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The Global South in Comparative Corporate Governance

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Abstract

This chapter situates the Global South in current debates on comparative corporate governance, with a special focus on the “BICS” (Brazil, India, China, and South Africa). The BICS now boast higher levels of stock market capitalization as a percentage to GDP than the four largest Global North economies, and their firms are also increasingly integrated into Global North markets. However, traditional views on corporate governance in the Global South have either assimilated the South into Global North categories (such as legal families) or have had a narrow focus on failures in legal transplantation or in ensuring investor protection. New ways of thinking about the Global South are emerging, however. Those have identified institutional innovations and adaptations in corporate laws in the Global South that account for local realities, especially in incorporating concerns about stakeholder protections and inequality. Global South legal systems are also increasingly a prominent driver of corporate law and governance trends around the world. While in earlier decades Global South jurisdictions sought to mobilize the United Nations (UN) to regulate multinational corporations, more recently the UN has sought to mobilize corporations to mitigate regulatory gaps in the Global South. Concerns about regulatory gaps in the Global South with respect to human rights and environmental protection have helped inspire global trends in corporate governance such as the ESG movement and human rights due diligence, thus contributing to the resurgence of stakeholderist proposals and reforms in the Global North. Interestingly, the growing interest in stakeholder-oriented approaches in the Global North can also be interpreted as a form of “reverse convergence” in comparative corporate governance, with various institutions of the Global North coming to resemble their Global South counterparts.

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The Global South in Comparative Corporate Governance

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Abstract

This chapter situates the Global South in current debates on comparative corporate governance, with a special focus on the "BICS" (Brazil, India, China, and South Africa). The BICS now boast higher levels of stock market capitalization as a percentage to GDP than the four largest Global North economies, and their firms are also increasingly integrated into Global North markets. However, traditional views on corporate governance in the Global South have either assimilated the South into Global North categories (such as legal families) or have had a narrow focus on failures in legal transplantation or in ensuring investor protection. New ways of thinking about the Global South are emerging, however. Those have identified institutional innovations and adaptations in corporate laws in the Global South that account for local realities, especially in incorporating concerns about stakeholder protections and inequality.

Global South legal systems are also increasingly a prominent driver of corporate law and governance trends around the world. While in earlier decades Global South jurisdictions sought to mobilize the United Nations (UN) to regulate multinational corporations, more recently the UN has sought to mobilize corporations to mitigate regulatory gaps in the Global South. Concerns about regulatory gaps in the Global South with respect to human rights and environmental protection have helped inspire global trends in corporate governance such as the ESG movement and human rights due diligence, thus contributing to the resurgence of stakeholderist proposals and reforms in the Global North. Interestingly, the growing interest in stakeholder-oriented approaches in the Global North can also be interpreted as a form of "reverse convergence" in comparative corporate governance, with various institutions of the Global North coming to resemble their Global South counterparts.

1. Introduction

Studies on comparative corporate law and governance, like their counterparts in other areas of law, have traditionally focused on a handful of usual suspects from the Global North, thereby neglecting most of the world. The Global South, here understood as a synonym for the developing world, was historically overlooked in this as in other areas of study. Since the late twentieth century, interest in "emerging markets"—including those of Brazil, China, and India—has soared in view of their growing economic clout. Nevertheless, the corporate law and governance arrangements of these

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and other developing jurisdictions have often been examined based on the particular lenses and metrics conceived in the Global North.

This chapter explores both traditional and novel views on corporate law and governance in the Global South. The traditional view is that corporate laws in the Global South are antiquated, failed transplants of Global North institutions, or plagued by enforcement problems. Weaknesses in related institutions, such as poor contract enforcement and capital market failures, push for adaptations in ownership structures and governance arrangements. The result is that family ownership, business groups, and state ownership are particularly prevalent in the Global South. This view retains much descriptive and explanatory power, but it offers an incomplete portrayal of corporate law and governance in the Global South.

This chapter also presents a distinct view that conceives the Global South as a relevant site of innovation and experimentation in corporate law and governance in light of its particular economic, social, and institutional context. Specifically, it examines how high inequality and issues of state capacity in addressing externalities and distribution through other areas of law have pushed corporate laws in the Global South to deviate from Global North standards in pursuing heterodox forms of stakeholder protection. Examples of such heterodox stakeholderism include the mitigation of limited liability for the benefit of workers, consumers, and the environment in Brazil, the adoption of mandatory corporate social responsibility spending in India, and the promotion of Black stock ownership and board representation and South Africa.

This chapter focuses primarily on the "BICS" countries—Brazil, India, China, and South Africa—as the jurisdictions that have attracted the lion's share of attention in the corporate governance literature. The BICS includes the top three Global South countries by GDP (2022) and South Africa, a famous locus of legal innovation in public law and a country with exceptionally large equity markets as a percentage of GDP. The discussion of institutional developments will deemphasize China vis-à-vis the other BICS, for the simple reason that, as an emerging superpower, it has received by far the most coverage and is the subject of a dedicated chapter in this volume.[1] While focusing on the larger Global South jurisdictions is justifiable (and mirrors the existing emphasis on large jurisdictions in comparative law of the Global North), it is important to realize that the experiences of Global South giants may not be representative of smaller and poorer jurisdictions, which unfortunately remain understudied.

In the last decades, the BICS have experienced both significant growth in local capital markets and greater integration with international stock markets. A growing share of IPOs in the United States now comes from BICS countries, especially China and Brazil. Corporate governance in the Global South is also increasingly a key driver of global corporate governance in other ways. Global South jurisdictions have both motivated the rise of international corporate law, and led to the demise of the World Bank's Doing Business rankings. Moreover, concerns about regulatory gaps in the Global

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[1] Curtis J. Milhaupt, Party State Inc.: Chinese State Capitalism 2.0 (in this volume).

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South with respect to human rights and environmental protection have helped propel global trends in corporate governance such as the ESG movement and human rights due diligence, thus contributing to the resurgence of stakeholderist proposals and reforms in the Global North. Interestingly, the growing interest in stakeholder-oriented approaches in the Global North can also be interpreted as a form of "reverse convergence" in comparative corporate governance, with institutions of the Global North coming to resemble their Global South counterparts.

The exposition is structured as follows. Section 2 examines the different meanings and contested contours of the Global South, and contrasts them with alternative labels such as developing countries and emerging markets. Section 3 compares the patterns of capital market development and ownership structures in the BICS countries to those of the four largest Global North economies. Section 4 explores traditional views of corporate governance in the Global South. Section 5 outlines a new view of the Global South as a site for legal innovations and adaptations that have anticipated the welfarist turn in the corporate governance debate in the Global North, although in distinct ways. Section 6 analyzes the role of regulatory competition and international corporate law in shaping corporate governance in the Global South, as well as probes how the Global South has helped shape global developments. Section 7 concludes by reflecting on how the incorporation of Global South jurisdictions into the study of comparative corporate governance enhances our understanding of the evolution and determinants of corporate law and governance around the world.

2. The Global South

This chapter refers to the term Global South as a broad category encompassing low and middle income countries. This use follows a general trend in the comparative literature of using Global South and Global North as the favored terminology to replace the use of the traditional dichotomy of developed and developing countries,[2] which carries a stronger hierarchical connotation. Such conception differs from that embraced by other works, which define the Global South as "not only, or even primarily, a place," but as a "specific epistemic, methodological, and institutional sensibility," which allows one to speak of the "South within the North" and vice-versa.[3]

Global South, in this chapter, also replaces the term "emerging markets" used in the first edition of this Handbook and in other works in comparative corporate governance.[4] The very label "emerging markets" was first crafted in the 1980s, not as a scholarly category, but simply as a marketing tool for a new index of foreign stocks—as

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[2] For other works embracing a similar use, see Peter B. Evans, From Embedded Autonomy to Counter-Hegemonic Globalization: A 60-Year Adventure in Exploring Comparative Political Economy, 49 Annu. Rev. Sociol. 1 (2023); Kevin E. Davis & Mariana Pargendler, Contract Law and Inequality, 107 Iowa L. Rev. 1485 (2022); Legal Heterodoxy in the Global South: Adapting Private Laws to Local Contexts (Kevin E. Davis & Mariana Pargendler eds., forthcoming Cambridge University Press).

[3] Philipp Dann, Michael Riegner & Maxim Bönnemann, The Southern Turn in Comparative Constitutional Law: An Introduction, in The Global South and Comparative Constitutional Law 3, 7 (Philipp Dann, Michael Riegner & Maxim Bönnemann eds., 2020).

[4] Mariana Pargendler, Corporate Governance in Emerging Markets, in Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Ruth V. Aguilera & Ilir Haxhi, Comparative Corporate Governance in Emerging Markets, The Oxford Handbook of Management in Emerging Markets (Robert Grosse & Klaus Meyer eds., 2018).

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a substitute for the then prevailing, but evidently unappealing, designation of "Third World" countries. Since then, the tag has also come to encompass certain ex-communist economies of the Second World, including Russia, hence rendering the group even more heterogeneous. The term emerging markets has an upbeat overtone and hints at shifting patterns of economic opportunity.

Emerging market labels often follow their own market logic, rather than usual categorizations based on development levels. South Korea has achieved high-income status and is no longer classified as a developing country by the World Bank, the International Monetary Fund (IMF), the United Nations Conference on International Trade and Development, or the United Nations' Group of 77.[5] Nevertheless, as of 2023, Morgan Stanley Capital International (MSCI) has continued to classify the country as an emerging market for purposes of its 24-member emerging market index.[6] Emerging market classifications are also less sensitive to the tides of history: Russia, which once strived for global preeminence as part of the Soviet Union, is often classified as an emerging market, but not as a Global South jurisdiction.

Notwithstanding its appeal to foreign investors and broader audiences, the terminology of emerging markets has the disadvantage of reifying the image of Global South jurisdictions—most of which are former colonies—as mere sites of foreign economic opportunity or exploitation. The focus on "markets" abstracts, and thus obscures, the polities and societies of these jurisdictions—elements which, as described in Section 4 below, are critical to the understanding of their corporate law and governance arrangements. The focus on "emerging" economies, in turn, emphasizes financial interests at the expense of social, economic, and political challenges.

Despite common constraints resulting from lower income per capita, Global South jurisdictions are highly heterogeneous and arguably even more diverse than developed economies, even though the latter's corporate governance systems are seldom grouped and studied as a unitary category. Countries such as Brazil, China, India, and South Africa have deeply diverse histories, political systems, legal regimes, and economic structures. It should therefore come as no surprise that their corporate governance practices, too, look significantly different. Most sweeping generalizations about corporate governance in the Global South—even if illuminating at a high level of abstraction—are unlikely to provide an accurate depiction of individual countries' realities.

