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## Using Proactive Legal Strategies for Corporate Environmental Sustainability

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# USING PROACTIVE LEGAL STRATEGIES FOR CORPORATE ENVIRONMENTAL SUSTAINABILITY

Gerlinde Berger-Walliser,\* Paul Shrivastava\*\* & Adam Sulkowski\*\*\*

## ABSTRACT

*We argue that proactive law can help organizations be more sustainable. Toward that end, this Article first summarizes proactive law literature as it pertains to corporate sustainability. Next, it examines a series of cases on the pivotal nexus between proactive law and corporate sustainability. It then advances novel propositions that connect proactive law to central organizational design elements. The discussion traces further implications and suggests fruitful avenues for research and ways of using proactive law for firms to become more sustainable.*

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I. INTRODUCTION

In the past forty years, the world has developed a new understanding of the relationship between humans and the natural environment. Within this time period, awareness of environmental crises has steadily increased. The current world population of approximately 7.3 billion is expected to increase to 9.7 billion by 2050.<sup>1</sup> The global economy will continue growing over this time, assuming no catastrophic perturbations, resulting in a possible tripling of resource extraction by 2050.<sup>2</sup> This population increase and growth in global production, consumption, and pollution will likely further exacerbate negative impacts on ecosystems and climate.<sup>3</sup> To cope with worsening environmental conditions and mitigate further harms to humans and damage to the natural environment, public, private, and corporate efforts to prevent environmental degradation and to develop resilience and disaster programs must be broadened and intensified. Some even argue persuasively that enterprises should look beyond having zero net effect and pursue the goal of having a restorative effect.<sup>4</sup>

Corporations increasingly internalize the social costs and potential gains of corporate environmental sustainability practices and address them as one aspect of corporate social responsibility (CSR).<sup>5</sup> A growing body of research and case studies show that corporations are beginning to under-

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1. See U.N. Dep’t of Econ. & Soc. Affairs, *World Population Prospects 2015*, U.N. Doc. ST/ESA/SER.A/377, at 3 (2015), [https://esa.un.org/unpd/wpp/publications/Files/WPP2015\\_DataBooklet.pdf](https://esa.un.org/unpd/wpp/publications/Files/WPP2015_DataBooklet.pdf).

2. Nina Chestney, *Global Extraction of Primary Materials to Triple by 2050 –UNEP*, REUTERS (July 20, 2016, 12:00 PM), <http://www.reuters.com/article/climatechange-materials-idUSL8N1A54KS>.

3. See PRICE WATERHOUSE COOPERS, *THE WORLD IN 2050: WILL THE SHIFT IN GLOBAL ECONOMIC POWER CONTINUE?* 1 (2015), <http://www.pwc.com/gx/en/issues/the-economy/assets/world-in-2050-february-2015.pdf> (stating that the world economy is projected to grow at an average rate of just over 3% per annum from 2014 to 2050, doubling in size by 2037 and nearly tripling by 2050); Price Waterhouse Coopers, *Climate Change and Resource Scarcity*, <http://www.pwc.co.uk/issues/megatrends/climate-change-and-resource-scarcity.html> (last visited Sept. 23, 2016) (discussing the impacts of population growth and consumption increases on climate).

4. GUNTER PAULI, *BLUE ECONOMY: 10 YEARS, 100 INNOVATIONS, 100 MILLION JOBS* (2010) (advocating for a “blue economy” which “engages in regeneration” and goes “beyond mere preservation”).

5. Maurice Berns et al., *The Business of Sustainability: What it Means to Managers Now*, 56 MIT SLOAN MGMT. REV., no. 1, 2009, at 20.

stand how long-term sustainability goals can be drivers of corporate success.<sup>6</sup> However, despite the fact that some companies have fully embraced the concept of sustainability, environmental conditions are still worsening at the macro-level.<sup>7</sup> Environmental regulation remains piecemeal and reactive, and corporate sustainability programs are still primarily driven by efficiency and compliance, and thus do not reach their full potential.<sup>8</sup>

To address these concerns, this Article outlines a theoretical framework that combines legal concepts with central organizational design elements to support corporate environmental sustainability through the use of proactive law. Proactive law is an emerging approach in legal literature that regards law as an enabling instrument for companies to prevent legal disputes and reach strategic goals.<sup>9</sup> Originally a European concept, proactive law has been previously studied in U.S. legal literature as a means for companies to gain competitive advantage,<sup>10</sup> or to enhance global sustainability governance.<sup>11</sup> Management research has linked environmental responsiveness to organizational capabilities and performance, thus influencing competitive strategies and organization,<sup>12</sup> and has recognized the positive role corpora-

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6. See Michael J. O'Hara, *Governing for Genuine Profit*, 36 VAND. J. TRANSNAT'L L. 765, 777–78 (2003) (explaining why managing long-term goals creates shareholder wealth). See generally RESEARCH IN CORPORATE SUSTAINABILITY: THE EVOLVING THEORY AND PRACTICE OF ORGANIZATIONS IN THE NATURAL ENVIRONMENT (Sanjay Sharma & Mark Starik eds., 2002).

7. Wayne Visser, *The Age of Responsibility: CSR 2.0 & the New DNA of Business*, 5 J. BUS. SYS. GOV'T & ETHICS, no. 3, 2010, at 7, 13 (stating that “while at the micro level—in terms of specific CSR projects and practices—we can show many improvements, at the macro level almost every indicator of our social, environmental, and ethical health is in decline,” and pointing to individual positive examples).

8. See Gerlinde Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO. INT'L L.J. 417, 433–34 (2015) (calling for a synergistic relationship between the private and public sector to create an effective regulatory framework); see also Ingrid Bonn & Josie Fisher, *Sustainability: The Missing Ingredient is Strategy*, 32 J. BUS. STRATEGY, no. 1, 2011, at 5 (addressing sustainability as a strategic instead of an operational issue to fundamentally transform corporate strategies and operations).

9. See generally Gerlinde Berger-Walliser, *The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement*, in PROACTIVE LAW IN A BUSINESS ENVIRONMENT 13 (Gerlinde Berger-Walliser & Kim Østergaard eds., 2012).

10. See generally George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641 (2010) (relating proactive law to the law and strategy approach in the U.S. legal literature and applying proactive law to identify how firms can use law as a source of competitive advantage).

11. See generally Berger-Walliser & Shrivastava, *supra* note 8 (engaging law and sustainable business to determine the best way to develop a regulatory framework based on the principles of proactive law).

12. See Sanjay Sharma & Harrie Vredenburg, *Proactive Corporate Environmental Strategy and the Development of Competitively Valuable Organizational Capabilities*, 19 STRAT. MGMT J. 729, 730 (1998) (providing empirical evidence for the relationship between environmental responsiveness to organizational capabilities and performance; with references); see also

tions can play in shaping environmental regulation.<sup>13</sup> This Article is the first attempt to integrate the proactive law approach with organizational environmental sustainability, thus linking corporate sustainability strategy and proactive law, and moving beyond regulatory aspects alone.

The Article proceeds in three parts. Part II outlines the evolving nature of corporate sustainability. Part III describes the proactive law approach and provides practical examples of how it relates to corporate sustainability. Part IV develops a theoretical framework that fuses research on sustainability, strategic leadership, organization, and proactive law to advance corporate sustainability goals. The Article concludes by discussing the policy implications of this approach and suggestions for future empirical research on proactive law and corporate sustainability.

