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Through Covid-19 towards sustainability: The role of business and law

Professor Beate Sjåfjell, 28 February 2022

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COVID-19: a late lesson from an early warning

'COVID-19 is not only a wake-up call, it is a dress rehearsal for the world of challenges to come [...] The pandemic has taught us that our choices matter. As we look to the future, let us make sure we choose wisely.' A. Guterres (2020), Secretary-General of the United Nations

Source: R. Strand, Z. Kovacic, S. Funtowicz, L. Benini, A. Jesus, 'COVID-19: lessons for sustainability?' Briefing for the European Environmental Agency, 20 Jan. 2022 https://www.eea.europa.eu/publications/covid-19-lessons-for-sustainability/covid-19-lessons-for-sustainability

Overview of my presentation

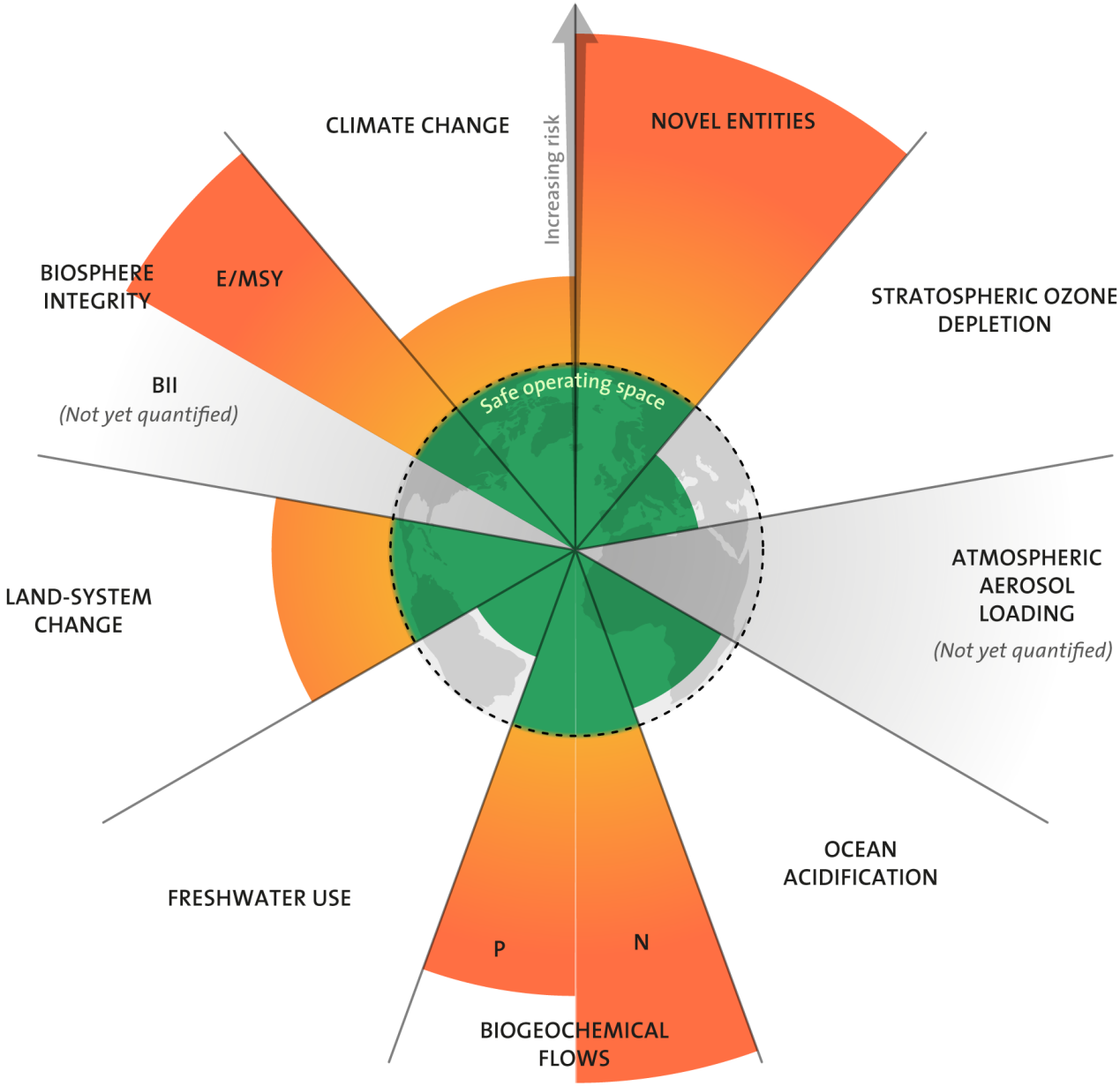
- A research-based concept of sustainability
- The role of business – and barriers to their contribution
- The role of law and especially company law
- Regulating for business contribution to sustainability
  - Through a sustainable company law reform
  - Through corporate sustainability due diligence