Indeed, one may question whether the distinction between Global North and Global South jurisdictions in comparative corporate governance is even tenable. In other words, do Global South jurisdictions really boast peculiarities that set them aside from Global North norms? Or are they, as a group, indistinguishable from their Global North counterparts? A recent empirical study led by financial economists found that emerging markets still constitute a separate asset class: emerging stock markets continue to differ

[5] The G77 is a group of developing countries established in 1975 as "the largest intergovernmental organization of developing countries in the United Nations, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development." See: https://www.g77.org/doc/

[6] Dave Sebastian, MSCI Keeps Emerging-Market Rating on South Korea, Despite Push for Upgrade, Wall St. J., June 23, 2022.

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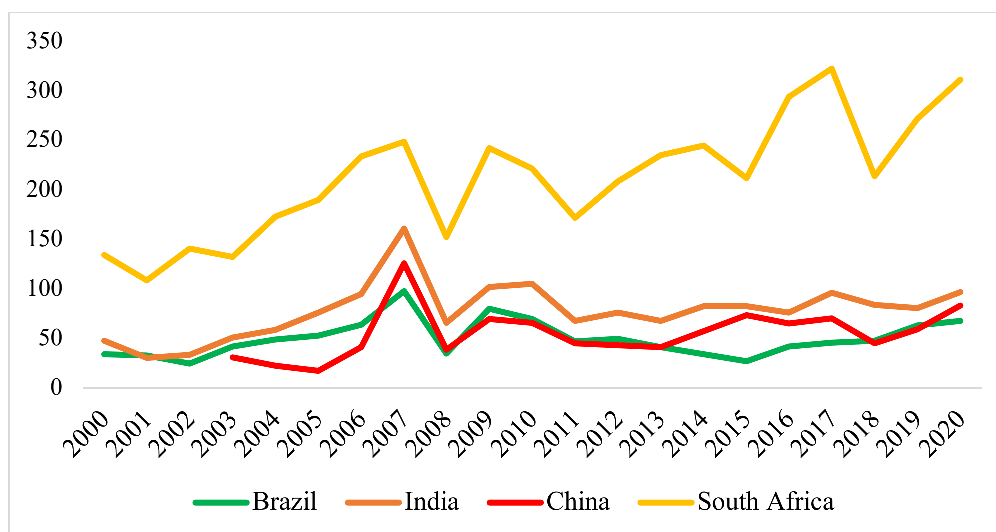
in a statistically significant way from developed markets, exhibiting lower levels of stock market capitalization and valuation ratios, even though their performance is now highly correlated with that of developed markets.[7] The following section poses this question with respect to levels of stock market development and ownership structure in BICS countries vis-à vis the largest four Global North economies by GDP (Germany, Japan, the United Kingdom, and the United States—or GUSJUK for short).

3. Stock Market Development and Ownership Structures

In 2012, for the first time in history, Global South jurisdictions absorbed the majority of global flows in foreign direct investment.[8] The share of foreign direct investment steered to the Global South vis-à-vis the Global North jumped from only 16% in 1990 and 2000 to 45% in 2010 and a whopping 71% in 2022.[9] Global South jurisdictions are not only latecomers as FDI targets but also in terms of capital market development, at least in recent history. But if the "emergence" of their capital markets was once a prophecy, it has since turned into reality, especially for the BICS countries.

As depicted in Figure 1 below, the stock markets of the BICS have experienced significant growth since the 2000s—more than doubling their initial ratio of capital market capitalization to GDP. By comparison, as reflected in Figure 2, the largest four Global North economies (Germany, United States, Japan and the United Kingdom—or GUSJUK, for short) experienced more modest levels of growth of market capitalization to GDP, with the exception of Japan, whose equity markets recovered from a previous crisis during this period.

Figure 1. *Market capitalization of listed domestic companies (% of GDP) in BICS*[10]



[7] Geert Bekaert, Campbell R. Harvey & Tomas Mondino, Emerging Equity Markets in a Globalized World, 56 Emerg. Mark. Rev. 1 (2023).
[8] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2013, at iii (2013).
[9] United Nations Conference on Trade and Development (UNCTAD), Annex Table 01: FDI Inflows, by Region and Economy, 1990-2022 (2023).
[10] The relevant data was extracted from The World Bank, Market Capitalization of Listed Domestic Companies (% of GDP) (2023).

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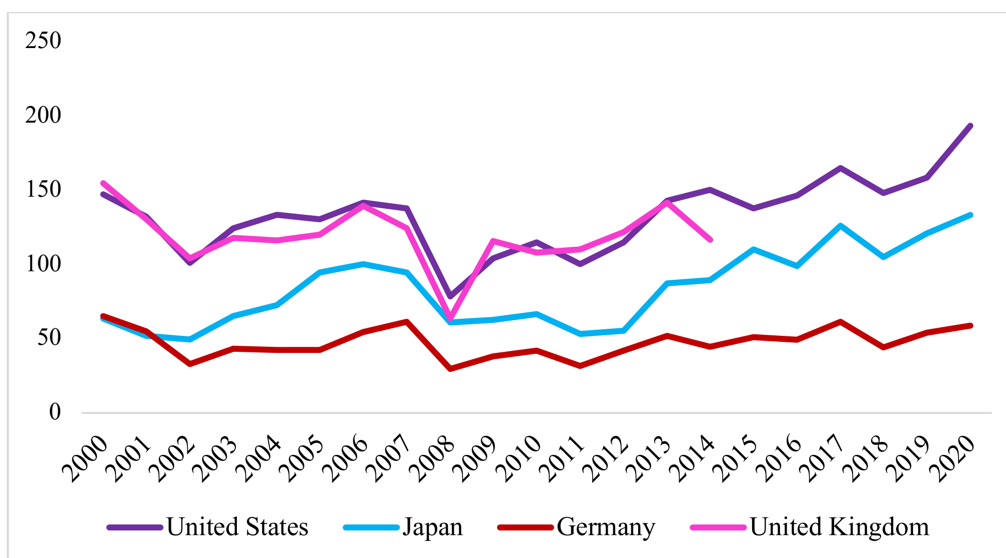
Figure 2. *Market capitalization of listed domestic companies (% of GDP) in GUSJUK*[11]



Despite significant levels of recent growth in BICS countries, the stock markets of Global South jurisdictions as a whole still punch significantly below their weight. While the share of global market capitalization of emerging markets increased from 19% in 2009 to 26% in 2021, this share is still far lower than their 39% share of global GDP.[12] Goldman Sachs currently predicts that the share of emerging markets in total market capitalization will grow even further in the coming decades and will come to overtake the United States by 2030.[13]

Importantly, there is significant variation in terms of stock market development both within the Global South and within the Global North. As of 2020, Brazil, China and India had levels of market capitalization as a share of GDP that were higher than Germany's, but lower than the other larger Global North jurisdictions. By contrast, at a whopping 300% of GDP, South Africa's level of capital market development far exceeds even that of the United States, though stagnant economic growth may play a role in reducing the denominator. Perhaps surprisingly, the 2020 ratio of market capitalization in the BICS (139.68%) exceeded that of GUSJUK (121.83%),[14] even though average GDP in the 2010-2020 decade in the former surpassed that of the latter, as reflected in Table 1. However, there is also significant variation in the levels of growth in the last decade in the BICS jurisdictions, with growth rates in China and India far exceeding all top Global

[11] Id.
[12] Morgan Stanley, Emerging Market Allocations How Much to Own?, at 3 (2021).
[13] Goldman Sachs, Emerging Stock Markets Projected to Overtake the US By 2030, Goldman Sachs (Jun. 22, 2023).
[14] The relevant data was extracted from The World Bank, Market Capitalization of Listed Domestic Companies (% of GDP) (2023). Data for the United Kingdom comes from CEIC Data, United Kingdom Market Capitalization: % of GDP (2023), https://www.ceicdata.com/en/indicator/united-kingdom/market-capitalization--nominal-gdp

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North economies, while Brazil and South Africa had growth rates that were lower than the GUSJUK average.

Table 1. *GDP growth in the period 2010-2020*[15]

Country	Average GDP growth	Average annual GDP growth
Brazil	3.3%	0.33%
China	93.5%	9.3%
India	64.9%	6.49%
South Africa	8.0%	0.80%
BICS	42.4%	4.24%
Germany	12.2%	1.22%
Japan	3.6%	0.36%
United Kingdom	6.2%	0.60%
United States	18.3%	1.83%
GUSJUK	10.0%	1.0%

Although there are no longer substantial differences in levels of capital market development as a percentage of GDP between the selected Global North and Global South jurisdictions, with the latter having overtaken the former as a group, starker contrasts still persist when it comes to ownership structures. Table 2 below shows that, consistent with usual understandings, there is greater ownership concentration, greater state ownership, and a smaller presence of institutional investors in the BICS compared to the GUSJUK. In particular, levels of state ownership in the BICS exceed those of all Global North jurisdictions examined. Moreover, none of the BICS boast the significant levels of ownership dispersion observed in the United States and the United Kingdom and the clear dominance of institutional investors, though the same is also true of Germany and Japan. Listed state-owned enterprises (SOEs) also exist in various Global North jurisdictions, but their greater presence in the Global South is particularly striking.[16] Policy channeling—i.e., the use of state ownership to achieve public policy objectives—is also particularly pervasive in these jurisdictions.[17]

Notably, there are significant differences regarding levels of stock ownership by the population at large. While equity ownership is highly concentrated among the

[15] The relevant data was extracted from The World Bank, GDP Growth (Annual %) (2023).
[16] For a discussion of governance challenges associated with listed SOEs in the Global South and beyond, see Curtis J. Milhaupt & Mariana Pargendler, Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform, 50 Cornell Int'l L. J. 473 (2017); Curtis J. Milhaupt & Mariana Pargendler, Related Party Transactions in State-Owned Enterprises: Tunneling, Propping, and Policy Channeling (Luca Enriques & Tobias H. Tröger eds., 2019).
[17] Id.