## II. THE EVOLVING NATURE OF CORPORATE SUSTAINABILITY

Corporate sustainability exists at multiple levels: natural resource management, environmental protection, crisis prevention and management, and climate change mitigation and adaptation.

For the past ten years the annual State of the World report by World Watch Institute, along with studies by other research organizations, has documented severe ecological degradation in virtually all major ecosystems of the world.<sup>14</sup> Scientists largely agree that humans are exceeding the adaptive capacity of the biosphere and compromising healthy, functional ecosystems.<sup>15</sup> Beyond the massive and persistent ecological harm inflicted by modern industrial societies,<sup>16</sup> there are instances of acute disasters such as

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Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. ECON. PERSP. 97, 101–04 (1995) (arguing that firms from jurisdictions with strict environmental regulations will gain a competitive advantage through innovation offsets).

13. See generally Andrew King, *Why it Pays to Become a Rule Maker*, 56 MIT SLOAN MGMT. REV., no. 2, 2015, at 11.

14. See Michael Renner & Tom Prugh, *Failing Governance, Unsustainable Planet*, in STATE OF THE WORLD 2014: GOVERNING FOR SUSTAINABILITY 3, 3–4 (Lisa Mastny ed., 2014) (noting worsening environmental trends due to growth in greenhouse gas emissions and natural resource use); see also AM. ASS'N FOR THE ADVANCEMENT OF SCI., *WHAT WE KNOW: THE REALITY, RISKS AND RESPONSE TO CLIMATE CHANGE* (2014), [http://whatweknow.aaas.org/wp-content/uploads/2014/07/whatweknow\\_website.pdf](http://whatweknow.aaas.org/wp-content/uploads/2014/07/whatweknow_website.pdf) (noting the overwhelming evidence of human-caused climate change and describing its vast implications).

15. See, e.g., Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14 ECOLOGY & SOC'Y, no. 2, 2009 (providing groundwork for the estimation of the safe space for human development).

16. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY* (2014), <http://www.ipcc.ch/report/ar5/wg2> (providing a comprehensive discussion of impacts of climate change in societies around the world).

the 1984 Bhopal disaster,<sup>17</sup> the Chernobyl Nuclear Accident in 1986,<sup>18</sup> and the 2010 Macondo Well *Deepwater Horizon* oil spill.<sup>19</sup> Lesser-known, but more massive, slower-moving catastrophic phenomena include oil spillages in the Ogoniland region of the Niger delta of Nigeria<sup>20</sup> and the rainforests in South America.<sup>21</sup> Such disasters occur at local, regional, and international levels, and are part of larger, complex, social, economic, and technological systems.

These catastrophic events often implicate corporations, but companies do not always have direct control over the events' causes and consequences. For example, in the case of the 2011 Fukushima Reactor Meltdown, a tsunami was the principal cause of the ensuing nuclear accident in Fukushima, Japan.<sup>22</sup> Such crises pose risks that are different from the more familiar

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17. See, e.g., PAUL SHRIVASTAVA, *BHOPAL: ANATOMY OF A CRISIS* (1987) (recounting the worst industrial accident in history, examining the causes, and suggesting policy changes to help prevent future crises). The Bhopal disaster was a gas leak incident that occurred in December 1984 at the Union Carbide (India) Limited (UCIL) pesticide plant in Bhopal, India where over 300,000 people were exposed to methyl isocyanate (MIC) gas and other chemicals. *Id.* at 1–5.

18. See, e.g., World Nuclear Ass'n, *Chernobyl Accident 1986*, INFORMATION LIBRARY, <http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Chernobyl-Accident> (last updated June 2016) (describing the Chernobyl accident in detail as well as the environmental and human health effects).

19. See, e.g., Helen K. White et al., *Impact of the Deepwater Horizon Oil Spill on a Deep-Water Coral Community in the Gulf of Mexico*, 109 *PROC. NAT'L ACAD. SCI. U.S.* 20303 (2012) (describing the impact of the *Deepwater Horizon* oil spill on a deep-water well in Mexico).

20. See, e.g., Prince Mmom & Augustine Igbuku, *Challenges and Prospect of Environmental Remediation/Restoration in Niger Delta of Nigeria: The Case of Ogoniland*, 5 *J. ENERGY TECHS. & POLY* 5, 5–6 (2015). The clean-up of the Ogoniland region of the Niger delta is projected to take a quarter century, cost roughly \$1 billion, and involves a territory of 1,000 square miles. John Vidal, *Niger Delta Oil Spill Clean-up Launched – But Could Take Quarter of a Century*, *THE GUARDIAN* (June 1, 2016, 7:01 PM), <https://www.theguardian.com/global-development/2016/jun/02/niger-delta-oil-spill-clean-up-launched-ogoniland-communities-1bn>.

21. See, e.g., Paul Arellano, Kevin Tansey, Heiko Balzter & Doreen S. Boyd, *Detecting the Effects of Hydrocarbon Pollution in the Amazon Forest Using Hyperspectral Satellite Images*, 205 *ENVTL. POLLUTION* 225, 225 (2015). 18 billion gallons of toxic wastewater were released into waterways of the Ecuadorian rainforest and crude and toxic sludge was left in 1,000 open-air, unlined waste pits. Amazon Watch, *Chevron's Chernobyl in the Amazon*, CHEVRON, <http://amazonwatch.org/work/chevron> (last visited Dec. 15, 2016). It is possible that the sources of oil pollution may have included both operations of Chevron and the national oil company of Ecuador. Clifford Krauss, *Big Victory for Chevron Over Claims in Ecuador*, *N.Y. TIMES* (Mar. 4, 2014), [http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?\\_r=0](http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?_r=0).

22. See World Nuclear Ass'n, *Fukushima Accident*, INFORMATION LIBRARY, <http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Fukushima-Accident> (last updated July 2016); see also Berger-Walliser & Shrivastava, *supra* note 8, at 429 (describing the interdependent nature of today's corporate industrial systems and the significant damage to the environment and human life an error within some small subsystem can generate).

forms of corporate risks for which companies have developed and implemented procedures (i.e. technological, financial, and market risks). Ecological crises—both systemic and acute—have incalculable total costs in terms of loss of irreplaceable life-supporting ecosystem services, economic damage, and human suffering and require stakeholder engagement for specifying and addressing them.<sup>23</sup> Practices that would help industrial civilization to continue with fewer perturbations, such as collocating factories to completely utilize each other's waste streams, decarbonizing energy, changing food supply chains, and cradle-to-cradle product design, are in nascent stages of adoption, in some cases, due to perceived stakeholder preferences for incremental changes.<sup>24</sup>

In an effort to mitigate and adapt to large-scale ecological collapse without compromising economic development, experts have long advocated for a move towards sustainable economic development. In its landmark 1987 Brundtland Report (entitled "Our Common Future") the World Commission on Environment and Development (WCED) articulated the idea of "sustainability."<sup>25</sup> It defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>26</sup> The concept evolved into the "triple bottom line,"<sup>27</sup> of the "three P's" (planet, people, profit) or "three E's" (ecology/environment, economy/employment and equity/equality)—buzzwords that permeate many statements of corporate sustainability strategy.<sup>28</sup>

23. See Sharma & Starik, *supra* note 6; PAUL SHRIVASTAVA, GREENING BUSINESS: PROFITING THE CORPORATION AND THE ENVIRONMENT 4–19 (1996).