Photo: Michael Held

UN Sustainable Development Goals



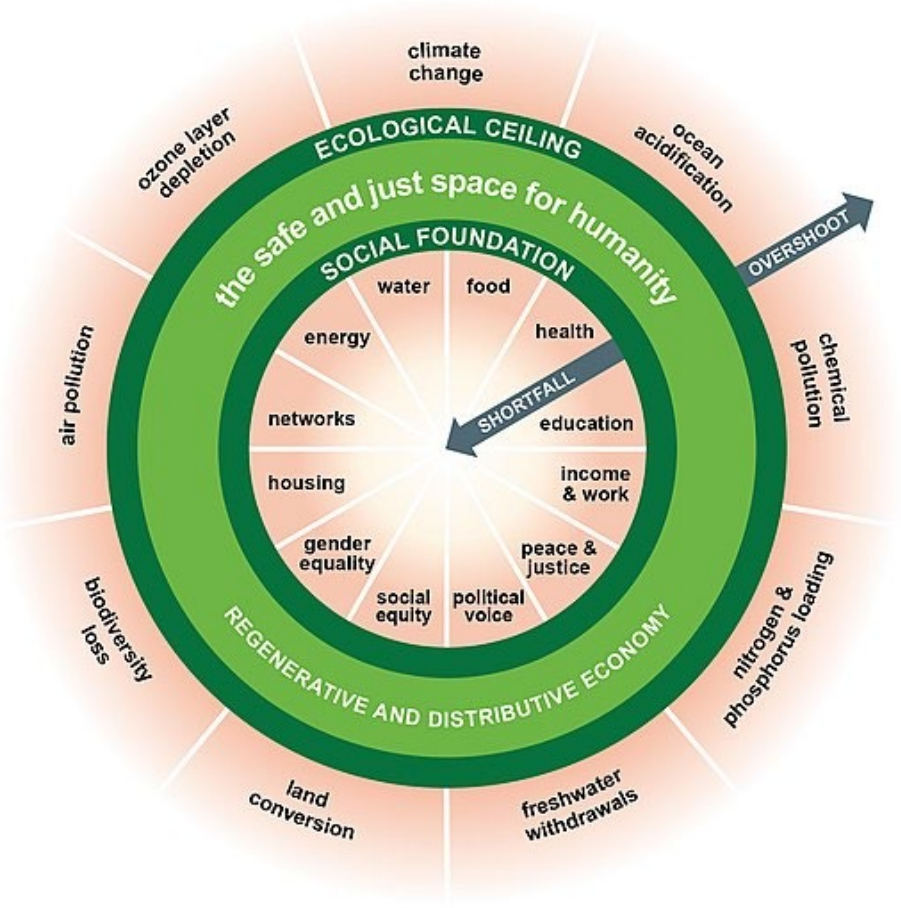
Photo source: un.org: About the Sustainable Development Agenda