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wealthiest even in the Global North,[18] inequality in equity ownership is even starkest in the Global South, where the vast majority of the population is completely excluded from stock market participation. Recent data suggests that the share of the population investing is stock markets is only 2% in Brazil, 3% in India, and 15% in China compared to 18% in Germany, 30% in the United Kingdom and 57% in the United States.[19] This, in turn, may help explain the greater appeal of stakeholder-oriented approaches in the Global South, discussed in section 6 below, and also in the Global North outside of the Anglo-Saxon world.[20]

Table 2. *Ownership Structures in 2022*[21]

Regulated market Size		Ownership by investor category					Ownership concentration
Jurisdiction	Number of listed companies	Institutional investors	Public sector	Strategic individual	Private corporation	Other free float	(% of companies where 3 largest shareholders own >50%)
Brazil	355	29%	14%	8%	24%	25%	61%
India	4960	21%	15%	12%	32%	20%	60%
China	4911	11%	30%	17%	10%	32%	43%
South Africa	216	24%	14%	3%	23%	36%	40%
BICS	10442	21%	18%	10%	22%	28%	51%
Germany	804	27%	9%	9%	19%	36%	59%
United States	4812	70%	3%	4%	3%	20%	15%
Japan	3904	30%	3%	5%	22%	40%	28%
United Kingdom	1334	60%	6%	3%	6%	25%	19%
GUSJUK	10854	47%	5%	5%	13%	30%	30%

[18] Rebecca Riddell et al., Inequality Inc.: How Corporate Power Divides Our World and the Need for a New Era of Public Action (2024) (reporting that, in the United States, "the richest 0.1% account for 19.8% of shares owned by households, the richest 1% own 44.6%, while the poorest 50% own just 1%").
[19] Brasil, Bolsa e Balcão (B3), Apresentação Institucional 3T23 (2023) (on Brazil, China, India, the United Kingdom and the United States); Deutsches Aktieninstitut, Shareholder Numbers 2022: Germany Can Share!, Deutsches Aktieninstitut (Jan. 17, 2023) (on Germany).
[20] For a discussion of the role of workers's reliance on stock market for retirement in the political economy of corporate governance, see Martin Gelter, The Pension System and the Rise of Shareholder Primacy, 43 Seton Hall L. Rev. 909 (2013).
[21] The relevant data was extracted from the OECD, OECD Corporate Governance Factbook 2023, Table 1.1, at 27-28 (2023).

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4. Traditional views

Traditional views of the Global South in comparative corporate governance oscillate between narratives of assimilation, on the one hand, and failure, on the other. The mainstream approach to comparative law has traditionally centered around legal family taxonomies. The categorization that came to dominate the literature divides jurisdictions around the world into common law and civil law traditions, with the latter then subdivided into French, German, and Scandinavian legal families.[22] This approach makes the Global South and its specificities all but invisible, and deliberately so. In their influential textbook on comparative law, Konrad Zweigert and Hein Kötz went so far as to urge comparativists to "ignore the affiliate [legal system] and concentrate on the parent system."[23] In this framework, later embraced and further decontextualized by the extensive and highly influential literature on "law and finance,"[24] Brazil is a French civil law jurisdiction, China is a German civil law jurisdiction, and India and South Africa are common law jurisdictions—none of which are deemed worthy of study in their own terms given the derivative nature of their legal systems.[25]

The framework of legal families (or, in economists' parlance, legal origins) holds a select few jurisdictions in the Global North as parents and the entirety of the Global South as mere "children" or affiliates. The now-dominant legal families framework has completely displaced earlier categorizations, such as those of the nineteenth-century Latin American jurists, which viewed the legal systems in the region as belonging to a "sui generis" class of their own that combined elements of diverse origins.[26] Although legal family taxonomies aim at the neutral creation of legal knowledge, their normative valence in creating hierarchies between legal systems is evident.[27] They have also served to obfuscate the legal, social, and economic conditions in the Global South, and the need to search for legal responses tailored to these idiosyncrasies.

In failing to take the Global South's legal characteristics and institutional environments seriously, the assimilationist view did not serve well neither the Global South nor the Global North, not least because of its own economic interests. With the rise of globalization, the assimilationist stance of the traditional view rapidly gave way to a critical diagnosis of legal failures and serious deficiencies in investor protection. In this account of legal failure, corporate laws in the Global South are either (i) hopelessly

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[22] See, e.g., René David, Les grands systèmes de droit contemporain (2d ed. 1966); Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law (2d ed. 1992).

[23] See Zweigert & Kötz, *supra* note 22, at 39.

[24] See, e.g., Rafael La Porta et al., Law and Finance, 106 J. Polit. Econ 1113 (1998); Rafael La Porta et al., The Economic Consequences of Legal Origins, 46 J. Econ. Lit. 285 (2008).

[25] This is despite traditional comparativists classifying South Africa as a mixed legal system, and the legal origins literature originally classifying China as a Socialist legal system before shifting to code it as having a German law origin. See Jacques Du Plessis, Comparative Law and the Study of Mixed Legal Systems, in Oxford Handbook of Comparative Law 474, 477 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (for South Africa). Contrast Rafael La Porta et al., The Quality of Government, 15 J. Law Econ. Organ. 222, 269 (1999) (coding China as having Socialist legal origin) with La Porta et al., supra note 24, at 289 (coding China as having German legal origin).

[26] See Mariana Pargendler, Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil, 60 American 805 (2012); Clóvis Bevilaqua, Resumo das Lições de Legislação Comparada sobre o Direito Privado 72-73 (1897).

[27] See Daniel Bonilla Maldonado, Legal Barbarians: Identity, Modern Comparative Law and the Global South 1-28 (2021).

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antiquated, (ii) failed transplants due to local misfit, or (iii) adequate on the books but plagued by enforcement problems in action.[28]

Such failings are viewed as so severe that scholars have even come to question the relevance of corporate law in the Global South altogether, to the effect that corporate governance in the developing world would rely primarily on extralegal factors.[29] For one, the 2009 edition of the influential comparative corporate law book "The Anatomy of Corporate Law" explains its focus on developed, rather than developing, economies because "where foundational legal institutions, such as functioning courts and the protection of property rights, are absent or compromised, then the way in which corporate law responds to specific problems is less likely to make a difference to the real economy."[30]

This traditional view of "failed law" also acknowledges that weaknesses in other institutions in the Global South, such as poor contract enforcement and capital market failures, push for adaptations in corporate ownership structures. The presence of a powerful controlling shareholder, and especially family control, affords political influence and reputational bonding that compensates for a lack of formal property rights protection, contract enforcement, and well-functioning markets.[31] At the same time, state ownership may substitute for regulation when contract enforcement and regulatory institutions are weak.[32] The result, as described in section 2, is that family ownership, business groups, and state ownership are particularly prevalent in the Global South, in no small part to compensate for other institutional shortcomings.

There is certainly more than a grain of truth to the diagnosis of legal failures in the Global South. Take, for instance, the recognition of insufficient outside investor protection in Global South jurisdictions. In 2023 Brazil and India witnessed two of the greatest corporate scandals in their history, which involved public companies controlled

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[28] See, e.g., Francisco Reyes Villamizar, The Organization of American States' Model Law on Simplified Corporations, 11 J. Civ. L. Stud. 1, 7 and 31 (2018) (on problems of formalism and enforcement in corporate laws in Latin America); Daniel Berkowitz et al., The Transplant Effect, 51 Am. J. Comp. L. 163, 168 (2003) (describing the problem of misfit of legal transplants due to the lack of adaptation to local conditions). A focus on problems of enforcement, as opposed to substantive legal differences, also exists in comparative contract law. See Mariana Pargendler, Comparative Contract Law and Development: The Missing Link?, 85 Geo. Wash. L. Rev. 1717, 1719 (2017). For an account of narratives of legal failure in Latin America more broadly, see Jorge L. Esquirol, The Failed Law of Latin America, 56 Am. J. Comp. L. 75 (2008).

[29] For a description of this argument in the Chinese context, see Tamar Groswald Ozery, Law and Political Economy in China: The Role of Law in Corporate Governance and Market Growth (2023).

[30] Reinier Kraakman et al., The Anatomy of Corporate Law: A Comparative and Functional Approach 3 (2nd ed., 2009).

[31] On family ownership in developing countries, see, e.g., Ronald J. Gilson, Controlling Family Shareholders in Developing Countries, 60 Stan. L. Rev 633 (2007); on business groups in developing countries, see, e.g., Tarun Khanna & Yishay Yafeh, Business Groups in Emerging Markets: Paragons or Parasites?, 45 J. Econ. Lit. 331 (2007); Randall Morck, The Riddle of the Great Pyramids, in Oxford Handbook of Business Groups (Asli M. Colpan et al. eds., 2010).

[32] James Si Zeng, State Ownership and Regulatory Costs, A Law and Economics Explanation for the Prevalence of State-Owned Enterprises in China, 31 Colum. J. Asian L. 1 (2017) (arguing that in developing countries with weak regulatory capacity, state ownership helps reduce regulatory costs); Andrei Shleifer, State Versus Private Ownership, 12 J. Econ. Persp. 133, 144 (1998) (asserting that success of privatizations or regulated industries hinges on the existence of good contract institutions).

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by the richest entrepreneurs in these countries.[33] In Brazil, retailer Americanas filed for bankruptcy after major accounting irregularities hid nearly US$4 billion of debt. Around the same time, a U.S. short-seller published the report "Adani Group: How the World's 3rd Richest Man is Pulling the Largest Con in Corporate History." The report exposed large-scale abuses through market manipulation and related party transactions enabled by the use of numerous offshore entities, including in Mauritius and in the Caribbean, to hide Adani family's beneficial ownership and circumvent numerous corporate and securities law rules to the detriment of minority shareholders and the integrity of Indian markets.

A central subject of debate is the extent to which recent developments and reforms have prompted convergence in legal investor protection. Traditional conceptions of failed law usually lead to reliance on solutions from the Global North to address problems of legal systems from the Global South. In this perspective, convergence was expected to occur along the lines of "the end of history for corporate law," i.e., toward the outside shareholder-oriented model prevailing in the Anglo-American world.[34] However, this traditional view ignores the role of Global South jurisdictions as hubs for legal innovation and pioneers of new developments in global corporate governance, a topic to which I now turn.

5. New views: adaptations and innovation in the Global South[35]

For the most part, the literature on comparative corporate law and governance has studied Global South jurisdictions either through (i) single-country case studies,[36] (ii) regional studies,[37] or (iii) as part of a large sample of countries based on metrics and interests of the Global North.[38] Studies that incorporate a broader set of Global South jurisdictions often do not engage in North-South comparisons.[39]

This prevailing approach has several shortcomings. Empirical studies premised on rich countries' metrics downplay legal and institutional innovations by Global South jurisdictions, and reinforce the narrative of failure when the latter fall short of checking

[33] Brazilian billionaires Jorge Paulo Lemann, Carlos Alberto Sicupira and Marcel Telles, controllers of global investment giant 3G Capital, were controlling shareholders of Americans until 2021, when they reduce their holdings to become "significant shareholders" (*acionistas de referência*). In India, billionaire Gautam Adani is founder and chairman of family-owned conglomerate Adani Group.