24. See Sanjay Sharma & Irene Henriques, *Stakeholder Influences on Sustainability Practices in the Canadian Forest Products Industry*, 26 STRATEGIC MGMT. J. 159, 159, 161–67 (2005) (examining "how managers' perceptions of different types of stakeholder influences in the Canadian forestry industry affect the types of sustainability practices that their firms adopt").

25. REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE (1987), <http://www.un-documents.net/our-common-future.pdf>.

26. *Id.* ¶ 1.

27. See JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 70–94 (1997) (broadening the concept of environmental sustainability and presenting the concept of the "Triple Bottom Line" of economic prosperity, environmental quality and social justice and practical steps to build a sustainable corporation).

28. ANDRES R. EDWARDS & DAVID W. ORR, THE SUSTAINABILITY REVOLUTION: PORTRAIT OF A PARADIGM SHIFT 20–23 (2005). See generally Thomas N. Gladwin et al., *Shifting Paradigms for Sustainable Development: Implications for Management Theory and Research*, 20 ACAD. MGMT. REV. 874, 876 (1995) (reviewing and critiquing the development of management scholarship following the Brundtland Report).

Corporate reaction to the calls for sustainable development has varied through the years.<sup>29</sup> Until the mid-1960s, U.S. and European corporations operated in cultural climates that emphasized corporate productivity while ignoring environmental degradation. The playing field began to change in response to large-scale pollution and public outcry, stimulated by works such as Rachel Carson's influential book *Silent Spring*.<sup>30</sup> In the 1970s, government regulations began to hold corporations more accountable for their environmental impacts. To avoid legal penalties, corporations reacted with attempts to mitigate the environmental risks and impacts of their operations.<sup>31</sup>

The conservative governments of the 1980s (e.g., Ronald Reagan in the U.S., Margaret Thatcher in the U.K.) did not aggressively enforce existing regulations, or pursue the passage of new legislation to protect the environment.<sup>32</sup> Nonetheless, corporations became responsive to public opinion and environmental activism, and reacted to public lobbying by categorizing environmental concerns alongside other social responsibilities.<sup>33</sup>

By the 1990s, corporate environmentalism emerged with a "compliance" mentality in corporate environmental management policies.<sup>34</sup> Insurance companies, customers, and investors were seen as advocates for environmental stakes.<sup>35</sup> Some corporations began public reporting on their social and environmental performance.<sup>36</sup> The rise of reporting schemes such as the Global Reporting Initiative (GRI) and ISO 14000 environmental management standards represents an expression of this trend.<sup>37</sup> Courts have

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29. See ANDREW J. HOFFMAN, FROM HERESY TO DOGMA: AN INSTITUTIONAL HISTORY OF CORPORATE ENVIRONMENTALISM 12–13 (2001).

30. RACHEL CARSON, *SILENT SPRING* (1962); HOFFMAN, *supra* note 29, at 10.

31. HOFFMAN, *supra* note 29, at 12.

32. See Paul Hamilton, *Review*, 41 CANADIAN J. POL. SCI. 1, 240–41 (2008) (reviewing MONICA PRASAD, *THE POLITICS OF FREE MARKETS: THE RISE OF NEOLIBERAL ECONOMIC POLICIES IN BRITAIN, FRANCE, GERMANY, AND THE UNITED STATES* (2006)); Clint Bolick, *Thatcher's Revolution: Deregulation and Political Transformation*, 12 YALE J. REG. 527 (1995).

33. See generally Cynthia E. Clark, *Differences Between Public Relations and Corporate Social Responsibility: An Analysis*, 26 PUB. REL. REV. 363 (2000) (analyzing the way businesses respond to public opinion and societal pressures).

34. See HOFFMAN, *supra* note 29, at 134–40 (2001) (describing the influence of activists, government, consumers, investors, competitors and insurance companies on corporate environmentalism between 1988 and 1993).

35. *Id.*

36. Brendan O'Dwyer, *Corporate Environmental Reporting*, 33 ACCT. IRELAND 18, 18–19 (2001) (describing the development of corporate environmental reporting in the 1990's).

37. See generally Global Reporting Initiative, *About GRI*, <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx> (last visited Nov 7, 2016).

laid out the scenarios in which publicly traded companies will be liable under securities law for failing to disclose environmental liabilities.<sup>38</sup>

Today, with increased government regulation, public awareness, and stakeholder pressure, as well as the increasing cost of natural resources, corporations must at least appear to be concerned about their environmental impacts.<sup>39</sup> Companies adopt resource-efficient production processes, use eco-friendly packaging, and engage in public-private partnerships such as the U.N. Global Compact (UNGC) in order to develop their sustainability programs.<sup>40</sup> Corporate leaders recognize the benefits of sustainable practices including reduced costs and risks, reputation boosts, attractiveness to talent and investors, and increased competitiveness.<sup>41</sup> Some companies, such as Green Mountain Coffee Roasters, Patagonia, and Newman's Own, have even made the environment one of their central business purposes.<sup>42</sup> These social enterprises, also known as "benefit corporations" or "hybrid organizations," pursue social goals through for-profit organizations.<sup>43</sup>

38. Risa Vetri Ferman, *Environmental Disclosures and SEC Reporting Requirements*, 17 DEL. J. CORP. L. 483, 499–500 (1992).

39. See generally World Bus. Council for Sustainable Dev., *Overview, ABOUT US*, <http://www.wbcsd.org/Overview/About-us> (last visited Sept. 22, 2016) (the WBCSD provides a list of ecological sustainability programs adopted by the world's largest corporations).

40. See Paul Shrivastava, *Environmental Technologies and Competitive Advantage*, 16 STRATEGIC MGMT. J. 183, 190–95 (1995) (providing illustrative case studies on how companies use environmental technologies to significantly improving their environmental and competitive performance); United Nations Global Compact, *Our Mission, WHO WE ARE*, <https://www.unglobalcompact.org/what-is-gc/mission> (last visited Sept. 22, 2016); see also Surya Deva, *Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107, 115 (2006) (describing and critiquing the UNGC); George Kell, *The Global Compact: Origins, Operations, Progress, Challenges*, 11 J. CORP. CITIZENSHIP 35, 37–39 (2003) (describing the United Nations' role as an authoritative convenor and facilitator between governments, companies, labor and civil society organizations).

41. See generally Thomas Dyllick & Katrin Muff, *Clarifying the Meaning of Sustainable Business*, ORGANIZATION & ENVIRONMENT, Mar. 23, 2015, at 1–2, <http://oae.sagepub.com/content/early/2015/02/12/1086026615575176.full.pdfhtml>.

42. For other examples see Visser, *supra* note 7, at 13. For an auto-bibliographical description of the carpet manufacturer Interface's transition to a sustainable business model see RAY ANDERSON & ROBIN WHITE, *CONFESSIONS OF A RADICAL INDUSTRIALIST: PROFITS, PEOPLE, PURPOSE: DOING BUSINESS BY RESPECTING THE EARTH* (2009).

43. Andrew J. Hoffman & Nardia Haigh, *Positive Deviance for a Sustainable World: Linking Sustainability and Positive Organizational Scholarship*, in THE OXFORD HANDBOOK ON POSITIVE ORGANIZATIONAL SCHOLARSHIP 953, 958 (Kim S. Cameron & Gretchen M. Spreitzer eds., 2012). For an analysis of the benefit corporation from a legal and CSR perspective, see Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287 (2013); see also Justin Blount & Patricia Nunley, *Social Enterprise, Corporate Objectives, and the Corporate Governance Narrative*, 52 AM. BUS. L. J. 201 (2015).