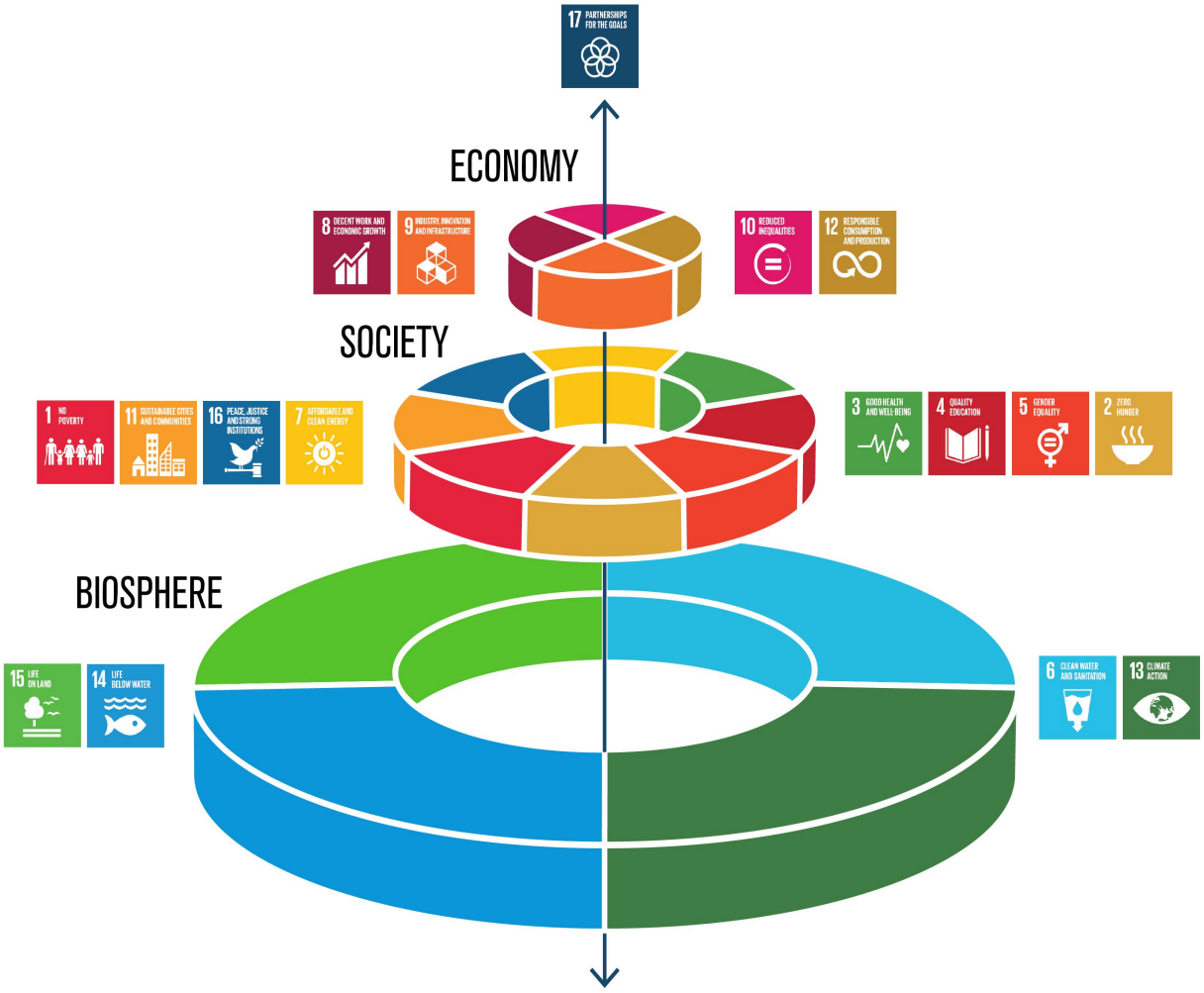
Credit: Azote and Stockholm Resilience Centre, based on analysis in Persson et al. 2022 and Steffen et al. 2015



Source: Sjåfjell, Häyhä & Cornell, 2020,
Figure Credit: Sarah Cornell



Source: Raworth 2017; Leach, Raworth & Rockström 2013



Credit: Azote for Stockholm Resilience Centre, Stockholm University (CC BY 4.0)