[34] See Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L. J. 439 (2001).

[35] This section draws heavily from Mariana Pargendler, Corporate Law in the Global South: Heterodox Stakeholderism, 47 Seattle Univ. Law Rev., forthcoming 2024.

[36] See, e.g., Li-Wen Lin & Curtis J. Milhaupt, We Are the (National) Champions: Understanding the Mechanisms of State Capitalism In China, 65 Stan. L. Rev. 697 (2013); Petra Mahy, The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation, 61 Am. J. Comp. L. 377 (2013); Umakanth Varottil, The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony, 31 Am. U. Int'l L. Rev. 253 (2016).

[37] See, e.g., Independent Directors in Asia: A Historical, Contextual and Comparative Approach (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017); The Derivative Action in Asia: A Comparative and Functional Approach (Dan W. Puchniak, Harald Baum & Michael Ewing-Chow eds., 2012).

[38] See, e.g., La Porta et al., supra note 24.

[39] For a notable if discrete exception, see Li-Wen Lin, Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences, 23 U. Pa. J. Bus. L. 429 (2021) (comparing legislation in France, Mauritius, India, South Africa, China, and Indonesia, among others, and finding the diffusion of mandatory philanthropy legislation only in developing countries as well as unique approaches in developing countries, such as mandatory corporate philanthropy laws).

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all the boxes conceived specifically with the context or needs of the North in mind. At the same time, reliance on case studies against the backdrop of Global North practices has also produced an "odd-duck" syndrome, with certain institutional features in individual Global South jurisdictions being described as exceptional only because other countries that share similar features are left out of the picture.

However, Global South jurisdictions are not only followers or failures in corporate law, but also creators. This section aims to enhance our understanding of corporate law and governance in the South by going beyond the usual—though often still relevant—accounts of failed transplants and enforcement problems. Instead, it will focus on legal differences and innovations in corporate law and governance in Brazil, India, and South Africa that serve as adaptations to these countries' particular economic, social, and legal contexts. The exposition that follows will deemphasize China not because it fails to offer innovations in corporate governance—on the contrary, China is a leader in heterodox stakeholderism[40]—but because the peculiarities of its system have received the most attention in the literature compared to other jurisdictions in the South.[41] But while narratives of "Chinese exceptionalism" have their place, there are also analytical gains in placing China along a continuum of heterodox stakeholderism in the Global South.

A. Heterodox stakeholderism in the Global South

In recent years, the debate about whether corporate law should serve purposes other than investor protection—from fighting climate change to promoting greater diversity—has taken center stage. At least on the books, attention to stakeholder interests has long been salient in corporate law and governance in the Global South. Corporate laws in the Global South have a tradition of challenging the modular conception of corporate law, according to which the field should focus exclusively on agency problems.[42] This parallels other heterodox challenges to modularity in other areas of law.[43] From a bird's-eye view, the growing challenge to a modular conception of corporate law—according to which the field should focus exclusively on agency problems—represents a form of "reverse convergence," with the Global North coming to increasingly resemble the Global South, rather than vice-versa.

[40] Ronald J. Gilson & Curtis J. Milhaupt, Shifting Influence on Corporate Governance: Capital Market Completeness and Policy Channeling, 12 Harv. Bus. L. Rev. 1, 49 (2022) (depicting the Chinese system under the influence of the Communist Party as "possibly the world's most stakeholder-oriented system of corporate governance").

[41] Tamar Groswald Ozery, Law and Political Economy in China (2023) (describing the key political function of corporate governance law in China); Dan W. Puchniak, No Need for Asia to be Woke: Contextualizing Anglo-American "Discovery" of Corporate Purpose, 4 Revue européenne du droit 14, 16 (2022) ("at least on paper, Chinese corporate law and governance is as purposeful as can be"); Virginia Harper Ho, Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China, 46 Vand. J. Transn'l L. 375, 382 (2013) (describing state-centric CSR in China as "an adaptation of the institutions and accountability structures that shape law's legitimacy, enforcement, and even substance").

[42] For a discussion of the modular approach to law and economics, see Mariana Pargendler, Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs, 45 J. Corp. L. 953 (2020).

[43] For an examination of other areas of law, Davis & Pargendler, Legal Heterodoxy in the Global South, supra note 2 (addressing legal heterodoxy in the Global South in property, torts and legal personhood, among other areas); Davis & Pargendler, Contract Law and Inequality, supra note 2 (on contract law).

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Heterodox stakeholderism is here understood as legal rules and institutions that differ from those observed in the Global North in ways that provide for the incorporation of broader public policy and distribution objectives. Beyond noting that the Global South has long deviated from a modular and narrow vision of corporate law, this section illustrates the poietic (creative)—rather than merely mimetic (derivative)[44]—character of corporate law in the Global South. It does so by discussing instances of heterodox stakeholderism, namely (i) the mitigation of limited liability for the benefit of stakeholders, (ii) mandatory spending on corporate social responsibility (CSR), and (iii) the promotion of racial diversity in corporate governance.

(i) The erosion of limited liability for the benefit of stakeholders

Limited liability is the most celebrated attribute of the corporate form, having been famously hailed as "the greatest single discovery of modern times."[45] At the same time, shareholders' limited liability gets in the way of the prevailing modularity approach to law and economics, according to which concerns about stakeholder protection should be addressed not by corporate law, but by other areas of law. Limited liability clearly undermines the protection of stakeholders through tort law and regulations, making the corporation "the perfect externalizing machine."[46]

In view of these problems, the law-and-economics literature has long cast doubt on the efficiency of shareholder limited liability vis-à-vis involuntary creditors, such as tort victims.[47] Despite some relevant exceptions,[48] progress toward overcoming limited liability for the benefit of involuntary creditors (such as tort victims) and non-adjusting creditors (such as workers and consumers)[49] has been glacial, if not completely stalled, in Global North jurisdictions.[50]

Unbeknownst to most observers, the strongest challenges to limited liability as an obstacle to stakeholder protection have come from the Global South. Brazil's erosion of limited liability with respect to involuntary and non-adjusting creditors exemplifies the use of innovative, even if potentially problematic, approaches to stakeholder protection

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[44] The terminology comes from Daniel B. Maldonado, Global Legal Pluralism and the Rights of Nature, in Legal Heterodoxy in the Global South: Adapting Private Laws to Local Contexts (Kevin E. Davis & Mariana Pargendler eds., forthcoming).

[45] Nicholas Murray Butler, Politics and Economics, 143rd Annual Banquet of the Chamber of Commerce of the State of New York, New York: Press of the Chamber of Commerce, 43, 47 (1911).

[46] Carsten Gerner-Beuerle & Michael Anderson Schillig, Comparative Company Law 814 (2019).

[47] See, e.g., Richard A. Posner, The Rights of Creditors of Affiliated Corporations, 43 U. Chi. L. Rev. 499, 520 (1976); Henry Hansmann & Reinier Kraakman, Toward Unlimited Shareholder Liability For Corporate Torts, 100 Yale L. J. 1879 (1991).

[48] See, e.g., Cees van Dam, Breakthrough in Parent Company Liability: Three Shell Defeats, an End of an Era and New Paradigms, 18 Eur. Co. & Fin. L. Rev. 714 (2021) (examining the 2021 decisions in the U.K. and the Netherlands imposing a duty of care on parent companies with respect to the operational activities of subsidiaries).

[49] See John Armour et al., Transactions with Creditors, in The Anatomy of Corporate Law: A Comparative And Functional Approach (John Armour, Luca Enriques et al., 2017) (discussing the distinction between adjusting and non-adjusting creditors in the context of limited liability).

[50] See, e.g., Pat Akey & Ian Appel, The Limits of Limited Liability: Evidence from Industrial Pollution, 76 J. Finance 5 (2021) (finding an increase in toxic emissions by subsidiaries after the U.S. Supreme Court's restrictive interpretation of parent company liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in its 1998 decision in *United States v. Bestfoods*).

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in the developing world. Brazil has effectively eliminated limited liability in order to provide full compensation of harm caused to consumers, workers, and victims of environmental harm. It has also aggressively imposed liability on directors, officers and controlling shareholders of failed financial institutions.[51] Both the country's Consumer Protection Code of 1990 and the Law on Environmental Crimes of 1998 provide that courts may pierce the corporate veil of a company "whenever its legal personality is an obstacle for the compensation of harm."

It is worth noting that veil piercing for the benefit of stakeholders in Brazil is, for the most part, a recent phenomenon that dates back the last few decades, not a vestige of antiquated laws, indigenous customs, or colonial history. One possible explanation for this recent development is that unlimited liability for the benefit of stakeholders in Brazil may compensate for weaknesses in the regulatory system in curbing externalities, tunnelling and inequalities.[52] Although recent, this approach has been durable. It is also not limited to left-wing supporters. For instance, when the Brazilian Congress passed a more ambitious bill aiming to impose numerous procedural constraints on veil piercing in 2022, former conservative President Jair Bolsonaro vetoed it as unconstitutional and contrary to the public interest.[53]

Although Brazil's experience in eroding limited liability for purposes of stakeholder protection is particularly stark, it finds parallels in other jurisdictions in the Global South. India has also mitigated limited liability in corporate groups over the last decades by recognizing a doctrine of enterprise liability for the benefit of tort victims of hazardous activities.[54] In the wake of the Bhopal disaster of 1984, in which the leakage of toxic gas resulted in thousands of deaths, Indian courts came to hold parent companies liable for the damage caused by hazardous activities.[55] Departing from earlier precedents, the Indian Supreme Court embraced an absolute strand of enterprise liability in the 1987 *Mehta* case, which resulted from an oleum gas leak in Delhi two years earlier. It held that "[i]f the enterprise is permitted to carry on the hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident."[56]

Indian courts subsequently applied the concept of enterprise liability for hazardous activities to hold liable the U.S. parent company in the Bhopal case, after a U.S. court declined jurisdiction on the ground of *forum non conveniens*.[57] The decision emphasized the importance of adapting Indian law on limited liability and veil piercing to modern

[51] Mariana Pargendler, How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil, 58 Colum. J. Transnat'l. L. 1, 4 (2019).
[52] Id.
[53] Mensagem de Veto No. 657, de 13 de dezembro de 2022 (Brazil).
[54] See, e.g., Francisco Reyes, Latin American Company Law, A New Policy Agenda: Reshaping the Closely Held Entity Landscape II 23 (2013).
[55] For a detailed discussion of Indian decisions on the matter, see Abhi Raghunathan, The Grand Trunk Road from Salomon to Mehta: Economic Development and Enterprise Liability in India, 100 Geo. L. J. 571 (2012).
[56] M.C. Mehta v. Shriram Food and Fertilizer Industries Case No. AIR 1987 SCR (1) 819 (Decision of the Supreme Court of India, Dec. 20, 1986). For a discussion, see id. at 590-91.
[57] Union Carbide Corp. v. Union of India Case No. (1988) MPJR 233: (1988) MPLJ 540 (Decision of the Madhya Pradesh High Court in Civil Revision No. 26, Apr. 5, 1988). For a discussion, see Raghunathan, supra note 55, at 591-92.

