set by the ISO in order to improve environmental performance and allow consumers to make environmentally responsible choices. In the textiles area, international standards have been developed by the GOTS for certification of textiles made with natural fibers and certification as "organic" requires the product be composed of at least 95% natural and organically grown fibers. A product that is GOTS certified is considered prestigious. Further a GOTS certification also means a company adheres to the following four fundamental rules: the production of natural fibers in accordance with the rules of organic farming; reducing the environmental impact of production processes; compliance with social responsibility criteria defined on the basis of certain conventions; and traceability of raw materials, semi-finished and finished products throughout the production chain.

In addition to the certifications in the fashion industry, we considered marks related to the use of recycled materials, such as Recycled Content Certification, and the Global Recycle Standard; the Made In Green is a certification for sustainable textile products and enables the consumer to use a code to trace the item's production.

The National Chamber for Italian Fashion has also initiated various private sustainability initiatives as the issue has become a priority for many Italian fashion companies. For example, there are guidelines on eco-toxicological requirements for clothing, leather goods, footwear and accessories that aim to reduce certain chemical substances in the supply chain. These guidelines take into account more than 350 chemical substances, describe how they are used in the supply chain, and provide a methodological analysis for individual products. Other private

sustainability initiatives, include The Green Carpet Fashion Awards and the Fashion Pact. The Green Carpet Fashion Awards reward exceptionally sustainable brands, which gives them additional publicity. Similarly, the Manifesto of Sustainability for Italian Fashion discusses stages of the value chain, starting with design and ending with promotion of adherence to the Manifesto and communication of such adherence to stakeholders. Finally, the Fashion Pact is an initiative promoted by a large number of fashion companies to encourage biodiversity, stop global warming and protect the environment through agreed adherence to specified guidelines. However, as we noted, there is no sanction for failure to comply.

Lastly, because the "bottom-up initiatives" we evaluated require "self-regulation", they are non-binding and often criticized for that reason. Therefore, we briefly explored the emergence of the Benefit Corporation, or B-Corporation, movement. A Certified B Corporation is a standard issued by B-Lab, a U.S. organization, and requires the company make a binding commitment to sustainability, complete a verification process, and pass an assessment. While they continue to operate with a profit motive, these entities build social responsibility into their corporate charters, articles of association or bylaws. Accordingly, pursuit of stakeholder interests no longer lies within the scope of the Business Judgement Rule—it becomes a legal obligation of the company and its managers. B-Corp certification provides an effective legal guarantee for both consumers and suppliers. It is also an innovative and alternative form of commercial organization that effectively meets sustainability goals in terms of maintaining competitiveness and transitioning to a sustainable economy. In Italy, we highlighted how a Benefit Corporation is not a new type of entity. That is, it was discussed that if a company is nothing more than a nexus of contracts[741] whereby persons and means are organized for the joint exercise of an economic activity for the purpose of sharing the profits (Art. 2247 It. c.c.). Accordingly, we commented that what makes the B-Corp unique in Italy is not its corporate form, but the provision in the *atto costitutivo* and *statuto sociale* that the company must *also* consider public interests – and this requirement is legally binding for managers. And in this context, we emphasized, Benefit Corporations represent effective tools to bring about changes in the way fashion companies do business.

Chapter 3 analyzed the two primary instruments that served as the foundations of the sustainability movement for the fashion industry within Europe and the United States. For the United States, where business in general is guided by market forces and self-regulation, codes of ethics/conduct (which led to social responsibility) played a key role in sustainability.

[741] Marchetti (2000).