Increasing recognition of a research-based concept of sustainability

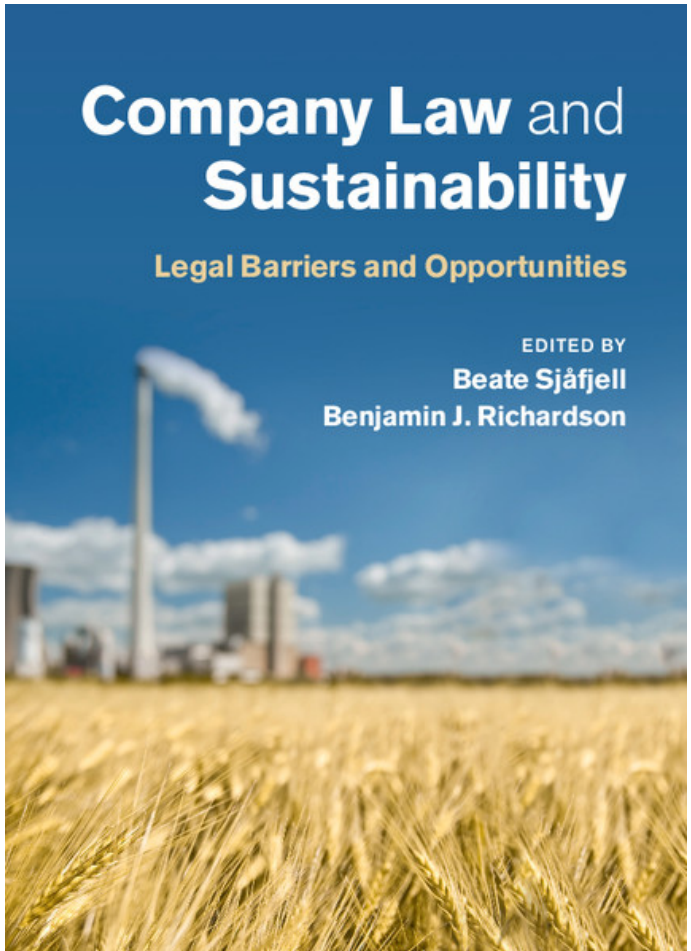
- The history of the SDGs
- International mention of planetary boundaries
  - E.g. UN press release during the pandemic (2020)
- Planetary boundaries in the EU
  - E.g. 7th Environmental Framework Programme & political concensus now on 8th Framework Programme
  - Häyhä et al Operationalizing the concept of a safe operating space at the EU level (2018)
  - A new Circular Economy Action Plan 2020
- Planetary boundaries employed by nation states
  - Sweden 2013; Switzerland 2015; The Netherlands 2018; New Zealand/Aotearoa 2020; Germany 2021
- The 'doughnut' of social foundations with planetary boundaries increasingly employed by cities, eg. Amsterdam 2020

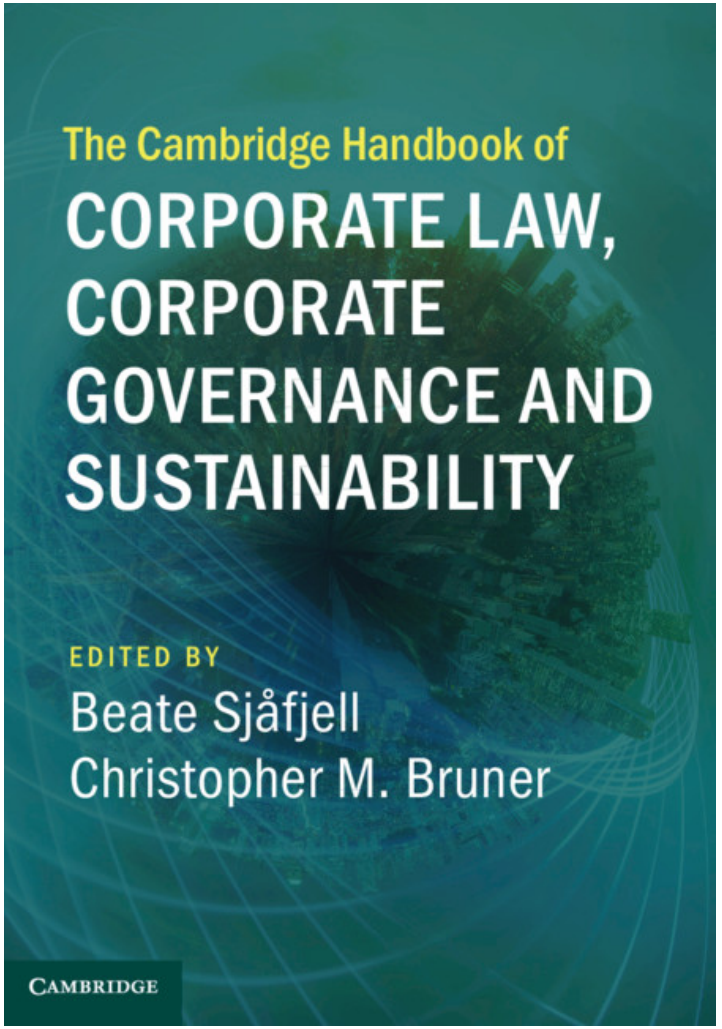
The role of business: corporate sustainability

