Untangling the Extraterritoriality of ESG Regulation

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Regulators across the world are developing rules governing the disclosure of ESG information by companies and investors. Many of these ESG disclosure requirements apply to companies domiciled in another country. In the context of ongoing debates about the legality, feasibility, and effectiveness of ESG disclosure regulation, this phenomenon portends an important question implicating international law: the exercise of extraterritorial authority by domestic regulators over foreign firms, conduct, and relationships. The global proliferation of disclosure-based ESG regimes is creating spheres of domestically-created legal authority that overlap and interact with each other globally. This Article describes the extraterritorial dimensions of ESG disclosure regulation and considers the implications of ESG extraterritoriality for the effectiveness of domestic regulation to address global challenges.

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I. Introduction

The negative externalities generated by commercial activity are manifestly apparent in the growing magnitude and scope of disruptions attributed to climate change.[1] Climate change is just one of a broad range of environmental and social factors that figure centrally in defining the impacts of business on society.[2] Companies are exposed to risks from these phenomena as well as able to exploit opportunities for growth and innovation resulting from them.[3]

Notwithstanding the growing salience of these risks and opportunities, companies frequently demonstrate an inability—and often unwillingness—to adequately manage them.[4] Enter ESG (environmental, social, governance) investing, which is premised on faith in private capital to influence corporations to address and incorporate sustainability in their decision-making and operations.[5]

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1 *See* 2022 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 9–11 (Hans-Otto Pörtner et al. eds., 2022), https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf [hereinafter IPCC AR6].

2 *See* WORLD ECONOMIC FORUM, GLOBAL RISKS REPORT 2024 7, 72–73 (2024), https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2024.pdf [https://perma.cc/EC9G-DMAZ] (noting, *inter alia*, cybersecurity, economic uncertainty, and misinformation and disinformation).

3 *See* Stephen Kim Park, *Legal Strategy Disrupted: Managing Climate Change and Regulatory Transformation*, 58 AM. BUS. L.J. 711, 723–28 (2021) (noting the disruptive effects of climate change on companies) [hereinafter Park, *Legal Strategy Disrupted*].

4 *See* Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217, 1241–47 (2022).

5 The term "sustainable finance" is used to capture a similar set of concepts, both in capital markets and other parts of the global system and is often used interchangeably with ESG. *See* European Commission, *Overview of Sustainable Finance*, https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance_en [https://perma.cc/96MM-FX7B] (last visited Mar. 17, 2024) [hereinafter EU Sustainable Finance Overview] (defining sustainable finance as "the process of taking environmental, social and governance (ESG) considerations into account when making investment decisions in the financial sector, leading to more long-term investments in sustainable economic activities and projects"); Virginia Harper Ho, *Sustainable Finance & China's Green Credit Reforms: A Test Case for Bank Monitoring of Environmental Risk*, 51 CORNELL INT'L L.J. 609, 611 (2018) (defining sustainable finance as "the integration of environmental, social, and governance ("ESG") considerations into global financial systems in order to promote financial stability, asset pricing, risk assessment,

The term ESG has become a flashpoint for divergent views about the responsibilities of business to society and legal mechanisms for promoting sustainability.[6] Consensus on the definition and objectives of ESG, both in the United States and globally, remains elusive.[7]

Domestic financial regulators have stepped into the fray, developing and implementing frameworks specifically addressing ESG.[8] In the United States, a key component of ESG regulatory strategies has been disclosure requirements on issuers promulgated by the Securities and Exchange Commission (SEC) under U.S. federal securities law.[9] Amidst recent market and regulatory developments, legal scholars have grappled with, *inter alia*, the SEC's design of mandatory ESG disclosure rules,[10] the value of voluntary disclosure based on private standards,[11] the value of

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and more efficient allocation of capital toward investments that promote sustainable and resource-efficient development").

6 *See* Chip Cutter & Emily Glazer, *The Latest Dirty Word in Corporate America: ESG*, WALL ST. J. (Jan. 9, 2024, 5:20 pm ET), https://www.wsj.com/business/the-latest-dirty-word-in-corporate-america-esg-9c776003 [https://perma.cc/59V4-H747] (describing the reluctance of certain companies to publicly refer to ESG).

7 As one set of commentators notes:

> Is sustainable finance about making money by realising opportunities presented by sustainability challenges and preserving financial value by addressing the risks? Or is it about tackling sustainability challenges as goals in themselves? Is it about financial value or pursuing wider outcomes that align with core social values? In reality, a good deal of sustainable finance appears to be about both, but aspirations to solve sustainability problems are often hiding in the shadows, uncertain whether they are allowed to show their face.

Iris H-Y Chiu, Lin Lin & David Rouch, *Law and Regulation for Sustainable Finance*, 23 EURO. BUS. ORG. L. REV. 1, 2 (2022).

8 *See* Stephen Kim Park, *Sustainable Finance in Global Capital Markets*, *in* the RESEARCH HANDBOOK ON GLOBAL CAPITAL MARKETS LAW 236 (Iris H.-Y. Chiu & Iain G. MacNeil eds., 2023).

9 *See* Colin Myers & Jason J. Czarnezki, *Sustainable Business Law? The Key Role of Corporate Governance and Finance*, 51 ENVTL. L. 991, 1009–17 (2021).

10 *See* Jill E. Fisch, Making Sustainability Disclosure Sustainable, 107 GEO. L.J. 923 (2019); Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures*, 23 U. PA. J. BUS. L. 740 (2021); Thomas M. Madden & Gerlinde Berger-Walliser, *Making Sense of ESG with the SEC*, 25 U. PA. J. BUS. L. 927 (2023).

11 *See* Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407 (2018); Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645 (2019); Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary*

ESG disclosure to investors,[12] and the informational needs of non-investors.[13]

The above-referenced scholarship, while insightful and influential, largely overlooks an important dimension of ESG. Capital markets and ESG issues are inherently global in nature, and ESG disclosure regulation, of course, is not an exclusively American phenomenon. Regulators across the world have addressed ESG issues through disclosure rules that pre-date the SEC's engagement.[14] Globally, ESG disclosure regulation is fragmented, with points of convergence and divergence between different jurisdictions.[15] The fruits of individual countries' regulatory initiatives are not self-contained, however. Rather, ESG spheres of domestically-defined regulatory authority overlap and interact with each other globally.[16] This overlap results, in part, from the application of domestic regulation to activities primarily conducted by foreign persons (and often outside the territory of the country), which impinges on territorial sovereignty, a fundamental principle of international law.[17]

Accordingly, this Article examines the extraterritorial

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and Mandatory ESG Disclosure, 101 TEXAS L. REV. 273 (2022).