A growing body of research analyzes these positive corporate efforts<sup>44</sup> and tries to explain what motivates an individual's or organization's "positive deviant practices" that seek to change organizations, industries, and socio-economic systems.<sup>45</sup> It also criticizes corporate sustainability programs as greenwashing,<sup>46</sup> incremental, piecemeal, and still primarily motivated by efficiency and cost concerns<sup>47</sup> rather than pure concern for the environment. The research observes that corporate efforts, as laudable as they are, have not been able to stop environmental degradation. On the contrary, our planet's biosphere is still in rapid decline.<sup>48</sup> The research calls for a fundamental shift toward a "holistic model of CSR," that better takes into account non-monetary values and needs in addition to corporate interests.<sup>49</sup>

### III. APPLICATION OF PROACTIVE LAW TO CORPORATE SUSTAINABILITY

In *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, we outlined the basic concepts of proactive law and its application to

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44. See Mark Starik & Patricia Kanashiro, *Toward a Theory of Sustainability Management: Uncovering and Integrating the Nearly Obvious*, 26 *ORG. & ENV'T* 7, 8 (2013) (outlining a "proto-theory" based on the cultural sustainability immersion concept); see e.g., Sharma & Starik, *supra* note 6; SHRIVASTAVA, *supra* note 23.

45. See Hoffman & Haigh, *supra* note 43, at 956 (summarizing the underlying reasons for organizations and individuals to seek positive change in their organizations, industries or socio-economic environment); see also King, *supra* note 13, at 11–12 (explaining what motivates firms to actively participate in public and private environmental rule-making).

46. See William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 *J. BUS. ETHICS* 253, 255 (2003) (arguing that "the problems and challenges of ensuring fair and accurate corporate social reporting mirror those accompanying corporate compliance with law").

47. See David Morrow & Dennis Rondinelli, *Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification*, 20 *EUR. MGMT. J.* 159, 162–63 (2002) (exploring the motivations and corresponding impact of firms adopting and certifying EMS).

48. See Dyllick & Muff, *supra* note 41, at 2–3.

49. See Visser, *supra* note 7, at 5, 14 (stating that "the incremental approach to CSR simply does not produce the scale and urgency of response that is required, nor does it get to the roots of business's unsustainability," and proposing a "holistic model of CSR" based on value creation, good governance, societal contribution and environmental integrity); see also Hoffman & Haigh, *supra* note 43, at 959 (examining how positive organizational scholarship can help sustainability make a shift from addressing "deficit gaps" to instead addressing "abundance gaps"); Paul Shrivastava, *Enterprise Sustainability 2.0: Aesthetics of Sustainability*, in *OXFORD HANDBOOK OF BUS. AND THE NAT. ENV'T* 631 (Andrew J. Hoffman & Pratima Bansal eds., 2011) (suggesting to focus research on corporate sustainability on internal spaces of the human mind and emotions in addition to its past focus on external spaces); Dyllick & Muff, *supra* note 41, at 10–13 (addressing how businesses can make more effective contributions to addressing sustainability challenges and ascertaining when businesses are truly sustainable).

sustainability regulation.<sup>50</sup> Here, we briefly summarize the concept of proactive law and then describe how it can be linked to corporate sustainability at the firm level.<sup>51</sup>

### A. *An Overview of the Proactive Law Approach*

The social-scientific concept of proactivity goes back to experimental psychology from the 1930s.<sup>52</sup> The word “proactive” implies acting in anticipation of future problems, needs, or changes.<sup>53</sup> Similarly, proactive law does not view law as a constraint with which companies and people need to comply.<sup>54</sup> It is not a cost factor, administrative burden, or a protective measure for one’s own interests.<sup>55</sup> In contrast to the dominant, adversarial, and backward-looking legal system, proactive law positions law as an enabling instrument to create success and foster sustainable relationships.<sup>56</sup>

Proactive law has its roots in Scandinavian legal realism wherein the law pursues socially useful goals and takes into account the economic and social consequences of judicial decisions.<sup>57</sup> It should come as no surprise that proactive law originally emerged as a European concept, as the traditionally less-litigious continental European civil law stands in sharp contrast to the Anglo-American common law system.<sup>58</sup> Originally developed by European legal scholars, proactive law emphasizes collaboration, common goals, and dispute prevention as opposed to the adversarial tradition of the United

50. Berger-Walliser & Shrivastava, *supra* note 8.

51. The following section builds on Berger-Walliser, *supra* note 9.

52. See Paul L. Whitely & Gerald Blankfort, *The Influence of Certain Prior Conditions Upon Learning*, 16 J. EXPERIMENTAL PSYCHOL. 843 (1933) (investigating the relation of conditions prior to learning efficiency using a variety of conditions antecedent to the learning test).

53. Merriam-Webster, *Proactive*, <http://www.merriam-webster.com/dictionary/proactive> (last visited Nov. 14, 2016).

54. Berger-Walliser, *supra* note 9, at 16.

55. See Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378, 380–81 (2008) (proposing a framework for firms to use “legal astuteness” for competitive advantage that included a “proactive approach”); see also Siedel & Haapio, *supra* note 10, at 647 (stating that managers tend to think about the law as a “burden or obstacle rather than a source of competitive advantage”).

56. See Berger-Walliser & Shrivastava, *supra* note 8, at 470 (describing the concept of proactivity and the objectives of proactive law).

57. Soile Pohjonen, *Proactive Law in the Fields of Law*, in A PROACTIVE APPROACH, 49 SCANDINAVIAN STUDIES IN LAW 54, 57 (Peter Wahlgren ed., 2006) [hereinafter A PROACTIVE APPROACH] (describing Scandinavian legal realism).

58. Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL. ANALYSIS & MGMT. 369, 369–406.

States and other common law countries.<sup>59</sup> However, the concept is equally applicable in the common law context.<sup>60</sup>

Proactive law urges a paradigm shift from a system based on narrowly defined and immediate self-interest, separation, and power, to one of understanding, integration, and accommodation.<sup>61</sup> To those ends it focuses on ex ante dispute pre-emption and legal risk management, rather than ex post dispute resolution.<sup>62</sup> To avoid getting to the stage of conflict, it suggests paying careful attention to legal clarity, early warning mechanisms, mutual understanding, and enhanced collaboration.<sup>63</sup> Proactive law originated from studies on the improvement of contracting processes.<sup>64</sup> However, the logic of proactive law is seeping into many different practical settings. The European Union (EU) itself can be seen as a result of proactive law logic in that it was formed to avoid another conflict between European states after the Second World War by bringing economic interdependence and political integration among European countries.<sup>65</sup> The EU's success can be measured by its receipt of the 2012 Nobel Peace Prize award in recognition of the EU's contribution towards the advancement of peace and reconciliation and democracy and human rights in Europe for over six decades.<sup>66</sup>

Proactive law is also outcome-orientated and driven by economic value creation.<sup>67</sup> It encourages original and creative thinking to generate new ideas and concepts in response to foreseeable exigencies. It also requires

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59. See Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 51 (1983) (providing comparative data on the amount of resources devoted to handling disputes in various countries).

60. See Siedel & Haapio, *supra* note 10; see also THOMAS D. BARTON, *PREVENTIVE LAW AND PROBLEM SOLVING: LAWYERING FOR THE FUTURE* (2009).

61. See BARTON, *supra* note 60, at 3–4 (providing practical examples to illustrate this paradigm shift in legal thinking).