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economic conditions, such as "a mass disaster and in which on the face of it the assets of the alleged subsidiary company are utterly insufficient to meet the just claims of multitude of disaster victims."[58] Interestingly, commentators—unaware of similar developments in other Global South jurisdictions, and using Global North practices as the benchmark—have described Indian law in this respect as "unique" and "revolutionary" from a comparative perspective.[59] This is a typical example of the "odd-duck" syndrome, which misses the bigger picture of broader patterns of corporate law heterodoxy in the Global South.

Colombia has also mitigated liability in view of protecting stakeholders. Its bankruptcy law holds parent companies presumptively liable for the obligations of subsidiaries.[60] In 2001, a path-breaking decision of the Colombian Constitutional Court held the controlling shareholders of a liquidated company temporarily liable for the company's social security and pension obligations.[61] The Court reasoned that this exceptional measure was justifiable in response to the violation of the "fundamental right of protection of the vital minimum, of life in dignified conditions and of the protection of old age" concerning the liquidated company's pensioners.[62]

(ii) Mandatory CSR spending

In one of its paradigmatic innovations, India's Companies Act of 2013 introduced the requirement of a corporate social responsibility policy providing for spending of at least 2% percent of profits on CSR for large companies. In the parliamentary debate leading up to the new legislation, economic inequality featured as a central concern. The Minister of the State for Corporate Affairs justified the new rule as a much-needed "perception correction" at a time of "big division in this country," when "the divide between the rich and the poor is getting bigger and bigger."[63] The provision was also expected to defray protests and buttress the popularity of the government's pro-business policies.[64]

India's mandatory CSR rule initially applied only on a "comply-or-explain" basis, but became mandatory ("comply or be penalized") for large companies in 2021, in a progressive hardening of heterodox stakeholderism in the country. The Companies Act's definition of CSR is quite broad, and encompasses a wide range of social objectives involving external stakeholders, such as eradicating extreme hunger and poverty, reducing child mortality and improving maternal health, combating the human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other

[58] Id.
[59] Meredith Dearborn, Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups, 97 Calif. L. Rev. 195, 226-227 (2009).
[60] L. 1116, diciembre 27, 2006, (Colombia); L. 222, diciembre 20, 1995, (Colombia), art. 148.
[61] Librada de Dios Viuda de Fajardo and others v. Compañía de Inversiones de la Flota Mercante S.A. and others Case No. SU-1023 (Decision of the Constitutional Court of Colombia, Sept. 26, 2001).
[62] Id. For an analysis of the decision, see Reyes, *supra* note 54; Ángel R. Oquendo, Latin American Law 793 et seq. (2006).
[63] Damien Krichewsky, CSR Public Policies in India's Democracy: Ambiguities in the Political Regulation of Corporate Conduct, 19 Bus. & Pol. 510, 532 (2007).
[64] Id. at 532-33.

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diseases, ensuring environmental sustainability, and contributing to the Prime-Minister's National Relief Fund.[65]

Curiously, the 2021 amendment explicitly excluded from the definition of CSR activities undertaken in the normal course of business or outside of India, sponsorships from which the company derives marketing benefits, and activities that benefit employees, among others.[66] The far-reaching welfare objectives of the CSR provisions, combined with the exclusion of benefits to employees, are indicative of a mode of heterodox stakeholderism in developing countries that aims to complement the state's role and compensate for government failures.[67] While philanthropic spending has greatly increased in key areas such as health, education, and sanitation, India's CSR model under concentrated ownership has generated concerns about corruption and cronyism due to contributions to government funds, and has failed to eliminate the country's deep-rooted social and economic problems.[68]

India's approach to mandatory CSR, however, is not alone in the Global South. In 2007, Indonesia was the first country to introduce mandatory corporate social responsibility requirements for corporations operating in businesses impacting natural resources.[69] The Constitutional Court of Indonesia upheld the provision in the face of a constitutional challenge noting that the voluntary nature of CSR is not universal but rather depends on the culture of each country.[70]

In 2009, Mauritius preceded India as the first jurisdiction to require the allocation of 2% of profits to CSR activities,[71] following a "neoliberal" turn in its politics that aimed at slashing taxes while concomitantly lowering social spending.[72] In its 2016 and 2020 statutes, Nepal similarly adopted a mandatory regime of corporate social responsibility spending of 1% of annual profits for industrial enterprises and banks, to be allotted to sectors ranging from community health services and community schools to roads and sewage.[73] Nevertheless, commentators have criticized Nepal's mandatory CSR regime as

[65] Companies Act 2013, schedule VII (India).
[66] Companies (CSR Policy) Amendment Rules, 2021 (India).
[67] See Afra Afsharipour, Lessons from India's Struggle with Corporate Purpose, in Research Handbook on Corporate Purpose and Personhood 377 (Elizabeth Pollman & Robert Thompson eds., 2021) (describing critiques of India's model as an "outsourcing of governance" that works by "taking the failure of the state and the corporates and trying to create a model out of it").
[68] Id. at 367, 375 and 377. See also Dhammika Dharmapala & Vikramaditya Khanna, The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013, 56 Int. Rev. L. Econ. 92 (2018) (finding that companies apportioning less than 2% on CSR increased, and companies apportioning more than 2% decreased, their spending after the new mandate in the 2013 Companies Act).
[69] For a discussion, see Petra Mahy, The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation, 61 Am. J. Comp. L. 377, 416 (2013); Andrew Rosser & Donni Edwin, The Politics of Corporate Social Responsibility in Indonesia, 23 Pac. Rev. 1, 2 (2010)
[70] Case No. 53/PUU-VI/2008 (Decision of the Constitutional Court of Indonesia, Aug. 11, 2008), point 3.19. See also Lin, supra note 39, at 455.
[71] Renginee Pillay, The Changing Nature of Corporate Social Responsibility, CSR and Development – The Case of Mauritius 2 (2015).
[72] Id. at 230; Lin, *supra* note 70 , at 441.
[73] Arhan Sthapit, Corporate Social Responsibility in Nepal: Beset with the Syndrome of 'Who'll Bell the Cat?' as Philanthropic Views Dominate CSR Practices, in Current Global Practices of Corporate Social Responsibility 786 (Samuel O. Idowu ed., 2021).

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"hastily legislated by replicating the Indian law," and "impracticable" given local constraints.[74]

(iii) Racial diversity in corporate governance

Racial and ethnic tensions have been particularly strong in shaping democracy and capitalism in the Global South.[75] Global South jurisdictions have responded to this context by pioneering efforts of affirmative action in corporate governance as a means to ease ethnic tensions and redress historical economic inequities across racial lines. Howk-Aun Lee and Lumkile Mondi have highlighted how Malaysia and South Africa are responsible for "two of the most extensive affirmative action programmes in the world, and perhaps most distinctively, the policy encompasses the corporate sphere."[76]

South Africa has played a leading role in promoting racial diversity in corporate governance. In a 1990 speech after his release from prison, Nelson Mandela denounced the concentration and racialization of economic power in post-apartheid South Africa, as illustrated by his statement that "less than ten conglomerates control almost 90 percent of the shares listed on the Johannesburg Stock Exchange," and that their directors would "almost exclusively be white males."[77] While conceding that international experience may counsel against tampering with the corporate power structure accepted globally, Mandela pointed to the particular reality of South Africa, "with its own history, its own reality, and its own imperatives" – one of which "is to end white domination in all its forms, to deracialize the exercise of economic power."[78]

A few years after Mandela's historic speech, the 1994 Reconstruction and Development Programme of the African National Congress (ANC) proposed as a "central objective" to "deracialize business ownership completely through policies of black economic empowerment,"[79] a mechanism viewed as central to defuse "social and racial tension" as a threat to social and economic stability.[80] The first wave of Black economic empowerment (BEE) initiatives came from the private sector through sales of unissued stock to a Black person or Black-run company.[81] While there were 231 BEE deals of this sort by 1998, leading to an estimated 10% of Johannesburg Stock Exchange companies being owned by Black businesses,[82] the fact that most transfers were made to Black

[74] Id. at 787.
[75] Amy Chua, Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development, 108 Yale L. J. 1, 5 (1998).
[76] Howk-Aun Lee & Lumkile Mondi, Affirmative Action and Corporate Development in Malaysia and South Africa, in Handbook of the International Political Economy of the Corporation 229 (Andreas Nölke & Christian May eds., 2018).
[77] Address by Nelson Mandela at Options for Building an Economic Future Conference convened by the Consultative Business Movement attended by South African business executives (1990).
[78] Id.
[79] Roger Tangri & Roger Southall, The Politics of Black Economic Empowerment in South Africa, 34 J. S. Afr. Stud. 699, 699 (2008).
[80] Id. at 700.
[81] Daron Acemoglu, Stephen Gelb & James A. Robinson, Black Economic Empowerment and Economic Performance in South Africa, Nontechnical Policy Brief, at 5 (2007).
[82] Id.