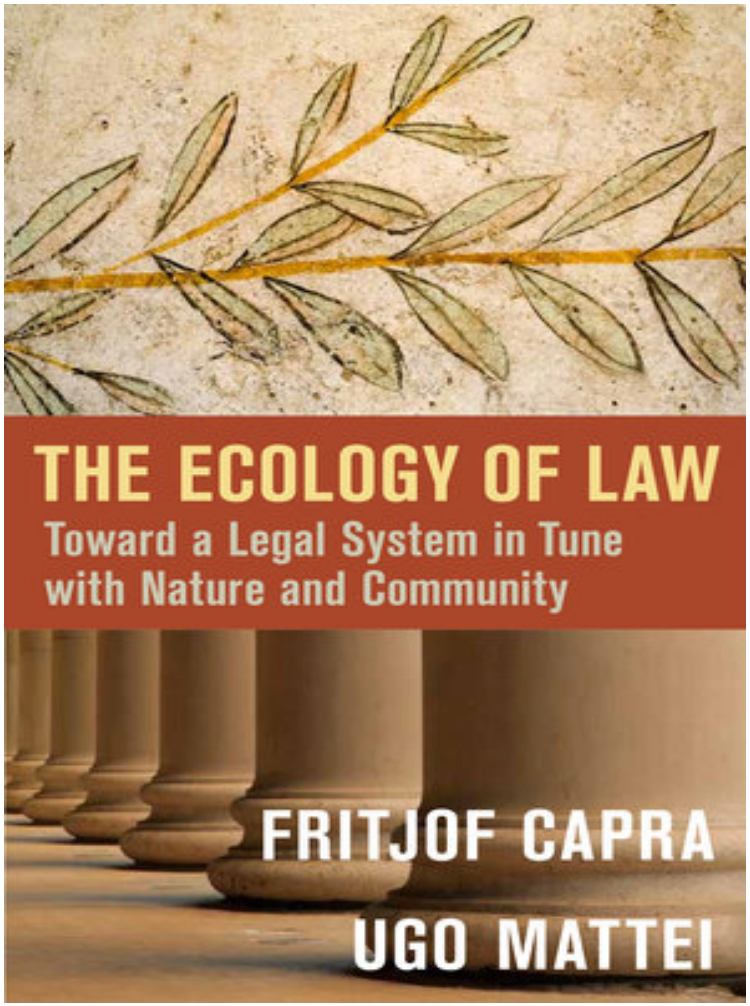
- Corporate sustainability is about business creating sustainable value within planetary boundaries & contributing to society's overarching goal of sustainability
- More specifically: business that creates value that is:
  - (a) environmentally sustainable, in that it ensures the long-term stability and resilience of the ecosystems that support human life;
  - (b) socially sustainable, in that it facilitates the achievement of human rights and other basic social rights, as well as good governance;
  - and (c) economically sustainable, in that it satisfies the economic needs necessary for stable and resilient societies

Source: Sjåfjell & Bruner, Corporations and Sustainability (2019)