Whereas, in Europe legislation and regulation, or the Circular Economy model, have been the fundamental basis for making companies more socially aware and responsive.
Prior to turning to codes of ethics/conduct within the American fashion industry, we looked at the origins and reemergence of business ethics and codes of conduct in general, dating far back in history. However, prior to the 1970s, it was rare to find a company with a modern code of ethics that promoted public welfare, or at least one that was well-developed. And, those ethical standards that were adopted were initially ineffective because they were typically in response to public criticisms and/or scandals. While the corporate scandals that spanned some 40 years (i.e., from the 1960s through early 2000s), contributed to the development of a global corporate (and even societal) culture, it was not until corporations implemented these ethical codes and standards into their governance structures and/or as a requirement in contractual documents that we saw ethical business practices take hold.
As concerns the fashion industry, we first considered how one instrument's efficacy (here, codes of ethics), can be a reason for adoption of a specific tool or model. With this in mind, we noted that codes of ethics are akin to a business' "constitution" and allow for self-regulation because they contain general principles to guide behavior. As such, ethical codes represent and often enhance a company's culture; they often attract talented employees; they can prevent or limit reputational damage caused by the association of a brand with illicit conduct such as waste, harming the environment, corruption, exploitation, conflict of interest, insider trading or excessive risk-taking, violating human/worker's rights. Accordingly, we noted within the fashion industry in particular that if a brand is perceived as "ethical", it (and the business) is more likely to benefit from improved profits and public image, making codes of ethics an efficient strategic marketing tool. In addition to the social pressures, there were legal pressures because various laws were enacted to make unlawful many detrimental behaviors. Thus, both social and legal pressures combined to produce a trend whereby having a code of ethics became the rule, and *not* having one became the exception. And, this trend spread and codes of ethics were successful due to three factors that we considered: (1) inefficiency of the free market to regulate; (2) inability of government, acting alone, to make necessary corrections therefore, enabling businesses to develop ethical standards; and (3) adoption by multinational companies doing business on a global scale (i.e., requiring third parties contracting with the company, such as suppliers, to employ similar ethics in their business practices). Finally, the trend of adopting an ethical code caused many businesses to go further by also incorporating codes of conduct, which are much more detailed and thus tend to be much lengthier. Nevertheless,

although the two types of codes are different, they have a shared function, which causes many companies (and scholars) to use them interchangeably.
As further concerns the fashion industry, which is particularly sensitive to consumer demand, and where ethical codes have served as a response to the more "ethics-conscious" consumer, we evaluated the codes of some 20 of the top brands to gain insight into the primary concerns of global fashion producers. First off, we noted that most of these companies stated their codes of ethics are legally binding for all employees, collaborators, and suppliers, no matter their position, type of employment contract, or role with the company; while other firms have expressly linked their codes of ethics to the primary supplier–buyer agreement such that a violation represents a breach of the parties' main contract – meaning suppliers are more likely to behave ethically due to "real" consequences. Still other companies have different "versions" of their ethical codes: Perhaps one for the entire company and another, separate code, for suppliers; or a single, multi-section code for specific parties/persons. Regardless of how a company may establish and enforce its code of ethics, we surmised that these codes have two practical effects in the fashion industry.

First, the company assumes a greater risk for third party behavior. And, where codes are sufficiently detailed, there is an increased likelihood the company will terminate a business relationship where a contracting third party (i.e., a supplier) violates these principles. Hence, businesses with more elaborate codes are more likely to contribute to an increasingly sustainable industry. Second, and more difficult to gauge in terms of effectiveness, since most codes contain statements that the third party must also abide by applicable law (whether national or international) as well as "internationally recognized standards," these codes are tantamount to an attempt to export laws of developed countries (here, the United States or Europe) to developing countries along with "principles", such as loyalty, honesty, good faith, ethical integrity, and the like. To understand the complexity, we explained the significance of legal rules (i.e., laws) and legal principles. While laws are typically respected since the failure to abide by them may carry some specific consequence (e.g., a civil or criminal penalty or subject the violator to legal action), principles, which are based on values, are not as easily enforced because they do not prescribe conduct in similar "all-or-nothing" terms. In terms of the fashion industry, which outsources supply to developing countries whose peoples may not share or understand these principles, the failure to comply with certain principles are difficult to enforce. As a result, fashion companies effectively may be allowing suppliers to "work as

usual" without improving standards or sustainability when they rely on principles rather than on more strict laws.

Regardless, we did note that all of the fashion companies had adopted codes of ethics consistent with western labor laws which provide the employees of their developing country suppliers greater legal security. To illustrate, all of the fashion companies adopted codes consistent with ILO principles relative to child and forced labor: A majority had standards for pay, such as some form of pay slip on a regular basis to combat undeclared or illegal work, maximum work hours and overtime pay. These same companies required their suppliers implement a management system which verifies the age of each employee by review of legally accepted documentation and address the issue of abuse of apprenticeship/traineeship schemes to avoid the payment of wages or benefit. More significantly, a written disciplinary procedure was required, thereby helping reduce the likelihood of groundless disciplinary action and giving employees a form of recourse. We found that those fashion companies with detailed codes tended to require suppliers provide workers with a written copy of their employment contract in a language the worker understands. Finally, and most significant to ensuring these codes are enduring, we found many companies implemented a management system similar to that required by Italian Legislative Decree No. 231/2001 (including a grievance system), identifying specific personnel responsible for the management and implementation of a supplier's social code, and a requirement to inform all workers and subcontractors of all applicable legislation. In addition to these requirements, other codes went a step further, by providing anonymous reporting channels to field complaints. Thus, we proposed that the more elaborate a company's code of ethics, the more likely the company's principles will trickle down to global suppliers. However, as we also must recognize, these codes are not a foolproof measure that prevent what consumers care about, such as human rights offenses or environmental violations.