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individuals with strong ties to the ANC led to charges that BEE was serving as a "populist" policy of appeasement."[83]

In view of concerns that the first wave of BEE only led to the creation a "small wealthy black elite," the government proposed a more expansive initiative of "broad-based black economic empowerment" (B-BBEE) in 2003.[84] Under the Broad-Based Black Economic Empowerment Act of 2003, the Minister of Trade and Industry would issue a code of good practice creating indicators and qualification criteria for purposes of procurement and other economic activities.[85] The B-BBEE promoted a "balanced scorecard" combining different metrics relating to Black equity ownership, Black people in senior management, procurement from Black firms, and skills development and socio-economic development of Black people.[86] Much more complex than the previous BEE, this system allows for different dimensions of inclusion to be traded off against each other.[87] Compliance with the B-BBEE scorecard is not mandatory, but is subject to various relevant carrots, such as advantages in public procurement and licenses that trickle down the supply chain.[88]

Racial inclusion in corporate governance in South Africa has come a long way since the Apartheid era, when legislation such as the Labour Relations Act (1956) prohibited Blacks from holding directorships and management positions.[89] By 2021, 27.6% of directors were Black non-executive directors, and 9.5% of executive directors were Black.[90] Black ownership of reporting companies was estimated at 29% in 2019.[91] Although disappointing in reflecting "a low level of economic transformation at the board level,"[92] racial inclusion in South Africa compares highly favorably to Global South counterparts such as Brazil, where a recent survey found no Black board members and only 1.05% Brown members despite majority representation in the population.[93]

Moreover, the B-BBEE Act of 2003 also paid attention to intersectionality by listing as one of its key objectives the goal of "increasing the extent to which black *women* own and manage existing and new enterprises, and increasing their access to economic

[83] Tangri & Southall, *supra* note 79, at 700.
[84] Department of Trade and Industry, South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment, at 18 (2003).
[85] Broad-Based Economic Empowerment Act, 2003, Section 9 (South Africa). The Act defines "black people" as "a generic term that means Africans, Coloureds and Indians."
[86] Department of Trade and Industry, *supra* note 84, at 5.
[87] Tangri & Southall, *supra* note 79, at 707 ("[t]o the chagrin of black business, there was the possibility of tradeoffs of one objective for another").
[88] Id. at 706; Anthony Butler, Black Economic Empowerment since 1994: Diverse Hopes and Differentially Fulfilled Aspirations, in Reinventing South Africa? (Ian Shapiro & Kahreen Tebeau eds., 2011) (noting that the codes "are binding on all state and public entities and are applied in all decisions involving procurement, licensing, concessions, public-private partnerships," to the effect that "[n]o private company can escape the codes… because the requirements of the procurement component cascade down public sector supply chains").
[89] Nadia Mans-Kemp & Suzette Viviers, Investigating Board Diversity in South Africa, 8 J. Econ. Fin. Sci. 392, 393 (2015).
[90] Id. at 396.
[91] David Thomas, Is South African Transformation Dead? African Business (Sep. 1, 2020),
[92] B-BBEE Commission, National Status and Trends on Broad-Based Black Economic Empowerment, at 56 (2020).
[93] Carlos Portugal Gouvêa, Corporate Governance and Racial Diversity in Brazilian Public Companies, ECGI Blog (June 7, 2022).

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activities, infrastructure and skills training."[94] The statute also specifically enabled the code of good practice to "distinguish between black men and black women."[95] The B-BBEE scorecard came to measure Black women empowerment separately, with five out of 20 points in the ownership section and five out of 19 in the management control section concerning the inclusion of Black women.[96] Interestingly, the B-BBEE Act of 2003 was enacted in the same year that Norway promulgated its pioneering legislation mandating gender quotas for corporate boards. Nevertheless, while Norway's model for increased diversity in corporate governance has been widely celebrated and influential in the literature, South Africa's groundbreaking effort to promote racial and gender diversity has been largely neglected by the literature.

South Africa's promotion of racial diversity in corporate governance was preceded by Malaysia's own experiment on this issue. Following independence in 1957, the Malays or Bumiputera owned a mere 2.4% of the country's corporate assets despite representing over half of the population, compared to the 27.2% of assets owned by the Chinese minority.[97] In the wake of growing ethnic tensions and anti-Chinese riots in 1969, the government adopted an ambitious New Economic Policy (NEP) in 1971, which was based on two pillars: (i) "to reduce and eliminate poverty irrespective of race" and (ii) "to restructure Malay society so as to correct economic imbalance and eliminate the identification of race with economic function."[98] Aimed at improving the Malays' vulnerable economic position, the NEP set a specific target of achieving 30% Bumiputera corporate ownership by 1990. Mechanisms to increase Bumiputera ownership included a minimum percentage of Bumiputera ownership for a stock exchange listing (reduced to 12.5% in 2009), the use of public investment vehicles for the benefit of Bumiputera, and the allocation of at least 30% of shares to Bumiputera during privatizations. Existing estimates suggest that Bumiputera ownership reached 19% in the 1990s and peaked at 23.4% in 2011.[99]

The affirmative action for the Bumiputera has been highly controversial,[100] but did not prevent Malaysia from achieving its "economic miracle" from 1970 to 1990 while also attaining most of its affirmative action goals. Observers have argued that, "by reducing political instability, the analysis suggests that the NEP may actually have boosted the growth rate when sociopolitical factors are taken into account."[101]

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[94] Broad-Based Economic Empowerment Act, 2003, section 2(d) (South Africa) (emphasis added).
[95] Id. at section 9(4).
[96] Francis Marimbe, A Compulsory 100% Black Women Score on the B-BBEE Scorecard Is the Panacea to Women Empowerment Challenges, Independent Online (Feb. 22, 2023).
[97] Government of Malaysia, Mid-Term Review of The Second Malaysia Plan: 1971-1975, at 23 (1973); Jomo K. Sundaram, The New Economic Policy and Interethnic Relations in Malaysia, United Nations Research Institute for Social Development, Identities, Conflict and Cohesion Programme Paper No. 7, at 11 (2004).
[98] Gillian Hart, The New Economic Policy and Redistribution in Malaysia: A Model for Post-Apartheid South Africa?, 23 Transformation 44, 48-49 (1994).
[99] Government of Malaysia, Executive Summary Eleventh Malaysia Plan 2016-2020: Anchoring Growth on People, at 24 (2015).
[100] See, e.g., James Chin, James Chin, Racism towards the Chinese Minority in Malaysia: Political Islam and Institutional Barriers, 93 Political Quarterly 451, 455 (2022) ("the institutional racism imposed by the NEP reinforced the view that all non-Malays are members of the 'out group'").
[101] Id. See also Jomo K. Sundaram, Khoo Boo Teik & Chang Yii Tan, Vision, Policy and Governance in Malaysia, World Bank PSD Occasional Paper No.10 (1995), at 20 ("[s]ome critics maintained that NEP's

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Nevertheless, this complex history is often neglected in the conventional comparative governance literature guided by agency cost concerns, in light of which Malaysia has mostly attracted attention for its (misleadingly) high scores on investor protection in the World Bank's Doing Business Ranking,[102] as well as for the massive corruption scandal involving Malaysian state-owned company 1MDB.[103]

(iv) Understanding heterodox stakeholderism in the Global South

The preceding discussion offered illustrative, but not exhaustive, examples of heterodox stakeholderism in the Global South. Heterodox stakeholderism appears to originate from and respond to varied factors. First, the erosion of limited liability in Brazil and CSR mandates in India seem to serve as adaptations—whether functional or perverse—to shortcomings in state capacity in other areas of law. In environments of rampant inequality and major social and environmental degradation, the view that corporate law should focus exclusively on shareholder wealth maximization tends to lose legitimacy, if not economic justification. Problems of state capacity in combating inequality and curbing externalities through other areas of law create both political and functional pressure on corporate law to address broader welfare objectives. This pressure, which has long been felt in the Global South, is now reaching the Global North, bringing about the surprising and unpredicted prospect of "reverse convergence" in comparative corporate governance—with institutions of the developed world coming to resemble their developing country counterparts, rather than the other way around.

Second, some facets of heterodox stakeholderism may respond to distinct *distributive* consequences of corporate law rules across North-South lines—an issue traditionally overlooked by corporate law scholarship due to the adoption of doctrinal or law-and-economics approaches that are blind to geographical and political boundaries. As illustrated by Indian law developments following the Bhopal disaster, upholding limited liability of parent companies for corporate disasters tends to favor shareholders in the Global North over victims in the Global South. It is thus unsurprising that jurisdictions in the South have been keener to embrace parent company liability than those in the North.

Finally, certain strands of heterodox stakeholderism in the Global South may also reflect particular local values. South Africa, for instance, has been hailed as a pioneer in integrated reporting and as a "global leader in sustainable corporate governance."[104] In introducing integrated sustainability reporting, the King II Report of 2002 explicitly linked the new concept to the African value of ubuntu: "[c]loser to home, the notion of sustainability and the characteristics of good corporate citizenship referred to above can be found within the concept of Ubuntu—African humanism, which is generally regarded

restructuring retarded the country's growth, although it is virtually impossible to prove whether the high-growth 1970s would have seen even higher growth without NEP's interethnic distribution.").

[102] Dan W. Puchniak & Umakanth Varottil, Related Party Transactions in Commonwealth Asia: Complexity Revealed, in The Law and Finance of Related Party Transactions 330 (Luca Enriques & Tobias H. Tröger eds. 2019).

[103] Vivien Chen, Corporate Law and Political Economy in a Kleptocracy, 70 Am. J. Comp. L. 480 (2022).

[104] Christopher M. Bruner, The Corporation As Technology: Re-Calibrating Corporate Governance For A Sustainable Future 227 (2022); Robert G. Eccles et al., Integrated Reporting in South Africa, 413-038 Harvard Business School Case 3 (2012).

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as the foundation of sound human relations in African societies."[105] It noted that "[t]he essence of Ubuntu is that one's personhood is dependent on one's relationship with others," and that "[t]he notion of sustainability and the triple-bottom-line in the corporate world is evolving to an approach that recognises the importance of inter-dependent relationships between an enterprise and the community in which it exists."[106]

The presence of such varieties of heterodox stakeholderism in the Global South is noteworthy per se and likely consequential from an economic standpoint. They therefore merit further studies and effort to determine the concrete consequences and normative implications of these novel approaches.

6. The Impact of Regulatory Competition and International Corporate Law

Corporate governance in the Global South is ever more intertwined with the Global North, and has influenced the latter's institutional developments in numerous ways. This section explores two channels for such interdependence: (i) regulatory competition, and the associated increase in foreign incorporation and listings by companies from the Global South in stock exchanges in the North, and (ii) coordinated harmonization efforts through international corporate law, which have been strongly motivated and influenced by developments in the Global South.

A. Regulatory competition and adoption of foreign laws

A noticeable trend in U.S. capital markets is the rise of foreign IPOs, which has taken place alongside a corresponding decline in domestic IPOs.[107] Global South companies have contributed significantly to this trend, which covers not only cross-listings but also increasingly direct listings in the United States of companies organized under the laws of foreign jurisdictions. As of January 2023, there were hundreds of Chinese companies listed on U.S. exchanges, with a total market capitalization exceeding US$1 trillion,[108] and more than 40 Brazilian companies, including 16 through direct listings. These figures likely understate the presence of foreign companies in the case of direct listings. For instance, prominent Brazilian financial companies Stone and Patria, which have pursued direct listings on U.S. are misclassified by data sources as Cayman Island companies.