62. See Berger-Walliser, *supra* note 9, at 30 (citing RICHARD SUSSKIND, *THE FUTURE OF LAW* 292 (1998)).

63. See Siedel & Haapio, *supra* note 10, at 668–69 (identifying understanding of the law as the first step for companies to gain competitive advantage through use of proactive legal strategies).

64. A PROACTIVE APPROACH, *supra* note 57, at 55. See generally Helena Haapio, *Quality Improvement Through Proactive Contracting: Contracts are too Important to Be Left to Lawyers!*, 52 AM. SOC. FOR QUALITY'S ANN. QUALITY CONGRESS PROC. 243 (1998) (explaining that application of proactive law can improve the contracting process).

65. Craig Parsons, *Showing Ideas as Causes: The Origins of the European Union*, 56 INT'L ORG. 47, 58 (2002) (analyzing the reasons Europeans post-war chose the European Union over other less developed international institutions).

66. *The Nobel Peace Prize 2012*, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2012](http://www.nobelprize.org/nobel_prizes/peace/laureates/2012) (last visited May 15, 2015).

67. See Berger-Walliser & Shrivastava, *supra* note 8, at 438 (identifying value-creation as a feature of proactive law).

cross-professional collaboration between lawyers, managers, and subject-matter experts, which is essential to reaching common goals and avoiding legal disputes.<sup>68</sup> A proactive lawyer places an emphasis on how to help the client reach desired outcomes and avoid the negative effects of litigation as opposed to reaching the best outcome in court.<sup>69</sup>

When drafting a supply contract, for example, the emphasis would not be on allocating responsibilities in case one of the parties does not perform its obligations.<sup>70</sup> Rather, the focus would be on how both parties can collaboratively ensure that satisfactory performance occurs in a timely manner.<sup>71</sup> This is not a new goal. It is a long-standing truism that avoiding disputes is typically less costly than reallocating funds through litigation.<sup>72</sup> Another truism is that creative legal counsel should try to understand and integrate their client's business and/or personal goals into the legal solutions they propose.<sup>73</sup> The contribution that proactive legal scholarship can make is to identify both a theoretical model and specific tactics that legal and business professionals can systematically apply to improve relationships with consumers, suppliers, employees, and other stakeholders, to ultimately achieve better business results. In doing so, proactive legal counsel will not only help their clients stay out of court, but they will be able to identify new business opportunities, mitigate risk, and ultimately be able to add value to business and society in general.<sup>74</sup>

The emerging legal literature on proactive law utilizes a variety of terms, sometimes synonymously and sometimes with subtle differences. It ranges from "proactive law movement" to "proactive law approach" to "proactive law." The "comprehensive law movement" embraces similar ideas (although it focuses on non-business arenas),<sup>75</sup> as does the "law and strategy" approach in the United States.<sup>76</sup> As far as regulation, which is beyond

68. *Id.*

69. Nordic School of Proactive Law, *The Idea*, <http://www.proactivelaw.org> (last visited Nov. 15, 2016) (defining Proactive Law as "a future-oriented approach to law placing an emphasis on legal knowledge to be applied before things go wrong").

70. See *Pathclearer: A More Commercial Approach to Drafting Commercial Contracts*, L. DEP'T QUARTERLY, Oct.-Dec. 2005, at 40-41.

71. *Id.*

72. See generally LOUIS M. BROWN, PREVENTIVE LAW 3 (1950).

73. *Id.*

74. For practical examples, see GEORGE SIEDEL & HELENA HAAPIO, PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE (2010).

75. See Susan S. Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. DISP. RESOL. L.J. 1 (2006).

76. Constance E. Bagley, *What's Law Got to Do with It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587, 589 (2010); Bagley, *supra* note 55, at 380-81; Robert C. Bird, *Law, Strategy and Competitive Advantage*, 44 CONN. L. REV. 61, 67-71 (2011); Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J. L. BUS. & FIN. 1, 12 (2008); SIEDEL & HAAPIO, *supra* note 74, at

the scope of this article, the academic literature on “new governance”<sup>77</sup> including “polycentric governance”<sup>78</sup> and proactive regulation share some common features.<sup>79</sup> For the purpose of this Article we use “proactive law” as a comprehensive term for a cooperative approach to law that utilizes legal instruments as a means of communication, risk mitigation, solution implementation, and conflict avoidance.

The sustainability challenges described in Part II of this Article call for proactive and preventive strategies. Systemic ecological devastation involving mass extinction, toxic pervasive pollution, and habitat destruction is largely irreversible.<sup>80</sup> In the context of acute localized disasters, the ordering of a clean-up and payment of monetary damages, which is typically all the legal system can provide, cannot bring back lost lives and frequently fails to fully restore ecosystems.<sup>81</sup>

The interrelationships between industry and government often make it hard to pin responsibility for environmental problems on a single entity. Multiple actors may be responsible, all of whom would need to collaborate

12; see Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGMT. REV., no.1, 2014, at 83.

77. For an overview of the “New Governance” paradigm, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344–45 (2004) (identifying common traits to several “New Governance” approaches).

78. See Daniel H. Cole, *From Global to Polycentric Climate Governance*, 2 CLIMATE L. 395 (2011); Elinor Ostrom, *Nested Externalities and Polycentric Institutions: Must We Wait for Global Solutions to Climate Change Before Taking Action at Other Scales?*, 49 ECON. THEORY 353 (2012); Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVTL. CHANGE 550 (2010); Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* (World Bank Policy Research, Working Paper No. 5095, 2009), <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5095>; see also Jamie Darin Prenekert & Scott J. Shackelford, *Business, Human Rights, and the Promise of Polycentricity*, 47 VAND. J. TRANSNAT'L L. 451 (2014) (applying Polycentric Governance to business's obligation to respect and promote human rights); Scott J. Shackelford, *Governing the Final Frontier: A Polycentric Approach to Managing Space Weaponization and Debris*, 51 AM. BUS. L. J. 429, 468–69 (2014) (applying Polycentric Governance to space governance as global commons).

79. See Berger-Walliser & Shrivastava, *supra* note 8, at 453 (suggesting “that effective sustainable governance should be proactive in its content orientation while using a reflexive or polycentric mechanism for its technical legislative implementation”).

80. See generally JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2005) (providing multiple examples for environmental collapse).

81. Nat'l Oceanic & Atmospheric Admin.: Office of Response & Restoration Management, *Response to the Exxon Valdez Spill*, <http://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/exxon-valdez-oil-spill/response-exxon-valdez.html> (last visited Oct. 19, 2016) (reporting on a long-term study to track the process and progress of ecological recovery and the effects of various response techniques after an oil spill).

in order to prevent ecological crises and promote sustainable development.<sup>82</sup>

Management research has shown how proactive environmental practices can improve efficiency of an organization and legitimacy in the eyes of outside stakeholders, thus yielding competitive advantage.<sup>83</sup> However, these proactive environmental strategies are largely viewed as “organizational commitments . . . not required by law.”<sup>84</sup> The rest of this Article explains how legal institutions can provide formal structures that foster corporate environmental sustainability through the use of proactive law.