12 *See* Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*. 41 J. CORP. L. 647 (2016); Paul Brest, Ronald J. Gilson & Mark A. Wolfson, *How Investors Can (and Can't) Create Social Value*, 44 J. J. CORP. L. 205 (2018); *see also* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 24–26 (2020) (noting investor demands for climate risk disclosure).

13 *See* Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. REG. 499 (2020).

14 *See* Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT'L L. 249 (2019).

15 *See* Adam Sulkowski & Ruth Jebe, *Evolving ESG Reporting Governance, Regime Theory, and Proactive Law: Predictions and Strategies*, 59 AM. BUS. L.J. 449, 477–83 (2022).

16 *See* Nico Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance*, 33 EURO. J. INT'L L. 481, 495 (2022) [hereinafter Krisch, *Jurisdiction Unbound*].

17 *See* Austen L. Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. REV. 1099, 1100 (2011) (characterizing territoriality as "a cornerstone of an international system organized around Westphalian concepts of state sovereignty, formal equality and nonintervention"); Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1311 (2014) (observing that "any extraterritorial exercise of force inside another state infringes that state's jurisdictional monopoly of force within its borders").

application of ESG regulation, focusing on the legal mechanisms through which governments regulate disclosure outside of their own borders—a form of transnational regulation that I refer to as "ESG extraterritoriality."[18] Questions about the appropriate use of extraterritoriality have figured centrally in numerous areas of cross-border economic regulation, including antitrust,[19] anti-corruption,[20] securities fraud,[21] derivatives,[22] corporate human rights due diligence,[23] and economic sanctions.[24]

Why is extraterritoriality important in the context of ESG regulation? The European Union (EU), in particular, has embraced ESG disclosure by companies and investors as a foundation of its efforts to promote sustainability.[25] By contrast, at the time of the writing of this Article, the status of the United States' ESG disclosure regime is highly uncertain, with starkly different views on the relevance of ESG issues to securities disclosure and the need for tailored rules.[26] In any case, the United States' approach

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18 *See* Chris Brummer, *Territoriality as a Regulatory Technique: Notes from the Financial Crisis*, 79 U. CIN L. REV. 499, 500–01 (2010) [hereinafter Brummer, *Territoriality as Regulatory Technique*] (noting the relative lack of scholarly attention on the mechanics of regulatory power beyond national borders in the context of global finance).

19 *See* Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMPAR. L. 631, 635 (2009) [hereinafter Buxbaum, *Territory, Territoriality*].

20 *See* Joel Slawotsky, *U.S. Extraterritorial Jurisdiction in an Age of International Economic Strategic Competition*, 52 GEO. J. INT'L L. 427, 427 (2021).

21 *See* Yuliya Guseva, *Cross-Listings and the New World of International Capital: Another Look at the Efficiency and Extraterritoriality of Securities Law*, 44 GEO. J. INT'L L. 411 (2013).

22 *See* John C. Coffee, Jr., *Extraterritorial Financial Regulation: Why E.T. Can't Come Home*, 99 CORNELL L. REV. 1259, 1261 (2014).

23 *See* Luca Enriques & Matteo Gatti, *The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention*, OXFORD BUS. L. BLOG (Apr. 21, 2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate [https://perma.cc/K73U-E8CF]; Rachel Chambers & David Birchall, *How European Human Rights Law Will Reshape U.S. Business*, 20 HASTINGS BUS. L.J. 3, 21 (2024) (addressing the EU Corporate Sustainability Due Diligence Directive).

24 *See* Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*, 33 ARIZ. J. INT'L & COMPAR. L. 631, 632 (2016).

25 *See infra* Part III.A.

26 *Compare* Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 COLUM. BUS. L. REV.

to regulating ESG disclosure will be distinct from the EU and other major capital markets.[27]

What I posit is that the "clash of jurisdictions" between the United States, the EU, and other major capital markets regulators resulting from ESG extraterritoriality will have uncertain implications for the effectiveness of ESG disclosure regulation.[28] Moreover, through the prism of ESG regulation, I seek to shed light on the use of extraterritoriality by regulators to address global phenomena such as climate change, human rights, and data.[29] ESG extraterritoriality operationalizes competing conceptions of ESG across global capital markets.[30] The overlap and conflict evident in the United States and the EU's respective approaches to ESG disclosure highlight the role of state power in international

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840, 871–76 (2021) (advising against the SEC developing ESG disclosure rules) *with* Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1455 (2021) (arguing that ESG disclosure rules are material and consistent with the SEC's mission) *and* George S. Georgiev, *The Market-Essential Role of Corporate Climate Disclosure*, 56 U.C. DAVIS L. REV. 2105, 2105 (2023) (highlighting the justification for mandatory climate disclosure on the basis of market efficiency).

On March 6, 2024, the SEC adopted final rules governing climate-related disclosure. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11275 & 34-99678 (Mar. 6, 2024), https://www.sec.gov/files/rules/final/2024/33-11275.pdf [hereinafter SEC Climate Risk Disclosure Final Rules]. Legal challenges to the final rules are expected to be broad and prolonged. *See* Declan Harty, *SEC Signs Off on Landmark Climate Rule as Legal Backlash Looms*, POLITICO (Mar. 6, 2024), https://www.politico.com/news/2024/03/06/sec-set-to-launch-landmark-climate-rule-sparking-legal-blitz-00145323.

27 Harper Ho & Park, *supra* note 14, at 290–315, 324–28 (comparing ESG disclosure regimes in the United States with Brazil, the People's Republic of China, the EU, Hong Kong, South Africa, and the United Kingdom).

28 *See infra* Part III.B. *See also* Cedric Ryngaert, *International Jurisdiction Law*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW 16 (Austen Parrish & Cedric Ryngaert eds., 2023).

29 *See* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 841–56 (2009) [hereinafter Parrish, *Reclaiming International Law*] (tracing the rise of extraterritoriality). *See also* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 400–06 (2005) [hereinafter Krisch, *Times of Hegemony*] (characterizing the use of domestic law by powerful states as a turn away from international law).