Turning to Europe's Circular Economy model, we considered its various dimensions, all of which appear to focus on waste as an asset. And, given the amount of waste (in the liability sense) generated by the fashion industry annually, we posited that the circular economy model is fundamental to the sustainable fashion movement.

We began our discussion of this model by outlining the legal framework of waste management practices, which is central to any circular economy model. As part of this discourse, we considered various proposals, directives and initiatives that focus on preventing waste through employment of the three "Rs" (reduce, reuse, recycle), all of which are integral to and compatible with a sound waste management system, a circular economy model and, hence,

sustainability. Yet, we noted the European Union's version of the model employs a fourth "R" – recover. It is this 4R framework that makes the European Circular Economy model appealing to fashion sustainability. In the context of circular fashion, where textile waste is tremendous, directives have been adopted by Member States establishing a separate waste collection system for textiles in the very near future (by 2025), providing economic incentives for re-use and recovery, and imposing fees and restrictions for waste producers. We looked at the changes to Directive 2008/98/EC and the introduction of provisions to extend producer responsibility (not to be confused with "fault"), which have not only made possible terming waste as a "resource" and the system of waste management as "sustainable material management", but have also provided incentives to potentially prevent waste at its source and promote product design for the environment. That is, laws directed at "polluter pays" push business toward reducing (or at least re-thinking) pollution and bleeding-off precious resources. Finally, in terms of the European Circular Economy model, we considered the importance of the value-added tax to fashion industry sustainability by shortening the production chain, decreasing transportation costs, and reducing the environmental impact.

For the fashion industry, with its trending toward "fast fashion" in particular, we also posited that a circular economy relies on designing products for long-term, rather than short-term, use and further creating products that can be divided and reconstructed. Here, we discussed some of the sustainable raw materials introduced in Chapter 2, such as hemp, coconut, pineapple, citrus, mycoTEX (from fungus root), suberis (from cork), nettle, Bannatex®. We also considered the European standards for biodegradability versus compostability, and the impact to the environment of both. Since the two terms are distinct, they must be understood from a sustainability perspective as a product must be both biodegradable and compostable to be sustainable.

Additionally, sustainability concerns have led to the rise of alternative consumption models for consumers. There are various forms of this "collaborative fashion consumption" (CFC) wherein consumers, instead of purchasing new products, access existing garments – through swapping, second-hand purchasing, or renting/leasing clothing. Numerous fashion companies have embraced and sponsored "buy-back programs" where consumers turn in old garments (often for vouchers towards new fashion items) so companies can recycle, upcycle or reuse unwanted items. Both CFC and buy-back programs create a "win-win" – they promote sustainability, while satisfying the consumer's demand for access to new products.

Any discussion about making business more sustainable through the use of codes of ethics/conduct would not be complete without a discussion of some legal challenges and

obstacles – the focus of the third section of Chapter 3. We reviewed some laws in the United States and Europe aimed at deterring unethical business practices, or compelling values-based business conduct, before considering some legal challenges surrounding the enforceability of corporate codes by their intended beneficiaries, e.g., consumers. The most controversial case we considered involved the mega-retailer Wal-Mart. The U.S. courts rejected all contractual theories which would have made Wal-Mart liable to the plaintiffs based on the underlying supplier agreements. This unfavorable result sparked great criticism, as it endorsed what has been characterized as a deceitful practice: On the one hand, a business' ability to benefit to a from the public declaration of commitment to worldwide social and environmental standards; on the other, a complete lack accountability to the public they attempt to influence with their ethical codes. However, another private lawsuit against The Gap for similar ethical code breaches, but this time liability was based on racketeering claims (aiding and abetting wrongdoing), was successful. As the court reasoned, despite the power of multinational businesses to enforce their codes, they cause, or aid and abet, suppliers to continue sweatshop conditions; they also profit from sweatshop conditions, and they cause investment injuries by using those profits to perpetuate the arrangement with codes of conduct and monitoring systems that discourage involvement by stakeholders to improve labor conditions.