### B. *Practical Applications of Proactive Law*

The logic of proactive law is seeping into practical settings at the international, state, industry, and individual firm levels. The following examples demonstrate the practical relevance of proactive law for corporate environmental sustainability at each level. Proactive law is not tied to a single national legal system. Instead it is an over-arching legal mindset meant to promote desirable economic and social goals. It seeks value creation for all stakeholders through structures that can be supranational or international, allowing for resolution of complex cross-boundary problems.<sup>85</sup>

One example in which proactive law would be useful is water management. Rivers flow across international boundaries through different jurisdictions and can be controlled at different points, which affects availability and causes conflicts over usage and pricing.<sup>86</sup> In many cases there is abundant data on the quantity and quality of water flow in rivers to anticipate

82. See generally SHRIVASTAVA, *supra* note 17.

83. See Michael A. Berry & Dennis A. Rondinelli, *Proactive Corporate Environmental Management: A New Industrial Revolution*, 12 ACAD. MGMT. EXECUTIVE 38, 40–41 (1998); see also DANIEL C. ESTY & ANDREW S. WINSTON, GREEN TO GOLD: HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE, AND BUILD COMPETITIVE ADVANTAGE (2006); Stuart L. Hart & Mark B. Milstein, *Creating Sustainable Value*, 17 ACAD. MGMT. EXECUTIVE 56 (2003); Jeffrey G. York, *Pragmatic Sustainability: Translating Environmental Ethics into Competitive Advantage*, 85 J. BUS. ETHICS 97 (2009).

84. Nicole Darnall et al., *Adopting Proactive Environmental Strategy: The Influence of Stakeholders and Firm Size*, 47 J. MGMT. STUD. 1072, 1072, 1079–80 (2010) (substantiating “the development of stakeholder theory by deriving a size moderated stakeholder model and applying it to a firm’s adoption of proactive environmental practices”).

85. See Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 AM. BUS. L. J. 255, 284 (2015) (suggesting that both regulators and firms should be proactive in using environmental regulation for environmental issues on a global scale).

86. See, e.g., Valentin Jeutner, *Water Claims of a Palestinian State Under the Principles of International Law*, 24 GEO. INT’L ENVTL. L. REV. 367 (2012) (discussing a dispute between Israel and Palestine related to the three main shared water resources (Coastal Aquifer, Mountain Aquifer, Jordan River) under principles of international law).

associated problems.<sup>87</sup> Through proactive water management negotiated between national governments, limits can be placed on excessive upstream use to avoid disputes related to downstream water scarcity.<sup>88</sup> This issue has been well-managed in some cases where cross-border water management agreements have been adopted. For example, in Central Asia, the Interstate Commission for Water Coordination of Central Asia (ICWC) has issued two agreements: the Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, and the Republic of Uzbekistan on Cooperation in the Field of Joint Management on Utilization and Protection of Water Resources from Interstate Sources (1992),<sup>89</sup> and the Statute of the Interstate Commission for Water Coordination of Central Asia (2008).<sup>90</sup> These institutions have adopted water resource management principles such as equitable and reasonable utilization, obligations not to cause significant harm, and cooperation principles including information exchange, notification, consultation, and peaceful settlement of disputes.<sup>91</sup> The agreements have had positive impacts on the implementation of these principles in practice and have thus facilitated sustainable water resources management.<sup>92</sup> For firms depending on these water resources, the agreements and supranational structures make the amount of

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87. See Nat'l Water Quality Monitoring Council, *Water Quality Portal*, PRODUCTS, <http://www.waterqualitydata.us/> (last visited Aug. 28, 2016); see, e.g., Christer Nilsson & Birgitta Malm Renöfält, *Linking Flow Regime and Water Quality in Rivers: A Challenge to Adaptive Catchment Management*, 13 *ECOLOGY & SOC'Y*, no. 2, 2008, at 18 (reviewing knowledge on how "the flow regime and water quality can impact ecosystem processes").

88. See generally INES DOMBROWSKY, CONFLICT, COOPERATION AND INSTITUTIONS IN INTERNATIONAL WATER MANAGEMENT: AN ECONOMIC ANALYSIS (2007).

89. Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan on Cooperation in the Field of Joint Management on Utilization and Protection of Water Resources from Interstate Sources, Feb. 18, 1992, ICWC, <http://www.icwc-aral.uz/statute1.htm> (last visited Sept. 23, 2016).

90. Statute of the Interstate Commission for Water Coordination of Central Asia, Sept. 18, 2008, ICWC, <http://www.icwc-aral.uz/statute4.htm> (last visited Sept. 23, 2016).

91. See generally Interstate Commission for Water Coordination of Central Asia, <http://www.icwc-aral.uz/> (last visited Oct. 26, 2016).

92. See Muhammad Mizanur Rahaman, *Principles of Transboundary Water Resources Management and Water-related Agreements in Central Asia: An Analysis*, 28 *INT'L J. WATER RES. DEV.* 475, 490 (2012) (analyzing the use of transboundary water resources management principles through the regional water-related agreements in Central Asia). A specific success has been the partial restoration of the Aral Sea – while still covering less than half of its 1960s surface area, it has been growing and it is now a habitat for 15 wild species, up from a nadir of one species. Juliette Jowit, *Aral Sea Rescue Plan a 'Partial Success'*, *THE GUARDIAN* (Aug. 1, 2008), <https://www.theguardian.com/environment/2008/aug/01/endangeredhabitats.conservation>.

available resources more predictable, eliminating risks and price volatility.<sup>93</sup> Consequently, firms have a vital interest in working with the government to encourage proactive international agreements that serve public and private interests.

At the industry level, self-regulation efforts often seek to pre-empt or exceed externally driven regulations. For example, following the BP *Deepwater Horizon* oil spill, industry-driven regulation became more predominant.<sup>94</sup> Governments set general safety standards that must be met, but rig operators had to create individualized compliance plans.<sup>95</sup> Such systems, in which goals are set and corporations figure-out how to attain them, are known as “performance-based” or “goal-oriented” or “goal-setting” regulatory approaches.<sup>96</sup>

For example, the American Petroleum Institute (API) created the Center for Offshore Safety in 2010 to improve safety protocols.<sup>97</sup> The Center works to share best practices and help companies build enhanced safety programs, which are based on API standards.<sup>98</sup> It has published more than one hundred new and revised industry standards for safe exploration and production, which now are largely required by federal regulation.<sup>99</sup> In another industry, the American Chemistry Council regulates its members with its Responsible Care program, a system for minimizing potential environmental risks.<sup>100</sup> Similar agreements have been formed in the mining industry on a regional basis; where impact and benefit agreements (IBAs)

93. See generally Dombrowsky, *supra* note 88 (providing an economic analysis of international water-management agreements).

94. See Nick Lin-Hi & Igor Blumberg, *The Relationship Between Corporate Governance, Global Governance, and Sustainable Profits: Lessons Learned from BP*, 11 CORPORATE GOVERNANCE 571 (2011).

95. *Id.*

96. See Kaisa Sorsa, *The Role of Proactive Law for System Level Innovations*, in ACADEMIC FORUM FOR INNOVATIVE RESEARCH AND PRACTICE. PROCEEDINGS OF THE 2011 IACCM ACADEMIC SYMPOSIUM ON CONTRACT AND COMMERCIAL MANAGEMENT 108, 114 (René F. Henschel ed., 2011).

97. Ctr. for Offshore Safety, *Establishing a Culture of Safety*, <http://www.centerforoffshoresafety.org/> (last visited Sept. 23, 2016).

98. Ctr. for Offshore Safety, *About the Center for Offshore Safety*, ABOUT, <http://www.centerforoffshoresafety.org/About> (last visited Sept. 23, 2016).