30 *See* Krisch, *Jurisdiction Unbound*, *supra* note 16, at 495–503 (describing jurisdictional assemblage).

economic law.[31]

The remainder of this Article is organized as follows. Part II explains how and why governments project their regulatory authority extraterritorially. Part III analyzes the points of jurisdictional overlap and conflict between ESG disclosure regulation by the SEC and the European Union and addresses some implications for ESG disclosure. Part IV concludes with brief contextual observations.

II. Why and How do Countries Regulate Extraterritorially

Globally, ESG disclosure is governed by an amalgamation of domestic regulatory rules, international soft law, and private standards. Notwithstanding the prominence of ESG standards, powerful countries with large capital markets, such as the United States, play a central role in ESG disclosure. To provide context to ESG extraterritoriality, the following discussion considers the incentives for countries to regulate extraterritorially and the methods with which they do so.

A. Rationales for Extraterritorial Regulation

Given the pejorative connotations of extraterritoriality as a contravention of international law, why do countries so readily employ it?[32] In the context of inherently cross-border phenomena, such as climate change, one oft-cited reason for domestic law and private standards is the limited scope of international treaties vis-à-vis private parties, such as multinational corporations.[33] Indeed, extraterritoriality is justified as a means to enforce domestic policy objectives by addressing foreign conduct that is deemed to have

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31 *See, e.g.,* Gregory Shaffer, *Theorizing Transnational Legal Ordering,* 12 ANN. REV. L. SOC. SCI. 221, 227–30 (2016) (referencing transnational law scholarship that addresses state power in the development and application of international legal rules).

32 *See, e.g.,* Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239, 245 (2019) [hereinafter Verdier, *New Financial Extraterritoriality*] ("'Extraterritoriality' is an ambiguous term, one often laden with pejorative connotations."); Cedric Ryngaert & Austen Parrish, *Introduction to the Research Handbook on Extraterritoriality in International Law*, *in* RESEARCH HANDBOOK, *supra* note 28, at 6 (observing that "extraterritoriality has become an intensely political notion, which is used and abused in law to promote or oppose particular normative projects").

33 *See generally* Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability,* 52 AM. BUS. L.J. 255, 259–66 (2015).

harmful effects domestically.[34] Certain commentators have suggested that the deployment of domestic economic regulation serves as a means to fulfill a country's own vision of addressing a global issue, such as human rights or privacy.[35] Extraterritorial regulation can also privilege and protect domestic firms relative to their foreign competitors. Countries have varying capacities to deploy regulatory power globally, with the United States and the EU being the most motivated and capable.[36] These countries, along with emerging powers such as China, compete with each other for regulatory authority over companies, ratcheting up cross-border regulatory intervention in order to ensure that their rules dominate.[37]

B. Tools of Extraterritorial Regulation

Extraterritorial regulation is defined by the specific rationale offered to justify its use.[38] In order to analyze the manner in which ESG extraterritoriality is used, we must consider how its means relate to its ends through the lens of international law. Extraterritorial regulation may be simply defined as a counterpoint to territoriality—that is, as a state's jurisdiction to prescribe (i.e., exercise its lawmaking authority) over conduct occurring outside

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34 *See* Verdier, *New Financial Extraterritoriality*, *supra* note 32, at 302–03; Krisch, *Times of Hegemony*, *supra* note 29, at 402–03; *see also* John Armour, Luca Enriques & Thom Wetzer, *Mandatory Corporate Climate Disclosures: Now, But How?*, 2021 COLUM. BUS. L. REV. 1085, 1122–24 (2021) (noting the positive externalities of climate disclosures on corporate conduct).

35 *See generally* Krisch, *Jurisdiction Unbound, supra* note 16, at 506. *See* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020) (presenting the Brussels Effect); *see also* Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. INT'L L. & BUS. 87, 102–05 (2014) [hereinafter Park, *Targeted Social Transparency*] (addressing justifications for social disclosure regulation).

36 *See* Krisch, *Jurisdiction Unbound*, *supra* note 16, at 505. The application of extraterritorial jurisdiction by domestic regulators has long been associated with the size of the U.S. financial markets and the outsize influence of the SEC and other U.S. financial regulators. Brummer, *Territoriality as Regulatory Technique*, *supra* note 18, at 512.

37 *See* Slawotsky, *supra* note 20 (characterizing extraterritorial application of the U.S. Foreign Corrupt Practices Act (FCPA) as a legal tool in the U.S.-China rivalry).

38 Buxbaum, *Territory, Territoriality*, *supra* note 19, at 635 ("'Territoriality' and 'extraterritoriality,' though, are legal constructs. They are claims of authority, or of resistance to authority, that are made by particular actors with particular substantive interests to promote.").

of its territory.[39] Customary international law recognizes four principles on which extraterritorial prescriptive jurisdiction is permitted: nationality (active personality), passive personality (i.e., the nationality of the victim), protective, and universality.[40] In practice, however, extraterritoriality evades readily definable and consistently applied rules.[41]

Given the centrality of capital markets to ESG disclosure, the unique characteristics of finance are appropriate to consider.[42] Financial firms can move their assets and operations relatively easily in order to evade regulation.[43] Likewise, financial flows cross national borders with ease.[44] Financial regulators have an array of regulatory tools that can be employed extraterritorially in different ways.[45]

One set of tools employed by financial regulators does not rest on extraterritoriality *per se* but rather regulates financial activities within the jurisdiction through objective territorial principles.[46] Foreign firms, while treated no differently than their domestic counterparts, may be subject to rules in multiple jurisdictions, including in their home market. However, facially territorial regulation may be extraterritorial in effect depending on the nature and the magnitude of the domestic conduct required to trigger it. That is, foreign conduct may be subject to regulation based on relatively peripheral or inconsequential conduct with the regulating country[47] or on the effects of the foreign conduct on the

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39 Parrish, *Reclaiming International Law*, *supra* note 29, at 842–43.

40 Ryngaert, *supra* note 28, at 14. The effects principle (i.e., jurisdiction over activities that have a substantial effect on the state) is also commonly viewed as separate grounds for extraterritoriality. *See* RESTATEMENT (FOURTH): FOREIGN RELATIONS LAW OF THE UNITED STATES § 408–413 (2018); *but see* Ryngaert, *supra* note 28, at 15–16 (characterizing effects as an expansion of territoriality rather than a separate principle).

41 *See* Colangelo, supra note 17, at 1312–14.

42 *See* Stephen Kim Park, *Guarding the Guardians: The Case for Regulating State-Owned Financial Entities in Global Finance*, 16 U. PA. J. BUS. L. 739, 748–59 (2014) (providing an overview of extraterritorial financial regulation).