We considered other possible causes of action for breach of ethical codes. One theory is based the premise that codes of ethics can be considered unilateral promises designed to engender stakeholders to rely on such information in taking a particular action, to their detriment. Another theory proffered categories of codes pertaining to working conditions to which all suppliers must also adhere as third-party contractors. According to this reconstruction, the company would thus be contractually committed to the supplier to secure a benefit for the employees, who could then take legal action directly against the company. This approach has not been endorsed by US case law because of the difficulty in identifying employees as "intended beneficiaries". We compared how similar legal theories might be actionable under Italian law (i.e., the Italian Consumer Code) where a breach of ethical codes could constitute an unfair commercial practice if the commitment is firm and verifiable, as would be the case if the code is made public. However, under such theories, only the consumer could bring action, not aggrieved employees or other stakeholders. Finally, we discussed the application of various tort principles, including imposition on the dominant party (i.e., corporation) a "duty of care", and how these principles might be or have been utilized to create liability in suits brought in the United States. In the European context, however, legislation now exists that actually imposes a duty of care on businesses and provides for civil remedies. As recently as February

2022, other legislation has been proposed at corporate sustainability due diligence and responsible corporate behavior. However, while a bold step, this recent proposal toward corporate accountability applies to only 1% of European businesses.

We discussed “The Fashion Act” proposed in late 2021 in New York state. If passed, it will require fashion brands with at least $100 MM in revenues doing business in New York to map at least 50% of their entire supply chain and to disclose information related to their social and environmental impacts. Thus, companies will have to disclose total volumes of materials production for the purpose of conveying their environmental impact reduction strategy. As concerns workers’ rights, brands will be required to disclose median wages and measures in place to implement responsible business conduct in their policies and management systems. Significantly, noncompliant companies will be given three months to remedy the violation, or face fines up to 2% of their annual revenues, which will be then allocated to a community fund for environmental justice projects in the state. Obviously, if passed, The Fashion Act, would be revolutionary for holding brands legally accountable in an industry where commitments to human rights and the environment are essentially voluntary; and because it would be so revolutionary, it has been subject to a great deal of criticism because it relies on manufacturers and retailers to set their own reporting targets, which may be self-serving. From this perspective, The Fashion Act as drafted would not be an effective instrument to regulate sustainability of or achieve circularity in the fashion industry operating in New York.

With regard to the Circular Economy model, we noted the primary challenges for its implementation within the fashion industry involve lack of standardization, incomplete information, and economic barriers. In this context we highlighted how recycling and reuse of old products and especially clothing has been practiced since long before the notion of sustainable development; and, as a result, there are several methods that may be employed – there is no “one size fits all”. Additionally, while there does not appear to be a solid argument for using any one of these forms of recycling over another, we noted that lack of standardization within a business often results in waste. Furthermore, since the fundamental objective of realizing a circular economy is the *reduction of waste*, lack of standardization could undermine any initiatives aimed at improving sustainability. We referred to some of the transposition delays of the European Waste Framework Directive and recalled that not all Member States have implemented an adequate waste management system, for example, and compliance with the Directive does not necessarily mean uniform practices especially as Member States have discretion to adopt national laws that are best suited for the local environment and relevant legal context. In this regard, we hypothesized that an enterprise’s internal policies could serve

this purpose; however, such voluntary regulation could be subject to many of the same enforcement problems we observed with codes of ethics/conduct.

As concerns incomplete information, we addressed this problem on three fronts. First, a lack of understanding between the technical, scientific meanings of biodegradability and compostability could stifle sustainability efforts and inadvertently mislead stakeholders. We observed how it is virtually impossible to achieve a "zero waste" economy and submitted that setting unrealistic goals could contribute to skepticism or confusion about the feasibility of sustainable initiatives. The potential environmental harm of treating decomposable and compostable products as interchangeable was also briefly addressed. Second, we posited that framing waste as a resource could have the effect of creating increased demand for exactly what we are trying to reduce or eliminate. And there is a disproportionate focus on the future of fashion without considering the impact of the clothing and textiles currently on the market or sitting in consumers' closets. We imagined, then, that even if proper waste management systems were in place, these clothes require care and energy/resource expenditure. Alternatively, we suggested that these items could be shared through peer-to-peer platforms or via some of the alternative consumption models, but such forms of exchange still constitute a niche market in general and especially in Italy. They also require a significant stock of diverse apparel and fashion items, not just in terms of style but also sizes. Third, we discussed that many consumers are unaware of the environmental impact of the fashion industry and how their purchasing choices affect market transition. To illustrate this point, we compared an average consumer's knowledge about the benefits of recycling packaging waste compared to old clothing. This is one barrier to diffusion of the Circular Economy model that, fortunately, appears to be gradually overcome by informational campaigns sponsored both by non-governmental organizations and fashion brands. However, it is nonetheless costly to improve consumer consciousness and without any guarantee that they will purchase more responsibly made products given that cheaper, unsustainable products are on the market. In this sense, lack of standardization and insufficient information go hand-in-hand.