Since 2017, there has been a trend of direct listings by Brazilian companies, most of which involve a Cayman Islands vehicle and a dual-class structure. Even after a 2021 reform permitted multi-voting stock in order to improve local capital markets' competitiveness, Brazilian corporate law still imposes significant restrictions on dual-class shares.[109] Despite backlash in the Global North and catch-up efforts to improve competitiveness in the Global South, this trend may well continue in the future. India, for

[105] King Committee on Corporate Governance, King Report on Corporate Governance for South Africa 2002, at 99 (2002).
[106] Id.
[107] Dhruv C. Aggarwal, Law and the Rise of Foreign Issuer IPOs, 107 Iowa L. Rev. Online 136 (2022).
[108] U.S.–China Economic and Security Review Commission, Chinese Companies Listed on Major U.S. Stock Exchanges, at 1 (2023).
[109] For a discussion of the relevance of this constraint under Brazilian law, see Carlos Ragazzo & Rafael Costa, Overseas Primary Listing: U.S. Stock Markets as a Global Hub for IPOs?, 31 U. Miami Bus. L. Rev 46 (questioning the notion that the adoption of a dual-class shares structure is a key motivation for foreign listings).

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instance, currently prohibits direct listings overseas due to tax concerns, but the government is considering reversing its stance to allow a London Stock Exchange listing.[110]

Table 3. Country of origin of companies listed in the United States[111]

	2000	2010	2023
Brazil	28	28	42
China	10	88	240
India	8	12	12
South Africa	5	6	8
BICS	51	134	302

Global South companies have also been at the center of major enforcement actions and new legislation in the United States. At nearly US$3 billion, the corruption scandal involving Brazilian oil giant Petrobras resulted in the fifth largest securities settlement in U.S. history.[112] Brazil mining company Vale was the target of the first lawsuit brought by the SEC Climate and ESG Task Force, which accused the company of intentionally concealing the risk of collapse of its Brumadinho dam.[113]

In the context of rising geopolitical tensions with China, the United States has enacted legislation to impose disclosure requirements on China-based firms regarding ties to the Chinese government and the Chinese Communist Party, as well as to subject such firms to delisting if the Public Company Accounting Oversight Board (PCAOB) is unable to inspect their auditors.[114] Yet Global North reforms responding to scandals associated with Global South listings are in no way restricted to the context of growing tensions between China and the United States. After high-profile scandals involving Kazakh mining group ENRC and Indonesian Bumi, the U.K.'s Financial Services Authority (FSA) revised its premium listing rules in 2014 to impose stricter requirements on companies that have controlling shareholders, which were traditionally rare in the U.K. stock market.[115]

At the same time, certain reform efforts have also run in the opposite direction, with the London Stock Exchange relaxing limitations for related party transactions in 2018 in an (ultimately unsuccessful) attempt to attract the IPO of Saudi oil giant Aramco,

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[110] Nikunj Ohri, Delhi may relook at allowing Indian companies to list overseas, Sept. 11, 2023.

[111] Data for 2000 and 2015 was extracted from the U.S. Securities and Exchange Commission's International Registered and Reporting Companies Report, with the exception of 2015 data for China, sourced from the U.S.–China Economic and Security Review Commission's 2010 Report to Congress due to its greater accuracy in computing Chinese companies incorporated outside China. Data for 2023 comes from the Investing and Stock Analysis portals as of October 2023.

[112] Stanford Law School, Top Ten by Largest Settlement, Stanford Securities Class Action Clearinghouse (2023).

[113] Adrianne Appel, Vale to pay $55.9M in SEC settlement over dam disclosures, Compliance Week, Mar. 29, 2023.

[114] For a description and critique, see Jesse M. Fried & Tamar G. Ozery, The Holding Foreign Companies Accountable (HFCA) Act: A Critique, European Corporate Governance Institute Law Working Paper No. 721/2023 (2023).

[115] For a discussion, see Brian R. Cheffins, The Undermining of UK Corporate Governance (?), 33 Oxf. J. Leg. Stud. 503 (2013).

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which ultimately chose to go public in local markets.[116] At present, the FSA is currently considering liberalizing the rules for premium listing, including those applicable to controlling shareholders, in order to regain international competitiveness.

Still, access to foreign markets does not necessarily entail legal convergence. Jesse Fried and Ehud Kamar have warned that insiders of Chinese companies listing on U.S. exchanges remain largely "law proof" because the relevant individuals, assets, and records are behind China's "Great Legal Wall," and therefore out of reach from U.S. plaintiffs and prosecutors.[117] Meanwhile, securities lawsuits against Brazilian firms cross-listed on U.S. exchanges have given rise to a problem of "double circularity," through which investors acquiring shares in the United States have benefitted from hefty settlements while investors acquiring shares in São Paulo have been unable to obtain compensation to date.[118] This very problem, together with the forces of international corporate law reform,[119] has prompted Brazil to propose legal reforms to improve private enforcement in the country, which are currently under consideration.

The rise of direct listings in the United States by both China and Brazil through companies incorporated in the Cayman Islands and other small off-shore financial centers shows these countries' contribution to "Delaware's new competition,"[120] or the Caymanization of global corporate governance. The phenomenon is also not limited to public firms, as the venture capital industry in Latin America increasingly operates through Delaware and/or Cayman Islands vehicles. It is noteworthy that many of these offshore financial centers (such as Bermuda, British Virgin Islands, and Cayman Islands) are former colonies with a majority of Black or Brown population, having achieved developed country status alongside their success as tax and regulatory tax havens, with "corporate law… providing a path to a form of decolonization," even as they remain British-dependent territories.[121] The Bahamas, for its part, "is the truly exceptional case of a postcolonial Black-majority state that is also a world-class financial center."[122] Still formally a member of the G-77, the Bahamas has achieved high-income status, and featured prominently in the scandal surrounding the failure of U.S.-owned crypto giant FTX.

B. The influence of international corporate law

Beyond the influence of foreign legal transplants and local innovations, Global South jurisdictions have been core targets of what I have termed "the rise of international corporate international corporate law," or the cascade of soft corporate law and

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[116] Shearman & Sterling, New Premium Listing Option in London for Sovereign Controlled Companies, Oxford Business Law Blog (Jul. 27, 2018).
[117] Jesse M. Fried & Ehud Kamar, China and the Rise of Law-Proof Insiders, 48 J. Corp. L. 215 (2023).
[118] For a discussion of the problem, see Érica Gorga, The Impact of the Financial Crisis on Nonfinancial Firms: The Case of Brazilian Corporations and the 'Double Circularity' Problem in Transnational Securities Litigation, 16 Theor. Inq. Law 131 (2015).
[119] For an influential evaluation and critique of the mechanisms of private enforcement in Brazil, see OECD, Private Enforcement of Shareholder Rights: A Comparison of Selected Jurisdictions and Policy Alternatives for Brazil (2020).
[120] William J. Moon, Delaware's New Competition, 114 Nw. U. L. Rev. 1403 (2020).
[121] Martin Sybblis, Corporate Law as Decolonization (working paper, 2023), at 52.
[122] Adam Tooze, The Hidden History of the World's Top Offshore Cryptocurrency Tax Haven, Foreign Policy, Jan. 15, 2023.

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governance standards promoted by international organizations and standard setters.[123] This body of law first emerged following the East Asian financial crisis in the late 1990s, which revealed how growing financial globalization and exposure to the Global South could hurt investors in the Global North. As weak corporate governance practices received the blame for the crisis,[124] the Organization for Economic Cooperation and Development (OECD), the World Bank, and the International Monetary Fund (IMF) came to embrace corporate governance reform around the world with significant fervor.[125]

The rise of international corporate law responds to "the grip of nationalism on corporate law"[126] and the interjurisdictional externalities of corporate law and governance in an interconnected world—aspects traditionally overlooked by comparative law scholarship. In this perspective, corporate law and governance arrangements in the Global South are not only of interest to the local contexts they are inserted in, but also to the Global North. The result is a growing push for international coordination in corporate lawmaking.

The first strand of interjurisdictional externalities concerns the protection of *foreign* investors and the avoidance of systemic risk. In the absence of external pressure, a jurisdiction may have insufficient incentives to protect sunk investments by foreign parties, to leave its markets open to international players, and to mitigate risk externalities whose effects are felt outside its borders. This is precisely the rationale behind the first generation of international corporate law motivated by the Asian financial crisis, which left a clear mark on corporate law in the Global South and helped transform global corporate governance.

In response to the diagnosis that weak corporate governance was a main contributor to the Asian crisis, the IMF imposed corporate and bankruptcy law reform as a condition for financial assistance following the crisis, and the OECD Principles of Corporate Governance inspired national corporate governance codes around the world, and the World Bank partnered with the IMF to assess countries' corporate governance as part of its Report on the Observance of Standards and Codes (ROSC), which were in turn benchmarked against the OECD Principles.[127] The International Finance Corporation, the private-sector support arm of the World Bank, also played a key role in revitalizing Brazil's capital markets with the launch of the premium listing segment Novo Mercado, an initiative that sought to use voluntary corporate governance standards to effectuate change notwithstanding strong political resistance from controlling shareholders to investor-friendly legal reforms.[128]

[123] Mariana Pargendler, The Rise of International Corporate Law, 98 Wash. Univ. Law Rev. 1765 (2021).
[124] Jack Glen & Ajit Singh, Corporate Governance, Competition, and Finance: Re-Thinking Lessons from the Asian Crisis, 31 E. Econ. J. 219, 220 (2005) (challenging what they called the "Greenspan-Summers-IMF" view, which attributed the crisis to "the Asian way of doing business and the institutional structures that supported that kind of business culture").
[125] Pargendler, supra note 21, in 1778 et seq.
[126] Mariana Pargendler, The Grip of Nationalism on Corporate Law, 95 Ind. L. J. 533 (2020).
[127] Pargendler, supra note 21.
[128] Pargendler, supra note 123. On factors prompting the creation of the Novo Mercado, see Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union, 63 Stan. Law Rev. 475 (2011).