43 Coffee, *supra* note 22, at 1260.

44 *See* Park, *Legal Strategy Disrupted*, *supra* note 3, at 734 (noting the prevalence of regulatory arbitrage in global financial markets).

45 *See generally* Krisch, *Jurisdiction Unbound*, *supra* note 16, at 489–90 (summarizing the expansive use of jurisdictional claims in financial regulation).

46 Brummer, *Territoriality as Regulatory Technique*, *supra* note 18, at 502–04 (describing domestic territoriality).

47 *See* CHRIS BRUMMER, SOFT LAW AND THE FINANCIAL SYSTEM 38 (2012). *See also*

regulating country.[48] On functionally similar but doctrinally distinct grounds, extraterritoriality may be justified as necessary to protect national interests from the harmful spillovers of foreign conduct.[49]

Another regulatory approach is territorial in application but deliberately extraterritorial in effect. For example, a regulation may require compliance by the foreign parent of any company (such as a domestically incorporated subsidiary) that operates in the regulating country.[50]

III. Extraterritoriality and the Tangled Lines of ESG Disclosure Regulation

As addressed in Part II, extraterritorial jurisdiction can be readily deployed by regulators to make domestic law effectively global in scope. How is extraterritoriality manifested in ESG disclosure regulation and what are its implications? With these questions in mind, the following discussion analyzes ESG disclosure rules developed by the United States and the EU.

A. The Application of ESG Extraterritoriality

Regulatory efforts in the United States and the European Union have revolved around reform of disclosure rules in capital markets.[51] While ESG regulation encompasses strategies that are not directly based on disclosure (such as measures to identify and classify economic activities, facilitate investor stewardship, clarify fiduciary duties, expand stakeholder rights, and regulate intermediary service providers such as ESG ratings and other data providers), debates about ESG reform have become synonymous

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RESTATEMENT (FOURTH), *supra* note 40, at §407 (stating the requirement of a genuine connection between the state and the regulated party under customary international law).

48 *See* BRUMMER, *supra* note 47, at 38; *see also* Ryngaert, *supra* note 28, at 16 (referencing the territorial effects doctrine).

49 *See* Verdier, *New Financial Extraterritoriality*, *supra* note 32, at 303; *see also* Ryngaert, *supra* note 28, at 21–22 (defining the protective principle).

50 *See generally* BRUMMER, *supra* note 47, at 35–36.

51 *See* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 286–301 (2022) [hereinafter Harper Ho, *Modernizing ESG Disclosure*]. Critiques of disclosure as a means of facilitating sustainable business conduct are not addressed in this Article. *See, e.g.,* Bruner, *supra* note 4, at 1253–59 (critiquing disclosure-based strategies).

with disclosure reform.[52] Globally, ESG disclosure regulation in the context of financial markets addresses disclosure by companies (*qua* issuers of securities), financial market participants (typically, an investment fund that buys and sells securities and manages assets on behalf of beneficial owners), benchmarks, and sellers of ESG financial products such as green bonds.

Whenever rules promulgated by multiple regulators address the same conduct, there is jurisdictional overlap.[53] If these respective rules differ from each other, then there is a potential jurisdictional conflict.[54] Jurisdictional overlap and conflict are evident in the United States and the EU's respective rules governing mandatory ESG disclosure by companies.[55]

Jurisdictional overlap arises from the regulation of multinational corporations with varying degrees of presence in foreign markets. The SEC exercises jurisdiction over foreign companies that are subject to federal securities laws. Foreign private issuers (FPIs) are subject to securities disclosure requirements under the Securities Exchange Act of 1934 and the Securities Act of 1933.[56] FPIs are subject to less rigorous

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52 *See* Iris H-Y Chiu, *Regulating Sustainable Finance in Capital Markets: A Perspective from Socially Embedded Decentered Regulation*, 84 L. & CONTEMP. PROBS. 75 (2021) (distinguishing and critiquing regulation of investment funds and companies).

53 *See* Krisch, *Jurisdiction Unbound*, *supra* note 16, at 485–86.

54 Ryngaert, *supra* note 28, at 13.

55 Another manifestation of potential ESG extraterritoriality is in the context of disclosure requirements on fund managers and financial products regarding their ESG investment practices. In May 2022, the SEC proposed new rules to regulate ESG disclosure by investment advisers and investment companies pursuant to the Investment Advisers Act of 1940 and the Investment Company Act of 1940. *See* Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279). The EU's Sustainable Finance Disclosure Regulation (SFDR) regulates a broader range of financial market participants and disclosures. *See* Laura Ferrell et. al., *Proposed ESG Disclosure Requirements for Investment Advisers and Investment Companies*, HARV. L. SCH. FORUM CORP. GOV. (June 20, 2022), https://corpgov.law.harvard.edu/2022/06/20/proposed-esg-disclosure-requirements-for-investment-advisers-and-investment-companies/ [https://perma.cc/NCY8-XWHN]; *see generally* Danny Busch, *EU Sustainable Finance Disclosure Regulation,* 18 CAP. MKTS. L.J. 303 (2023).

56 An FPI is a foreign issuer other than a foreign government that is incorporated or organized under the laws of a foreign country subject to certain exceptions. 17 C.F.R. § 230.405 (2020).

disclosure requirements than domestic firms.[57] The extraterritorial reach of federal securities law was substantially circumscribed by the United States Supreme Court in 2010 when it limited liability for securities fraud to domestically-listed securities and domestic transactions.[58] The SEC Climate Risk Disclosure Final Rules expressly cover both domestic issuers and FPIs.[59]

The EU's regulation of ESG disclosure is part of a broad-based framework of legal measures to implement the EU Sustainable Finance Action Plan and the European Green Deal.[60] The fulcrum of the EU's sustainable finance framework is the Taxonomy, which requires companies to classify whether an economic activity is sustainable based on six environmental objectives.[61] The Corporate Sustainability Reporting Directive (CSRD), which entered into force in 2023, governs the disclosure of ESG information.[62] Companies subject to the CSRD must disclose their alignment with the Taxonomy as well as other ESG issues in accordance with the European Sustainability Reporting Standards (ESRS).[63] Non-EU companies with securities registered on an EU-

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57 Yuliya Guseva, *Extraterritoriality of Securities Law Redux: Litigation Five Years After* Morrison v. National Australia Bank, 2017 COLUM. BUS. L. REV. 199, 211–12 (2017) (noting differences).