In the end, we concluded that improving sustainability in the fashion industry will depend on funding. That is, transforming from a linear to a circular model of production does not just mean designing clothes made from mushrooms, citrus, hemp, or nettle. It means changing every single aspect of production –from the design phase through end life. It means establishing new channels for private waste collection, deconstructing tightly woven threads, and reprocessing them for a new use. Indeed, we looked at projections from reputable sources and

noted that billions of dollars (between $20 billion and $30 billion) in investments will be required over the next 10 years if the fashion industry is to fully embrace a Circular Economy model. What is more, despite that the European Union is allocating €21 million ($23.5 million) in funds to facilitate the transition, this funding is only a fraction of what will be necessary. So, when we considered these estimated financial requirements in light of funding reportedly available and the turnover of a *major* fashion brand, we ultimately surmised that the transition is economically impossible for the majority.

Luckily, there are various ways for a company to raise capital, grow and expand its business. We first looked at financing options, but this required us to preliminarily ask the basic question of whether investors have a real interest in funding the adoption of strategies aimed at pursuing general objectives (such as the reduction of CO_2 emissions) intended to benefit the public and not investors. We observed that a positive correlation between the growing business case for sustainable investments and long-term profit has caused lenders to offer flexible instruments to businesses. Then we discussed the possibility for companies to receive sustainability-linked financing (or "bonds"), which after describing their purpose, versatility, and appeal for borrowers, we noted requires assumption of debt and creditworthiness proportionate to risk. Thus, despite the various advantages of sustainability-linked loans, we ultimately concluded that their potential use is suitable for only a few market players that can afford to repay such a significant loan.

We then examined private equity funds and leveraged buyouts to raise capital, including their respective legal schemes. After briefly outlining the investment structure of a private equity fund to highlight their appeal for smaller fashion brands, we noted they can inject significant amounts of capital into a firm. At the same time, we commented that structuring an acquisition by a private equity fund is usually a complex transaction and often results in a leveraged buyout.

This brought us to discuss leveraged buyouts in Italy, including the debate about their lawfulness which occurred both in the doctrine and the case law before "mergers with debt" were formally included in the Italian civil code via the 2003 company law reform. Through this discussion, we highlighted the business risks of a leveraged buyout. At the same time, we noted a leveraged buyout can mean the difference between business growth (or survival) and failure. In this regard we observed that – just like in America – European judges and legislators make certain policy choices on important macro issues; in the case of the leveraged buyout, the

potential negative consequences of business failure and layoffs were greater than that of offloading the debt of the acquiring company onto the target.

In this context we noted how the 2003 company law reform provided certain protections for shareholders because it required the board of directors to draft a merger plan (or prospectus) on whether the target company, in the directors' business judgment, will have sufficient future cash flows to support a leveraged buyout. We discussed how such a prediction is complicated in industries such as fashion that are sensitive to rapidly changing trends, noting that, in certain circumstances, the Business Judgment Rule safeguards directors from liability for making a "bad" decision.

Another tool we examined are SPACs, which are a type of special purpose vehicle formed to raise capital through an IPO for the purpose of acquiring another company. Although they have existed for decades, we noted an upsurge in their use in the past few years. Specifically, we observed that compared to the 59 SPACs that reportedly came to market in 2019, there were 613 recorded IPOs by SPACs in 2021. We surmised that this increased usage might be because SPACs can be publicly traded without being subject to a lengthy IPO process or the same disclosures as companies with commercial operations. This means they are capable of earning returns rather quickly. We observed that lack of regulation makes SPACs advantageous, but also poses serious risks for inexperienced investors. We also mentioned that while SPACs are less expensive at the initial IPO stage, founders typically receive 20% in stock of the acquired company in exchange for promoting the merger; such fees can yield expenses for the SPAC that exceed traditional IPO costs, and therefore SPACs are not always the more convenient alternative. Therefore, in consideration of these potential market dangers, we noted how the SEC is considering stricter regulation of these entities to offer more investor protection and a greater balance of interests.