Shareholder primacy as the main barrier





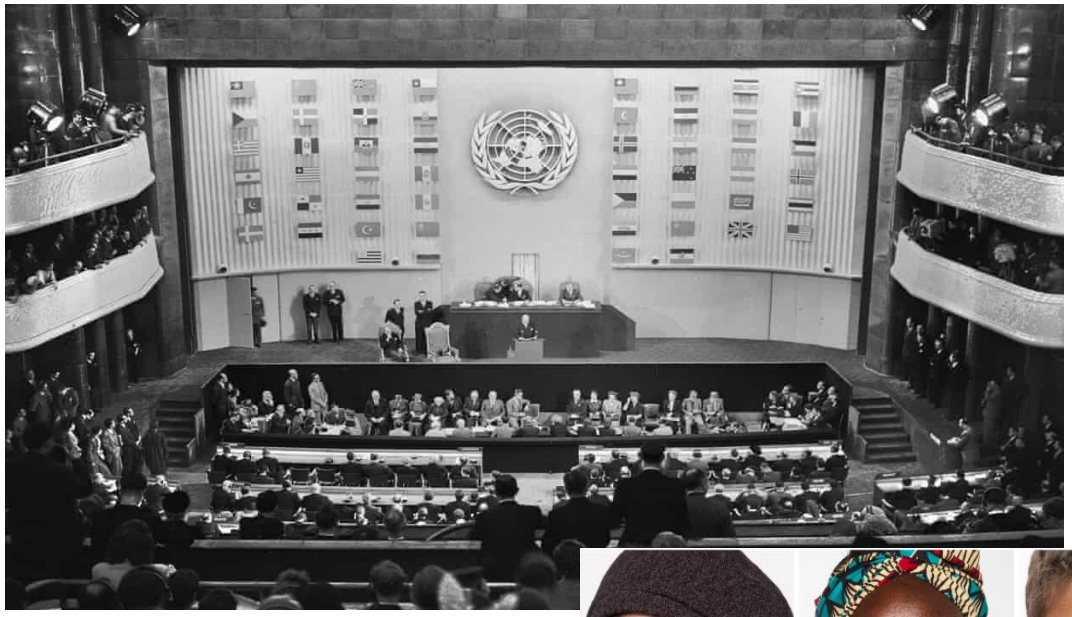


Law's potential and law's failure

- Amongst society's most powerful tools

- A mechanistic and siloed approach
- Property and power – rather than commons and community

- Rigid, backward-looking
- Path-dependent perpetuation of inequality
- Inverted relationship between competence of law and need for regulation



Source: www.theguardian.com/law/from-the-archive-blog/2018/nov/28/un-adopts-universal-declaration-human-rights-paris-1948
Photograph: STF/AFP/Getty Images.



Source: standup4humanrights.org/en/index.html



Source Paris picture:
Lawrence & Schäfer, 2019,
science.sciencemag.org/content/364/6443/829

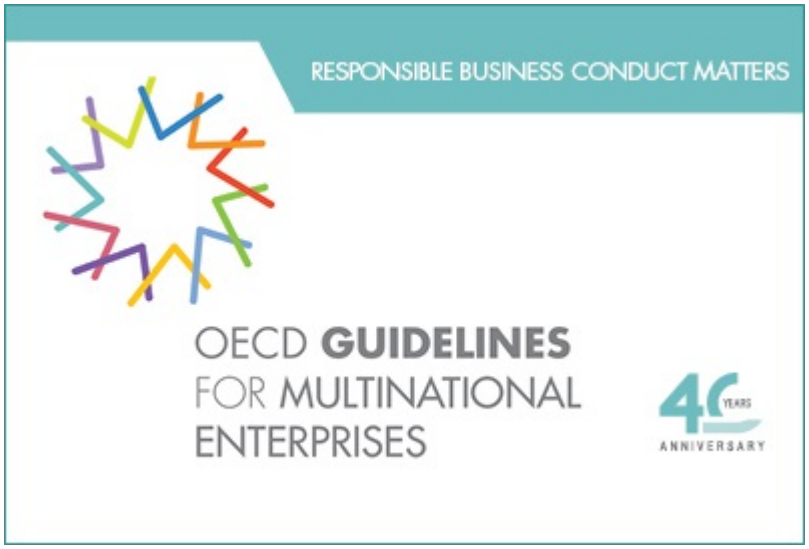




Source both Glasgow pictures:
www.reuters.com/business/cop/un-climate-negotiators-go-into-overtime-save-15-celsius-goal-2021-11-13/

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Sources: shiftproject.org/resources/ungps101/;
oecd.org/investment/mne/roundtable-40-years-of-the-guidelines.htm;
UN.org (About the Sustainable Development Agenda)