58 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010). *But see* Slawotsky, *supra* note 20, at 440–41 (noting that the pre-*Morrison* conduct-and-effect test for extraterritoriality applied pursuant to Section 929P(b) of the Dodd-Frank Act under the Tenth Circuit's 2019 decision in *Scoville v. SEC*).

59 *See* SEC Climate Risk Disclosure Final Rules, *supra* note 26, at 33.

60 *See* Veerle Colaert, *The Changing Nature of Financial Regulation. Sustainable Finance as a New EU Policy Objective*, 59 COMMON MKT. L. REV. 1669, 1677–78 (2022); *see also* EU Sustainable Finance Overview, *supra* note 5 (identifying six building blocks of the EU sustainable finance framework.

61 *See* Commission Regulation 2020/852, of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, 2020 O.J. (L 198) 13, 15; *see also* Dirk A. Zetzsche & Linn Anker-Sørensen, *Regulating Sustainable Finance in the Dark*, 23 EURO. BUS. ORG. L. REV. 47, 50, 72 (2022) (noting the centrality of the Taxonomy and the inter-connection between the Taxonomy and ESG disclosure rules).

62 The CSRD revises and expands the EU's Non-Financial Reporting Directive (NFRD). Directive 2022/2464, of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, 2022 O.J. (L 332) 15 [hereinafter CSRD].

63 *See* Commission Regulation 2023/2772, of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, 2023 O.J. (L 22.12.2023) 284 [hereinafter ESRS]; *see*

regulated market,[64] as well as large EU subsidiaries of non-EU companies are required to disclose under the CSRD.[65] In addition, large non-EU companies that exceed a revenue threshold and have one or more EU subsidiaries or branches subject to the CSRD are required to disclose under the CSRD on a consolidated basis.[66]

Jurisdictional conflict arises from divergence between the United States and the EU in their respective approaches to ESG disclosure. This Transatlantic divide reflects distinct social norms and pre-existing legal rules apart from ESG-specific laws and regulations.[67] Observers have noted the number and magnitude of points of divergence between the United States and the EU.[68] In

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also *Corporate sustainability reporting*, EUROPEAN COMM'N., https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en [https://perma.cc/J43M-RCUG]. In February 2024, the EU postponed the adoption of additional sector-specific standards under the ESRS. *See Daily News 08/02/2024: Commission welcomes agreement on postponing adoption deadlines for certain European Sustainability Reporting Standards*, EUROPEAN COMM'N. (Feb. 8, 2024), https://ec.europa.eu/commission/presscorner/detail/en/mex_24_707 [https://perma.cc/9PKA-TTJC].

64 The CSRD applies to EU subsidiaries of non-EU companies listed on EU regulated markets. There is an exemption for very small companies (i.e., micro-undertakings as defined by EU accounting rules). *See* CSRD, *supra* note 62, para. 17; *see also* Counsel Directive 13/34, art. 3, 2013 O.J. (L 182) 1 (EU) (defining a micro-undertaking).

65 This applies to companies that qualify as a large undertaking, including non-EU listed companies. *See* CSRD, *supra* note 62, para. 18*; see also* Counsel Directive 13/34, art. 3, 2014 O.J. (l 182) 4 (EU) (defining a large undertaking).

66 In effect, this will require ESG disclosures on the company's global activities at the enterprise or holding company level, including those attributable to non-EU subsidiaries. Disclosure under this reporting requirement will be subject to a separate reporting standard yet to be established. *See* CSRD, *supra* note 62, para. 20.

67 Virginia Harper Ho, *Non-Financial Reporting & Corporate Governance: Explaining American Divergence & Its Implications for Disclosure Reform*, 10 J. ACCT., ECON. & LAW 1, 9 (2020).

68 *See, e.g.,* Thibault Meynier, Sarah H. Mishkin & Matthew Triggs, *EU Finalizes ESG Reporting Rules with International Impacts*, HARV. L. SCH. FORUM CORP. GOV. (Jan. 30, 2023), https://corpgov.law.harvard.edu/2023/01/30/eu-finalizes-esg-reporting-rules-with-international-impacts/ [https://perma.cc/4268-9FXD] ("[P]roposals [by U.S. and U.K. regulators] diverge substantially from the CSRD[.]"); Peter Pears, Tim Baines & Oliver Williams, *The EU Corporate Sustainability Reporting Directive - What Non-EU Companies Should Know*, HARV. L. SCH. FORUM CORP. GOV. (Sept. 17, 2023), https://corpgov.law.harvard.edu/2023/09/17/the-eu-corporate-sustainability-reporting-directive-what-non-eu-companies-should-know/ [https://perma.cc/3S5Q-TBQ2] ("The CSRD goes far beyond the SEC's proposed rules[.]").

contrast to the EU's Taxonomy, the SEC lacks a classification system to contextualize firm-specific ESG information.[69] The topical scope of the U.S. and EU disclosure requirements is different. The SEC Climate Risk Disclosure Final Rules focus exclusively on climate risk, reflecting the United States' long-standing targeted and siloed approach to ESG-related disclosure.[70] The ESRS covers ten topical areas addressing environmental, social, and governance issues.[71] While both the SEC Climate Risk Disclosure Final Rules and the CSRD apply a disclosure threshold based on materiality, their definitions fundamentally differ. The SEC Climate Risk Disclosure Final Rules affirm a single materiality framework based on disclosure of financial risks to the company.[72] The EU has embraced double materiality, which seeks to capture risks that the company imposes on others, including non-investor stakeholders.[73] To cite one example of the effects of different materiality lenses, the SEC Climate Risk Disclosure Final Rules require disclosure of Scope 1 and 2 greenhouse gas emissions (i.e., direct emissions and indirect emissions largely from the generation of purchased or acquired electricity consumed by the issuer's operations) only if financially material to the company whereas the CSRD applies double materiality.[74]

B. Implications of ESG Extraterritoriality

Multinational corporations, of course, are accustomed to

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69 Virginia Harper Ho, *Climate Disclosure Line-Drawing & Securities Regulation*, 56 U.C. DAVIS L. REV. 1875, 1882–83, 1916 n. 176 (2023).

70 *See* Harper Ho & Park, *supra* note 14, at 292; *see also* Lisa Benjamin, *The SEC and Climate Risk*, 40 UCLA J. ENVTL L. & POL'Y 1, 21–27 (2022) (describing the SEC's 2010 guidance on climate change and the Dodd-Frank conflict minerals rule); Park, *Targeted Social Transparency, supra note 35, at* 108–13 (describing the Iran Threat Reduction and Syria Human Rights Act (ITRA) human rights disclosure rules and comparing them to the conflict minerals rule).