We pointed out that the tools examined could be interesting for the fashion industry given recent financial demands, but that each has specific drawbacks. We also recalled that fashion is a highly polluting industry and the financial resources required to render the industry more sustainable exceed most companies' individual capacities. In this context we proposed pooling resources among competitors to confront the industry's sustainability issue collectively, and suggested more substantial and binding tools are needed rather than loose commitments outlined in an industry pact. From this perspective, we discussed how excessive consolidation of market players could raise doubts about legitimacy under competition law and examined the relevant provisions of United States and European antitrust legislation. We noted how both

countries generally outlaw agreements and practices between competitors that potentially undermine liberal market competition, regardless of the potential long-term benefit for public interests.

In the U.S. context, as examples, we discussed a 2019 agreement between four leading automobile manufacturers in California to collectively combat environmentally detrimental effects of industry by setting higher emissions standards than those established under federal law. We noted that although the antitrust investigation against the manufacturers was closed in early 2020, the case depicts a significant and relevant challenge for big and polluting industries, such as fashion, in light of current sustainability concerns. Namely, despite the fact that the fashion industry is recognized for contributing to the climate change phenomenon, we observed that current legal frameworks may prohibit many brands from taking effective action to combat it.

We also examined parallels between *United Mine Workers of America v. Pennington* in which the establishment of a minimum wage was claimed to exclude small coal mine operators from the market through increased operating costs and more recent debates about whether companies have a moral duty to set minimum wages and/or safety standards, for example, in developing countries. Considering the prevalence of subcontracting and sub-subcontracting arrangements within the supply chain, we proposed that such a rule – although laudable – is likely to increase costs throughout the distribution network and could result in price increases for consumers and/or reduced market competition if traders are eliminated from the market.

At the same time, we observed an emergence in the legal scholarship to support a broader "consumer choice" method to antitrust analysis instead of the traditional "consumer welfare" method and noted that countries such as Australia and South Africa already allow environmental considerations in competition analysis.

Looking to the European framework, then, we emphasized how sustainability principles set out in the Treaties provide the legal basis for exceptions based on long-term public benefit. We noted the broad duty to integrate environmental protection requirements in EU policies as set out under Art. 11 TFEU, as well as exceptions for restrictive agreements or practices provided under Art. 101(3) TFEU. In particular, we observed that an anticompetitive agreement may be allowed under EU law when, for instance, it provides consumer benefit. However, we noted that long-term and intangible benefits, such as improved environmental conditions, are difficult to demonstrate, and in any case materialize after the relevant agreement has been decided on.

We also discussed the ancillary restraints doctrine and how, pursuant to Art. 101(1) TFEU, some anticompetitive practices are permitted provided they do not negatively impact competition, are instrumental in protecting the parties' legitimate interests, and pass a proportionality test. However, we observed that it is unclear from the provision how considerations should be factored into analysis of sustainability agreements. Therefore, we surmised the choice is left to individual Member States' legislators, meaning that the benefits of increased flexibility may be undermined by greater legal uncertainty.

In this context, we noted that, in July 2020, the Dutch Authority for Competition and Markets (ACM) released Draft Guidelines on Sustainability Agreements that allows up to 30% of industry or sector competitors to collaborate to provide long-term public benefits (such as improved environmental conditions); in these circumstances, and provided parties have acted in good faith, the agreement is exempt from antitrust law. Therefore, the Dutch solutions-oriented proposal could become a useful sustainable development model, as illustrated by a trend in this direction. In fact, we further noted that Italy has recently amended (with Constitutional Law No. 1/2022) Arts. 9 and 41 of its constitution to include sustainability initiatives and duties for companies.

Regarding future U.S. developments, we commented that the new Biden Administration appears more inclined to enact laws aimed at aligning U.S. interests with European policies.

In general, and as a final remark, we expressed overall optimism for future global collaboration on sustainability issues, highlighting how failing to take effective action on climate change could have a wide-reaching catastrophic impact on the public at-large. From this perspective, we noted that everyone – governments, competitors, consumers, stakeholders – has a legitimate interest to collaborate even at the sake of "collusion" but, at the same time, we must be mindful that the more complex the problem, the more complex the solution; and, it is not always easy to balance competing interests even when the group moves toward a common goal. Therefore, as the number of interests involved increases, so does the risk of a political deadlock, which may result in a sustainable development standstill and a major *faux pas*.

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