Sustainability in EU law

- Sustainability an overarching Treaty objective for the European Union internally in Europe and as a global actor:
  - [The EU] shall contribute to peace, security, *the sustainable development of the Earth*, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter (Article 3(5) of the Treaty of the European Union)

- Horizontal integration rules in the EU Treaties:
  - Environmental protection requirements *must be integrated* into the definition and implementation of the Union policies and activities, in particular with a view to promoting *sustainable development* (Article 11 of the Treaty of the Functioning of the European Union)

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Sustainability on the EU agenda



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Sustainable corporate governance: Company law as the missing piece



From corporate social responsibility…

- ‘Paradigm shift’ in CSR definition (2011)
- Directive on ‘non-financial’ reporting (2014)
- Shareholder Rights Directive II (2017)
- Action plan for sustainable finance (2018)
  - Disclosure Regulation (2019)
  - Taxonomy Regulation (2020)

… towards corporate sustainability?

- The UN Guiding Principles for Business and Human Rights (2011)
- Integrated into OECD Guidelines for Multinational Enterprises in 2011; OECD Guidance for Due Diligence (2018)

- EU Action Plan on sustainable finance, Action 10 (2018)
- EU Parliament call for mandatory due diligence for supply chains (2020) – legislative initiative report (2021)

- EU Commission Sustainable Corporate Governance (2020)
- Various Member States' initiatives, including France, Germany & Norway

- Proposal for Corporate Sustainability Reporting Directive, April 2021
- Proposal for Corporate Sustainability Due Diligence Directive, 23 February 2022

Corporate sustainability through Corporate Sustainability Due Diligence?

- 'Non-company law'? – but duty of care
- *Corporate sustainability* due diligence, limited to environmental and human rights
- Limited scope of directive & 'established business relationships' may constrain interpretation of 'value chain'
- Process: 'stakeholder' language
- Reporting, public and private enforcement – sufficient for level playing field and legal certainty?

- Corporate purpose, the proposed Directive & the misleading & dangerous shareholder vs stakeholder dichotomy

EU company law
– for corporate governance fit for future

- Embedding sustainable value creation into the law
- Enabling the board to fulfil its role
  - Strategy-setting
  - Supervision
  - Risk management
  - Sustainability due diligence

- A level playing field for business
- Legal certainty for all involved

- Coherence between company law and sustainability initiatives

- Source: Sjåfjell, Reforming EU Company Law to Secure the Future of European Business (2021)

Research-based reform proposal for sustainable company law for corporate sustainability

- Redefined purpose of the undertaking
  - Sustainable value creation within planetary boundaries
- Redefined duties of the board
  - Integrating sustainability in business models and strategies
  - Sustainability due diligence across global value chains
  - Ambitious plan for continuous improvement