71 ESRS, *supra* note 63, ann. I.

72 SEC Climate Risk Disclosure Final Rules, *supra* note 26, at 105 (citing 17 C.F.R. § 240.12b–2 and *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)).

73 *See* ESRS, *supra* note 63, paras. 37, 43 (distinguishing impact materiality from financial materiality and providing that "[a] sustainability matter is material from an impact perspective when it pertains to the undertaking's material actual or potential, positive or negative impacts on people or the environment over the short-, medium- or long-term").

74 *See* SEC Climate Risk Disclosure Final Rules, *supra* note 26, at 244–45; ESRS, *supra* note 63, para. 44(d).

complying with laws in the jurisdictions in which they do business. What sort of territorial hook applied by a regulator to trigger regulatory authority is left to the regulators and the laws of the jurisdiction.[75] The number of companies subject to a given regulation, including foreign parent companies and their foreign subsidiaries, can be effectively expanded (or narrowed) by toggling the criteria for its territorial reach.[76] However, ESG extraterritoriality raises several concerns worth addressing.

Jurisdictional overlap may increase compliance costs for firms that operate globally.[77] In the context of ESG disclosure, specifically, the sheer number of foreign firms that are subject to the CSRD is notable.[78] These companies will require greater investment in internal controls and auditing, external legal and audit services, and other related measures to comply with regulatory requirements across jurisdictions.[79] For example, the difficulty that companies encounter in measuring and disclosing their greenhouse gas emissions across their global supply chains may be exacerbated by jurisdictional conflicts.[80] One way, of

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75 *See* discussion *supra* Part II.B (referencing facially territorial regulation that may be extraterritorial in effect); *see also* Ryngaert, *supra* note 28, at 16.

76 *See* Armour, Enriques & Wetzer, *supra* note 34, at 1131 (suggesting that domestic climate disclosure rules should be applied to any company doing business in the jurisdiction).

77 *See* Emma Bichet, Jack Eastwood & Michael Mencher, *EU's New ESG Reporting Rules Will Apply to Many US Issuers*, HARV. L. SCH. FORUM CORP. GOV. (Nov. 23, 2022), https://corpgov.law.harvard.edu/2022/11/23/eus-new-esg-reporting-rules-will-apply-to-many-us-issuers/ [https://perma.cc/D4EN-PK7C]; *see also* Stephen Kim Park, *Social Responsibility Regulation and Its Challenges to Corporate Compliance*, 14 BROOK. J. CORP. FIN. & COM. L. 39, 47–48 (2019) (noting ESG compliance costs as an organizational barrier).

78 *See* Dieter Holger, *At Least 10,000 Foreign Companies to Be Hit by EU Sustainability Rules*, WALL ST. J. (Apr. 5, 2023), https://www.wsj.com/articles/at-least-10-000-foreign-companies-to-be-hit-by-eu-sustainability-rules-307a1406 [https://perma.cc/Z8QD-SNTU] (estimating over 10,000 companies will be subject to the CSRD).

79 *See id.* (noting that the process of developing compliance systems "will be a steeper learning curve for [U.S. companies that are unaccustomed to mandatory ESG disclosure requirements] and a more difficult task").

80 *See* Charlie Cibrario & Cynthia Hanawalt, *A Comparative Analysis of the SEC's Climate Disclosure Proposal,* COLUM. L. SCH. CLS BLUE SKY BLOG (Dec. 13, 2023), https://clsbluesky.law.columbia.edu/2023/12/13/a-comparative-analysis-of-the-secs-climate-disclosure-proposal/ [https://perma.cc/37SE-4DUF] (describing Sony's hypothetical disclosure compliance requirements as an EU company and a Japanese parent company under the CSRD as well as an SEC registered issuer and under U.S. state

course, that companies could seek to reduce compliance costs would be to harmonize firm practices globally.[81] Given the global nature of climate risk and capital markets, the ratcheting-up effect of ESG extraterritoriality may accelerate policymaking and regulatory reforms worldwide.[82]

Jurisdictional conflict may increase legal risk by reducing certainty on what constitutes compliance. A firm that inaccurately weighs the risks of non-compliance with the costs of compliance may run the risk of over-complying with disclosure requirements or under-complying with them.[83] The substantial differences between United States and EU disclosure rules may expose multinational firms to liability risk.[84] For example, companies that are subject to both the CSRD and U.S. securities law will need to assess how more detailed disclosure under the CSRD (such as Scope 3 emissions that are required to be disclosed by the CSRD but not the SEC Climate Risk Disclosure Final Rules) may lead to greater scrutiny and the basis for potential lawsuits under U.S. securities law, including shareholder class actions.[85]

Jurisdictional overlap may influence business decisionmaking in ways that are not intended by regulation. For example, a corporation with a subsidiary in the EU that is a small or medium size enterprise (and therefore subject to the CSRD's disclosure

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climate disclosure laws, such as California's laws enacted in 2023).

81 *See* BRUMMER, *supra* note 47, at 36 (describing de facto internationalization as a form of extraterritorial regulation).

82 Chiu et al., *supra* note 7, at 3.

83 *See* Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285, 307–11 (2017) (noting the challenges of over-compliance and under-compliance by firms).

84 Park, *Legal Strategy Disrupted*, *supra* note 3, at 735.

85 Raquel Fox, Simon Toms & Jeongu Gim, *The EU's New ESG Disclosure Rules Could Spark Securities Litigation in the US*, HARV. L. SCH. FORUM CORP. GOV. (Sept. 23, 2023), https://corpgov.law.harvard.edu/2023/09/23/the-eus-new-esg-disclosure-rules-could-spark-securities-litigation-in-the-us/ [https://perma.cc/9V95-KLAZ]; Subodh Mishra, *ESG as the Driving Factor in Multi-Country Class Action Cases,* HARV. L. SCH. FORUM CORP. GOV. (Oct. 7, 2021), https://corpgov.law.harvard.edu/2021/10/07/esg-as-the-driving-factor-in-multi-country-class-action-cases/ [https://perma.cc/TMS9-XSR4]. For financial institutions, liability risk is heightened insofar as they need to rely on the availability and reliability of data provided by their clients. *See* Laura Noonan, *Global Scope of EU's Greenwashing Crackdown Spooks Wall Street*, FIN. TIMES (Aug. 22, 2022), https://www.ft.com/content/084b3974-763f-4a96-866e-3acf29a9fd8c [https://perma.cc/6YUE-R3FN].