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A particularly influential instrument for reform in the Global South was the World Bank's Doing Business Report, which sought to influence corporate lawmaking around the world through its metrics of "investor protection." In India, Prime Minister Modi's "Make in India" campaign explicitly turned to the World Bank's Doing Business report to boost the business environment.[129] Under President Bolsonaro's administration, Brazil likewise made various cosmetic changes designed to improve the country's Doing Business ranking, even while making few substantive concessions. For instance, the 2021 reform of the Brazilian corporations law imposed the requirement of shareholder approval for related-party transactions, as encouraged by the ranking, but only for transactions exceeding 50% of the company's asset value—an extraordinarily high threshold that undermines the purpose of the change. Ironically, Brazil's reforms were never ranked by the World Bank. A scandal involving the ranking of certain Global South jurisdictions brought the system down in 2021, following evidence of data manipulation to boost the ranking of China and Saudi Arabia due to political pressures, on the one hand, and to reduce the ranking of Azerbaijan due to skepticism from the World Bank's staff, on the other.[130]

Standard setters of international corporate law, such as the International Organization of Securities Commissions (IOSCO), have also been influential in the Global South, helping legitimize reforms enhancing investor protection in the face of local political resistance. When Brazil's Securities Commission (CVM) sought to impose enhanced disclosure mandates for executive compensation, lawsuits challenged the requirement as an unconstitutional violation of executives' right to privacy and personal security.[131] The CVM argued in court that the new rules reflected international commitments it had assumed before IOSCO. The Brazilian judiciary ultimately upheld the new regulations by pointing to the "extreme relevance of credibility of capital markets, whose rules must be integrated with those already existing in the international market," refusing to "permit that possible cultural differences justify the lack of transparency."[132]

However, the influence of international institutions on corporate law has not been monolithic. The "Bretton Woods paradigm" represented by the World Bank and the IMF sought primarily to increase international market access, and influenced corporate law in the Global South through demands for greater investor protection. By contrast, the "United Nations paradigm" traditionally sided with developing countries in seeking to regulate multinational enterprises.[133] In the 1970s, a coalition of developing countries

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[129] The World Bank, Doing Business 2020: Comparing Business Regulation in 190 Economies, at 10 (2020). Pargendler, supra note 123, at 1793.

[130] Wilmer Cutler Pickering Hale and Dorr LLP, Investigation of Data Irregularities in Doing Business 2018 and Doing Business 2020: Investigations Findings and Report to the Board of Executive Directors (2021).

[131] Viviane M. Prado & Luiza S. Sampaio, Enforcing International Financial Standards in Brazil: Limits and Possibilities for Adoption of IOSCO Principles, Fundação Getulio Vargas São Paulo Law School Research Paper No. 95, at 25 (2014).

[132] Comissão de Valores Mobiliários v. Instituto Brasileiro de Executivos de Finanças Case No. 0002888-21.2010.4.02.5101 (Decision on Civil Appeal, Rapporteur Federal Judge Guilherme Diefenthaeler, Second Region Federal Regional Court, 23 May, 2014).

[133] On the contrast between both paradigms, see Jean-Philippe Thérien, Beyond the North-South Divide: The Two Tales of World Poverty, 20 Third World Q. 723, 725 (1999) ("the Bretton Woods paradigm favours a complete market liberalisation, while the UN paradigm insists on the need to subordinate the functioning of the world economy to objectives of social equity and sustainability"); Jean-Philippe Thérien

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known as the G-77 sought to establish a New International Economic Order based on a project of global reform and redistribution.[134]

In this context, the United Nations (UN) attempted to enact binding rules on transnational corporations known as the Draft Code of Conduct for Transnational Corporations. The Code aimed to empower governments in the Global South to regulate transnational corporations based on the premise that they "may lead to abuse of concentrations of economic power and to conflicts with national policy objectives."[135] After shifting from a Code *for* transnational corporations to a Code *on* transnational corporations, with the addition of a section on state responsibilities toward foreign investors, the initiative was formally abandoned in 1992 due to significant opposition, especially from the United States.[136]

Since 1999, there has been a noticeable reorientation of the UN stance toward large multinational corporations operating in the Global South: from a model of regulation based on the development objectives of Global South governments to one based on corporations' voluntary commitments to human rights and the environment by corporations through the "Global Compact."[137] The Global Compact's 2004 financial sector report "Who Cares Wins" coined the term "ESG" (environmental, social, and governance factors),[138] and has had a profound effect on shifting the debate and practice of corporate law and governance around the world. The influential UN Guiding Principles of Business and Human Rights (UNGP), approved in 2011, came to play a prominent role in corporate law reforms by coining and promoting the concept of "human rights due diligence" (HRDD). Both ESG and HRDD are key "legal implants" from international corporate law, conceived and designed artificially by international organizations for global adoption, rather than traditional legal transplants traveling from the live experience of one jurisdiction to another context.[139]

Yet the relationship between these UN-led ESG and HRDD movements and decades of Global South pressure and agenda-setting with respect to transnational corporations is often unappreciated. The triumph of the new voluntary approach at the UN level helped replace the project for binding codes promoted by Global South governments with private-sector—and Global-North led—developments. The emerging consensus was that corporations and investors from the Global North could, based on their own enlightened self-interest, help cure regulatory gaps arising from government failures in the Global South.

Importantly, the UN's focus on addressing social and environmental externalities through corporate law and governance in the Global North helped inspire a "cascade" of mandatory legislation geared towards curbing human rights abuses and environmental

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& Vincent Pouliot, The Global Compact: Shifting the Politics of International Development?, 12 Glob. Governance 55, 57 (2006).

[134] Jennifer Bair, Corporations at the United Nations: Echoes of the New International Economic Order?, 6 Human. 159, 159 (2015).

[135] United Nations, Draft Code of Conduct for Transnational Corporations, at 2 (1983).

[136] Bair, supra note 134, at 161–63.

[137] Thérien & Pouliot, *supra* note 133, at 57.

[138] United Nations, The Global Compact, Who Cares Wins: Connecting Financial Markets To A Changing World, at vii (2004).

[139] Pargendler, supra note 123, at 1775-76.

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degradation, thought to happen primarily in the South, by imposing duties on parent or lead companies in the North.[140] Such duties range from the disclosure mandates of the conflict minerals rule imposed by the U.S. Dodd-Frank Act of 2010, to France's Duty of Vigilance Law of 2017 and Germany's Supply Chain Due Diligence Act of 2023, among several others. These initiatives all aim to cure regulatory gaps worldwide not only through corporate governance, including influence over subsidiaries, but also through supply chain governance. By 2021, John Ruggie, the father of the UNGPs, and coauthors celebrated how the construct of HRDD was affecting corporate governance worldwide by "helping to provide a path beyond shareholder primacy, a ruling corporate governance norm for nearly half a century, towards multi-fiduciary obligations."[141]

The EU proposal of a new Corporate Sustainability Due Diligence Directive, which also contains corporate law rules, explicitly promises benefits not only for citizens and companies, but also "for developing countries," including "increased take-up of international standards" and "improved living conditions for people."[142] Concerns about extraterritoriality and a lack of participation from the Global South in such lawmaking have not gone unnoticed, however.[143] Moreover, the particular design of remedies for human rights abuses in the South is likely to matter from a distributive perspective. The system of administrative enforcement of human rights due diligence as envisioned by Germany and the EU proposal has shortcomings in that respect: not only can they encourage 'box ticking' and a 'race to the bottom' among Member States offering lax enforcement, but the payment of any fines would revert to the coffers of wealthy European jurisdictions themselves.[144] By contrast, parent company liability has distributional benefits in providing an avenue for compensating the very victims of human rights abuses and environmental disasters, typically more vulnerable persons located in the Global South.[145]

The rise of ESG and the expansion of supply chain due diligence mandates illustrate the complex ways in which the Global South has influenced global corporate governance. The very UN report coining the term ESG argued that "ESG issues are as important, and perhaps more important, in emerging market investment analysis," given that "regulation and enforcement are typically weak; [m]any of the world's most economically important non-renewable and renewable resources are located in developing countries; [d]eveloping countries are also where the world's most pressing environmental and social problems are caused and/or felt; [and] [c]ompanies are in general more involved in shaping markets and more exposed to government and societal

[140] John G. Ruggie, Caroline Rees & Rachel Davis, Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations, 6 Bus. Hum. Rights J. 179, 196 (2021).
[141] Id. at 181.
[142] European Commission, Corporate Sustainability Due Diligence: Fostering Sustainability in Corporate Governance and Management Systems, European Commission (Feb. 23, 2022).
[143] See, e.g., Kevin E. Davis, Roy Germano & Lauren E. May, Did the Global South Have Their Say on EU Supply Chain Regulation? (unpublished working paper, 2023) (finding that although stakeholders in the Global South participated in the Corporate Sustainability Due Diligence Directive and expressed support, the consultation process was not fully inclusive).
[144] Mariana Pargendler, The EU Proposal on Corporate Sustainability Due Diligence and the Mystique of Complete Corporate Separateness, Oxford Business Law Blog (Apr. 11, 2022).
[145] Id.

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expectations."[146] These initiatives follow a longstanding tradition of Global South engagement with Global North corporations at the UN level, and reflect a continued concern *for* realities in the South, though increasingly not always in terms dictated *by* the South.

7. Conclusion

The Global South boasts rising economic and geopolitical power, and accounts for a growing share of foreign direct investment, global market capitalization, and even company listings on U.S. capital markets. This chapter explored both new and traditional views of corporate law and governance in the Global South, with a focus on Brazil, India, China, and South Africa (BICS).

Perhaps surprisingly, levels of capital market capitalization as a percentage of GDP are now higher in the BICS than in the largest Global North economies. At the same time, quintessential features of corporate governance in the Global South have persisted. By and large, these jurisdictions have higher levels of state ownership than their counterparts in the Global North, and less ownership dispersion and institutional investor ownership than the United States and the United Kingdom.

Global South jurisdictions have innovated in the realm of corporate law as means to address their peculiar realities. South Africa has pioneered integrated reporting and measures for Black inclusion in corporate governance, while India and Brazil have respectively led the way in mandating CSR spending and mitigating limited liability as a measure of stakeholder protection. At least some manifestations of corporate law heterodoxy in the Global South respond to shortcomings of state capacity in other areas of law to address externalities and curb inequality—conditions that are increasingly driving changes in the Global North.

Beyond parallel developments propelled by converging conditions, the Global South has also directly influenced the direction of global corporate governance as a whole. Concerns about regulatory failures in the Global South and their global externalities have helped propel the rise of international corporate law, which has been a major powerhouse behind the evolution of corporate governance around the world. While Global South jurisdictions have for decades sought to harness the UN to regulate transnational corporations, since the turn of the century the UN has sought to mobilize corporations and investors to cure such regulatory gaps through voluntary initiatives. The ESG and the HRDD legal implants are products of this paradigmatic shift, and have helped transform the corporate governance debate in the Global North.

It is time for more forceful the inclusion of the Global South—including by covering a broader array of Global South jurisdictions—in the study of comparative corporate governance. Their legal systems are not simply utter failures or mere copies of those in the Global North as often assumed. This broader focus has the potential not only of enlarging our institutional imagination but also of enriching our understanding of the driving forces behind the evolution of corporate law around the world.

[146] Who Cares Wins, supra note 138, at 30.

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