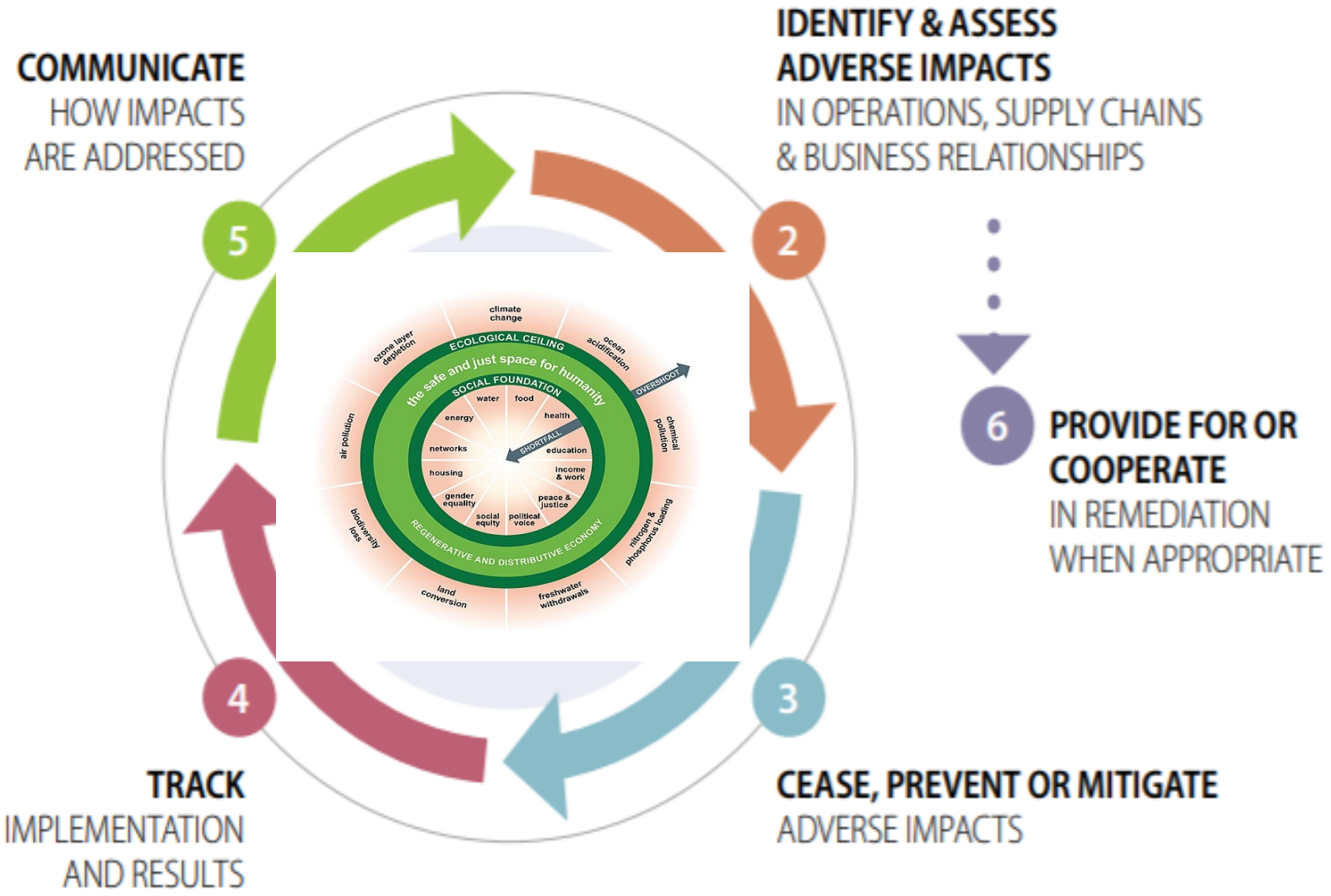
- Assurance, auditing and enforcement
  - Assurance of process by external experts
  - Auditing of sustainability reporting
  - Public and private enforcement

- Source: SMART reform proposals, business (2020)

The potential of sustainability due diligence for corporate governance fit for future

- A crucial tool for the company & its board
  - To identify and mitigate financial & business risks of unsustainability (forward-looking risk management)
  - To begin the transition towards sustainable business (strategy; business model choice; decision-making)
  - As a basis for meaningful reporting (facilitating sustainable finance, sustainable public procurement, etc)

- A crucial step towards a sustainable future



Adapted from Figure 1, OECD DD Guidance, 2018

A research-based approach to sustainability due diligence & discussion of the proposed directive

- A duty for the company and for the board
- Encompass the *business* of the company
- An integrated sustainability approach
- A mandatory (company law) instrument
  - Verification
  - Enforcement
  - Liability
- No safe harbour, no box ticking…
- Possible defence – crucial for legal certainty

- Sjåfjell & Mähönen, Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy (25 Feb 2022)

Possible further reading

- B. Sjåfjell, T. Häyhä, & S. Cornell, A Research-Based Approach to the UN Sustainable Development Goals. A Prerequisite to Sustainable Business, 2020/2021
- B. Sjåfjell, Reforming EU Company Law to Secure the Future of European Business, 2021
- L. Smit & C. Bright, The concept of a 'safe harbor' and mandatory human rights due diligence, 2020
- B. Sjåfjell & J. Mähönen, Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy (2022)

- B. Sjåfjell, Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case, 2009, on SSRN from 2022

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Sustainability is possible, with legislative reform to support the transition

Research Group **Companies, Markets & Sustainability** (the Company Law Group): jus.uio.no/companies

Blogging for Sustainability

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