requirements for small and medium-sized undertakings) may choose to delist its securities from EU-regulated markets to avoid being subject to the CSRD. Furthermore, ESG disclosure requirements indirectly affect third parties that are not directly subject to a given regulator's rules.[86]

C. Responses to ESG Extraterritoriality

ESG extraterritoriality may be viewed as a compelling and necessary strategy to address environmental and social risks and achieve sustainable development.[87] It may be alternatively viewed as an objectionable means to impose a country's values on foreign firms.[88] As a matter of regulatory design, the costs and benefits of ESG extraterritoriality should consider the value of state sovereignty, the feasibility of global coordination to achieve domestic regulatory objectives, and the prevalence of regulatory arbitrage by multinational corporations. Regardless of one's view on justifications for ESG extraterritoriality, it is worth considering how jurisdictional overlap and conflict can be managed to improve global ESG disclosure rules.

Under domestic law, various legal doctrines limit extraterritorial prescriptive jurisdiction, such as the presumption against extraterritoriality in United States law.[89] However, in the

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86 One example is the collection of data on Scope 3 emissions by companies subject to the CSRD from foreign suppliers and customers.

87 Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 299–300 (2006) [hereinafter Buxbaum, *Transnational Regulatory Litigation*] (observing that jurisdictions may take different approaches to operationalizing shared norms); *see also* Kalin Anev Janse & Anu Bradford, *The Brussels Effect on Sustainable Finance*, PROJECT SYNDICATE (Apr. 26, 2021), https://www.project-syndicate.org/commentary/eu-sustainable-finance-taxonomy-brussels-effect-by-kalin-anev-janse-and-anu-bradford-2021-04 [https://perma.cc/7U3R-UHE7] (proposing that the EU can project its values regarding sustainable development through ESG regulation); Cibrario & Hanawalt, *supra* note 80 ("Citizens and future generations need courageous and incisive climate policy, regardless of whether and how they may be affected by financial investment strategies and returns. The CSRD is a tool built with that ambition. The U.S. should take stock.").

88 Buxbaum, *Transnational Regulatory Litigation, supra* note 87, at 302–03 (noting objections based on international legitimacy); *see also* Roza Nurgozhayeva & Dan W. Puchniak, *Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?* (ECGI, Law Working Paper No. 744/2023, Jan. 2024), https://www.ecgi.global/sites/default/files/working_papers/documents/corporatepurposebeyondborders_2.pdf [https://perma.cc/U5CQ-FKR5].

89 The presumption against extraterritoriality is a canon of statutory interpretation

context of finance generally and ESG in particular, these domestic limiting doctrines are conspicuously absent.[90] The global ESG legal ecosystem features a constellation of transnational standard-setting bodies, such as the Task Force on Climate-related Financial Disclosures (TCFD) and the International Sustainability Standards Board (ISSB), and private standard-setting organizations like the Global Reporting Initiative (GRI).[91] At first glance, the U.S. and EU ESG disclosure frameworks appear anchored in this ecosystem. The SEC Climate Risk Disclosure Final Rules acknowledge ISSB, GRI, and other third party standards, expressly stating that the TCFD "is an appropriate reference point for the final rules."[92] The EU's sustainable finance framework incorporates numerous third party standards by reference.[93] Like the SEC's rules, the CSRD is aligned with the TCFD.[94] However, the substantive differences between the United States and EU ESG disclosure regimes suggest that regulators will not harmonize to a global standard *sua sponte*.[95] Domestic financial regulators are

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that presumes a federal law, absent evidence of contrary Congressional intent, is intended to apply only within the United States. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2102–03 (2015) (characterizing the presumption as a principle of restraint and domestic application of international comity). Due consideration of the range of legal approaches that may apply to the extraterritorial reach of statutes and regulations addressing ESG is left for another opportunity. *See* Franklin A. Gevurtz, *Extraterritorial Application of Statutes and Regulations*, 70 AM. J. COMP. L. 347 (2022) (providing an overview of the approaches used by the United States to apply statutes and regulations extraterritorially).

90 Verdier, *New Financial Extraterritoriality*, *supra* note 32, at 241 (observing that "the post–financial crisis era seems a new golden age of U.S. extraterritoriality"); Krisch, *Jurisdiction Unbound*, *supra* note 16, at 490 (noting that extraterritorial financial regulation "does not seem to be seriously questioned in principle").

91 *See* Sulkowski & Jebe, *supra* note 15, at 455, 467.

92 SEC Climate Risk Disclosure Final Rules, *supra* note 26, at 25. *See also* Harper Ho, *Modernizing ESG Disclosure*, *supra* note 51, at 318–19 (suggesting that the SEC endorse the TCFD and align climate risk disclosure rules with the TCFD framework).

93 *See* CSRD, *supra* note 62, para. 43; *see also* Dirk A Zetzsche et al., *The EU Sustainable Finance Framework in Light of International Standards*, 25 J. INT'L ECON. L. 659, 664–65 (2022).

94 *See* CSRD, *supra* note 62, para. 30.

95 *See* SEC Climate Risk Disclosure Final Rules, *supra* note 26, at 26 (stating that "while the final rules use concepts from both TCFD and the GHG Protocol where appropriate, the rules diverge from both of those frameworks in certain respects where necessary for our markets and registrants and to achieve our specific investor protection and capital formation goals"); *see also* Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1430–31 (2013) (noting the

reluctant to cede power,[96] and international law lacks institutionalized enforcement mechanisms to compel them to.

Jurisdictional conflict does not preclude regulatory harmonization.[97] Harmonizing ESG disclosure rules, such as through a treaty-based multilateral regime, would ameliorate many of the adverse effects of ESG extraterritoriality.[98] Alternatively, a global governance-based framework could emerge through which financial regulators coordinate with each other and collaborate with private and multilateral standard-setting bodies to consult on the development of regulatory rules and governance standards, clarify ambiguities and gaps between them, and drive harmonization.[99] However, creating new global regimes of any sort is time-consuming and politically fraught, and there are good-faith reasons for states to retain distinct regulatory regimes and the ability to regulate cross-border financial activity.[100]

In acknowledgement of this reality, a narrower, more targeted approach based on mutual recognition is more plausible. Mutual recognition is based on recognition by two or more states of the adequacy of the other's regulation of an activity or institution as a substitute for its own.[101] For firms, it enables them to operate

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priority that financial regulators place on domestic autonomy, flexibility, and discretion).