99. Brian Straessle, *API: Offshore Oil & Gas Operations are Safer than Ever*, NEWS & POLICY (Apr. 9, 2015), <http://www.api.org/news-and-media/news/newsitems/2015/apr-2015/api-offshore-oil-gas-operations-are-safer-than-ever> (describing recent developments in technology, standards and practices that have improved the safety of America's oil and gas industry).

100. Marc Allen Eisner, *Corporate Environmentalism, Regulatory Reform, and Industry Self-regulation: Toward Genuine Regulatory Reinvention in the United States*, 17 GOVERNANCE 145, 159 (2004) (examining the recent trends in corporate environmental management and regulatory reform).

between first nations, local communities, and the mining companies include profit-sharing, employment, wider economic development opportunities, greater transparency, and enhanced protection of environmental and socio-cultural amenities.<sup>101</sup> In addition, parties have entered into Good Neighbour Agreements (GNAs) whereby mining companies and the local communities have formed partnerships.<sup>102</sup> For example, a GNA in Montana between citizens in Stillwater and Sweet Grass counties and the Stillwater Mining Company established a process for citizens to meet regularly with company representatives who can proactively address problems such as the impact of mining, reclamation, and other activities.<sup>103</sup>

#### IV. TOWARDS A PROACTIVE LAW FRAMEWORK FOR ORGANIZATIONAL SUSTAINABILITY

As illustrated in Part III, proactive law offers promising perspectives on how a different approach to law can promote corporate sustainability and help prevent ecological disasters. By moving beyond individual examples, Part IV advances a theoretical framework that attempts to link proactive law to organizational sustainability, and proposes hypothesized relationships among organizational elements and proactive law strategies in an effort to enhance corporate sustainability.

##### A. *The Proactive Law Framework*

Proactive law is consistent with the precautionary principle, which holds that risks of harm should be ascertained before any activity is allowed.<sup>104</sup> Yet proactive law approaches are also constructive, or perhaps even more helpful, in contexts in which the precautionary principle is not followed and potential risks are not fully known. Some studies have shown

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101. See Lindsay Galbraith, Ben Bradshaw & Murray B. Rutherford, *Towards a New Supra Regulatory Approach to Environmental Assessment in Northern Canada*, 25 *IMPACT ASSESSMENT & PROJECT APPRAISAL* 27, 27–28 (2007) (providing formal assessment of the Mackenzie Valley Environmental Impact Review Board (MVEIRB) environmental assessment (EA) to determine whether the rise of private agreements might be attributable partly to deficiencies in the EA process).

102. See Sarah M. Zuzulock & James R. Kuipers, *The Good Neighbour Agreement: A Proactive Approach to Water Management Through Community Enforcement of Site-Specific Standards*, 53 *GREENER MGMT. INT'L* 73, 74 (2007).

103. See generally *id.* (analyzing a good neighbor agreement between the Stillwater Mining Company and local Montana citizens).

104. See David Kriebel et al., *The Precautionary Principle in Environmental Science*, 109 *ENVTL. HEALTH PERSP.* 871, 875 (2001) (explaining that the precautionary principle requires that “[w]hen there is substantial scientific uncertainty about the risks and benefits of a proposed activity, policy decisions should be made in a way that errs on the side of caution with respect to the environment and the health of the public”).

the value of proactive corporate strategies against global warming.<sup>105</sup> Previous research has evaluated how stakeholders pressure organizations to adopt proactive environmental practices,<sup>106</sup> and to what extent the relationship between stakeholder pressure and proactive environmental practices depends on the size of the organization.<sup>107</sup> Firms that adopt proactive environmental management strategies have been reported to become more efficient and competitive.<sup>108</sup> Though these are encouraging trends, we argue that voluntary corporate sustainability programs can be enhanced through formal legal structures to help corporations to fully reach their sustainability goals. Legal instruments such as contracts, self-regulation, or formal dispute resolution result in enforceability and legitimacy, which are otherwise lacking.

To this end, we advance the framework, see Figure 1, as a way of better understanding the role of proactive law in achieving corporate sustainability.

This framework of concentric circles is appropriate and helpful for several reasons. We will explain the figure by moving from the outermost circle towards the center circle. First, it illustrates the context of society and economics, in which human stakeholders all live within—and thanks to and at the mercy of—the natural environment. Further, the interests of ecological systems must be communicated to society's decision-makers by human representatives.<sup>109</sup>

105. See Olivier Boiral, *Global Warming: Should Companies Adopt a Proactive Strategy?*, 39 LONG RANGE PLAN. 315, 321 (2006) (arguing that managers should adopt a proactive strategy to address environmental concerns in light of the Kyoto Protocol and citing several empirical studies).

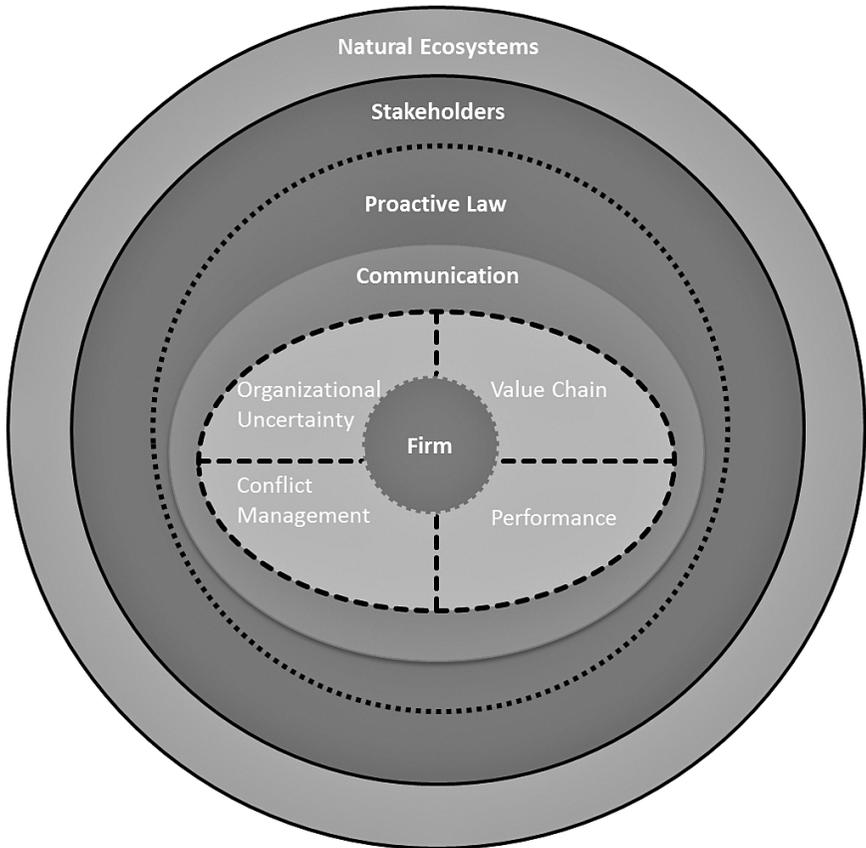
106. See Jon M. Shepard, Michael Betz, & Lenahan O'Connell, *The Proactive Corporation: Its Nature and Causes*, 16 J. BUS. ETHICS 1001, 1008 (1997) (stating that stakeholder activism and recognition of the social and ecological embeddedness of the economy are the reason for corporations "increasingly embracing organizational features to promote proactivity over mere reactivity in their stakeholder relationships"); see also Magali Delmas, *Stakeholders and Competitive Advantage: The Case of ISO 14001*, 10 PRODUCTIONS & OPERATIONS MGMT. 343, 343–44 (2001); Linda C. Angell & Gordon P. Rands, *Factors Influencing Successful and Unsuccessful Environmental Change Initiatives*, in RESEARCH IN CORPORATE SUSTAINABILITY: THE EVOLVING THEORY AND PRACTICE OF ORGANIZATIONS IN THE NATURAL ENVIRONMENT 155, 161–67 (Sanjay Sharma & Mark Starik eds., 2002) (examining how managers' perceptions of different types of stakeholder influences in the Canadian forestry industry affect the types of sustainability practices that their firms adopt).