96 Chris Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327, 330 (2010) (observing that "conflicting regulatory philosophies of national authorities, differing costs of adjusting to foreign regulatory standards, and competition among financial centers for securities transactions" are disincentives to international coordination and cooperation).

97 *See* Virginia Harper Ho, *Beyond Transplant: A Network Innovation Model of Transnational Regulatory Change*, 71 AM. J. COMP. L. (forthcoming), at 37–38, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4070152 [https://perma.cc/9CFG-NCUE] (proposing a public and private network-based approach).

98 *See* Coffee, *supra* note 22, at 1265–70 (proposing a mini-lateral approach revolving around the U.S. and the EU).

99 *See* Stephen Kim Park, *Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution*, 54 STAN. J. INT'L L. 1, 38–46 (2018) (proposing a hybrid regulatory approach to sustainable finance that engages with private standards); *see also* Edward F. Greene & Ilona Potiha, *Issues in the Extraterritorial Application of Dodd–Frank's Derivatives and Clearing Rules, The Impact on Global Markets and the Inevitability of Cross-Border and US Domestic Coordination*, 8 CAP. MKTS. L.J. 338, 388–91 (2013) (proposing that the FSB serve as an international forum for dialogue and standard-setting for derivatives).

100 *See* Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT'L L.J. 55, 64 (2011) [hereinafter Verdier, *Mutual Recognition*].

101 *Id.* at 63. In financial regulation, substituted compliance constitutes a

globally without being subject to some, or all, of a host state's regulatory requirements.[102] For regulators, mutual recognition constitutes a cooperative and institutionalized form of extraterritoriality.[103] By determining whether another state's regulation is equivalent to its own, a regulator has the autonomy to balance its objectives in exercising extraterritorial authority with the costs of foreign regulators doing the same. The ability of states to engage in regulatory competition is preserved, and opportunities for welfare-enhancing reciprocal bargains between states are created.[104]

A commitment to mutual recognition is evident, to varying and uncertain extents, in ESG disclosure rules developed by the United States and the EU. While the SEC's proposed rules solicited input on it, the SEC chose to defer further consideration in the SEC Climate Risk Disclosure Final Rules.[105] The CSRD exempts foreign entities that are subject to ESG disclosure requirements deemed equivalent to the CSRD.[106] However, the process and criteria on which mutual recognition would be granted by the European Commission are unknown.[107] Moreover, given the

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determination by a regulator whereby compliance with a foreign regulation will satisfy a domestic regulatory requirement so long as the regulator has determined that the foreign requirement is equivalent or comparable to the corresponding domestic one. Greene & Potiha, *supra* note 99, at 384–85.

102 *See* Verdier, *Mutual Recognition*, *supra* note 100, at 57.

103 Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 LAW & CONTEMP. PROBS. 263 (2005).

104 Verdier, *Mutual Recognition*, *supra* note 100, at 66.

105 *Compare* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 FED. REG. 21,334, 21,409 (Apr. 11, 2022) ("If we adopt an alternative reporting provision, should it be a mutual recognition system . . . ?") *with* SEC Climate Risk Disclosure Final Rules, *supra* note 26 at 568–69 ("[W]e are not adopting substituted compliance at this time . . . The Commission may consider such accommodations in the future depending on developments in the international climate reporting practices and our experience with disclosures under the final rules.").

106 CSRD, *supra* note 62, para. 20. EU subsidiaries of foreign parent companies, which are not listed on an EU regulated market, are exempt, subject to compliance with another ESG disclosure framework "in a manner equivalent to [the ESRS], as determined in accordance with an implementing act on the equivalence of sustainability reporting standards." *Id.* at para. 25.

107 Kolja Stehl, Leonard Ng & Matt Feehily, *EU Corporate Sustainability Reporting Directive—What Do Companies Need to Know*, HARV. L. SCH. FORUM CORP. GOV. (Aug. 23, 2022), https://deloitte.wsj.com/sustainable-business/new-eu-sustainability-reporting-

divergence between the CSRD and the SEC's less stringent and narrower rules, it is highly questionable whether the EU would grant equivalency to U.S. rules. To overcome the challenge of determining equivalence, international standards, such as principles developed by the International Organization of Securities Commissions (IOSCO), may provide a template for regulators.[108] Alternatively, the ISSB could be empowered to determine equivalency in accordance with its disclosure framework. For regulators, alignment with international standards through a bilateral mutual recognition arrangement may be preferable to home country firms being subject to regulatory requirements imposed by foreign regulators.[109]

IV. Conclusion

The regulation of ESG disclosure serves as a vehicle with which policy preferences can be carried out through markets. ESG extraterritoriality, as exercised by powerful states and financial regulators, is a means for countries to export and consolidate their policy preferences. Extraterritoriality also sheds light on a perpetual question in international law about the appropriate limits on state power through prescriptive jurisdiction. Embedded within this Article's analysis of the regulatory rules and institutional design of ESG disclosure is a normative question: what *should* be the prerogative of domestic regulators over global issues concerning business and society such as climate change? Before considering whether and how a global standard for ESG disclosure could be developed, it is worth considering whether the benefits of a multiplicity of national standards to powerful states—each

rules-how-impacted-us-companies-can-prepare-01675110236 [https://perma.cc/ANV4-F6SC].

108 *See* Verdier, *Mutual Recognition*, *supra* note 100, at 93–94. IOSCO, a network of national securities regulators, has addressed ESG disclosure in the context of its engagement on sustainable finance. *See* IOSCO, Report on Sustainability-related Issuer Disclosures, FR04/21 (June 2021), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD678.pdf [https://perma.cc/UD3L-8CCH].

109 *See* Lamar Johnson, *Gensler: EU regulations Would Take Precedence Without SEC Climate Rule*, ESG DIVE (Dec. 8, 2023), https://www.esgdive.com/news/gensler-eu-regulations-would-apply-without-sec-climate-disclosure-rule-csrd/702029/ [https://perma.cc/9YT7-QJ2U] (reporting on comments by SEC Chair Gary Gensler warning that U.S. companies would be subject to EU climate disclosure rules in the absence of SEC regulation).

reflecting a distinct set of social values and economic objectives—outweigh the costs of jurisdictional conflict. This Article sheds light on this narrow but timely and important set of questions.