107. Darnall et al., *supra* note 84, at 1090–91 (2010) (substantiating the development of stakeholder theory by deriving a size moderated stakeholder model and applying it to a firm's adoption of proactive environmental practice).

108. See generally Berry & Rondinelli, *supra* note 83, at 38; ESTY & WINSTON, *supra* note 83; Hart & Milstein, *supra* note 83, at 59–60.

109. This is especially so in American courts, per recent and controversial decisions of the United States Supreme Court on the issue of standing. Even where Congress passed

FIGURE 1:  
A FRAMEWORK FOR PROACTIVE LAW AND CORPORATE SUSTAINABILITY



Second, concentric circles are also appropriate for illustrating the context of a firm as embedded within stakeholders. As further discussed below, potential relations with stakeholders include a broad spectrum of relationships and risks including: supply chains, employment, customer transactions, investment, and conflict.

Proactive law is therefore best seen as surrounding the organizational elements of the firm. Dotted lines are deliberately chosen to represent the

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environmental protection legislation explicitly granting any citizen the power to litigate to enforce statutory mandates, the Supreme Court has added further hurdles, requiring plaintiffs to show how they personally have been harmed (as individual people) in order to pursue enforcement actions in courts. Adam Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation*, 24 J. ENVTL. L. & LITIG. 75, 83–91 (2009).

borders between proactive law and stakeholders and functions of the firm, as well as the boundaries of the firm. As elaborated below, this illustrates proactive law's ultimate function as a communication medium. Proactive law's two-fold function of transmitting information between the firm and stakeholders and as a protective layer against future liability is most analogous to a cell membrane. Cell membranes similarly serve an essential dual role by being semi-permeable: facilitating the passage of material back-and-forth between the cell and the external environment, but also screening-out harmful substances.<sup>110</sup> Proactive law functions similarly; as a semi-permeable membrane that facilitates stakeholder communication and simultaneously shielding the firm from harm.

Ultimately, this framework suggests that proactive legal strategies help to anticipate and pre-empt conflicts involving stakeholders and the natural environment.

## B. *Integrating Proactive Law and Organizational Elements*

Our framework demonstrates the sustainability benefits of proactive law for organizations as a function of organizational uncertainties, value chain characteristics, performance, and conflict management considerations. The following sections examine how proactive law can prevent organizational conflicts from emerging and becoming the subject of litigation. We also identify the specific ways in which proactive law principles directly influence organizational uncertainty, value chains, and firm performance. After discussing how the four functional areas (organizational uncertainty, supply chains, conflict management, and performance) relate back to the essential function of proactive law as a communications medium, we illustrate implications of the proposed theoretical model for practitioners and further research.

### 1. Proactive Law and Organizational Uncertainty

We propose that organizations articulate their proactive legal strategies to better insulate themselves from uncertainties, and thereby manage financial, litigation, and reputation risks. The risks related to long-term systemic harms and environmental accidents, for example, put a high burden of uncertainty on companies, especially those operating in high-risk sectors such as the oil industry. While corporations have direct control over the cause of some incidents, others, as was the case of the Fukushima Reactor

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110. Nat'l Ctr. for Biological Info., *Cell Membranes: Transport Across Cell Membranes*, <https://www.ncbi.nlm.nih.gov/books/NBK9928/> (last visited Sept. 24, 2016).

Meltdown,<sup>111</sup> involve factors that are beyond the corporation's control, such as natural occurrences.

Environmental accidents can draw negative attention in the media and result in costly litigation.<sup>112</sup> They are also typically not fully covered by insurance policies, resulting in financial disruption.<sup>113</sup> A corporate strategy to avoid or mitigate the consequences of such environmental harm can be enhanced through proactive legal means such as contracts that share the risk or allocate responsibilities between multiple parties involved in such high-risk economic activity. Insofar as proactive law removes uncertainties, it allows organizations to effectively manage potential dangers for organizations, the society, and the environment.<sup>114</sup>

A contract drafted according to the proactive law principles mentioned above, such as "outcome orientation," user-friendliness, and "cross-professional collaboration," not only shields the parties involved from legal or financial responsibility in case of non-performance by either side, but it also makes expectations and risks visible and allows parties to address them before they cause harm.<sup>115</sup> Additionally, a proactive contract, as opposed to a non-proactive contract, would not only identify the potential dangers and allocate responsibilities, but would establish an emergency protocol with shared tasks for all parties that makes best use of their technical, organizational, and financial capabilities to effectively resolve or mitigate the crisis. The contract could also include early-warning and dispute resolution mechanisms. If a dispute were to arise regarding the allocation of tasks among

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111. See World Nuclear Ass'n, *supra* note 22; see also Berger-Walliser & Shrivastava, *supra* note 8, at 427–29 (describing the interdependent nature of today's corporate industrial systems and the significant damage to the environment and human life an error within some small subsystem can generate).

112. See ROBERTA BIGLIANI, REDUCING RISK IN OIL & GAS COMPANIES 1 (EMC White Paper, May 2013), <http://www.emc.com/collateral/analyst-reports/minimizing-operational-risk-in-oil-gas-industry.pdf>; BRITISH PETROLEUM, US LEGAL PROCEEDINGS (2014), <http://www.bp.com/content/dam/bp/pdf/sustainability/group-reports/investigations-and-legal-proceedings.pdf>.

113. See Sharma & Vredenburg, *supra* note 12, at 734.

114. See Christopher B. Hunt & Ellen R. Auster, *Proactive Environmental Management: Avoiding the Toxic Trap*, 31 MIT SLOAN MGMT. REV., no. 2, 1990; see also Vernon Grose, *Proactive vs. Reactive Risk Management: A Case Study*, SYSTEMATIC RISK MANAGEMENT BLOG (Jan. 30, 2014, 4:01 PM), <http://www.omegainc.com/blog/bid/193569/Proactive-vs-Reactive-Risk-Management-A-Case-Study>.

115. See Gerlinde Berger-Walliser, Robert C. Bird & Helena Haapio, *Promoting Business Success Through Contract Visualization*, 17 J. L. BUS. & ETHICS 55 (2011). See generally Berger-Walliser and Shrivastava, *supra* note 8.

parties, this would facilitate a fast dispute resolution and prevent ecological disasters.<sup>116</sup>

It is likely that the parties involved in this process will disagree substantially about how to allocate the tasks.<sup>117</sup> To overcome and solve these conflicts durably, pre-contractual mediation, which uses a neutral third party to facilitate resolution, appears to be an effective, proactive legal tool.<sup>118</sup> Additionally, a pre-appointed facilitator could help the parties to resolve disputes over the interpretation of the contractual terms or shared tasks, thereby saving valuable time in case of an emergency.<sup>119</sup>

To link the management of organizational uncertainty to legal institutions through use of proactive legal strategy, a corporation engaged in potentially harmful economic activity should negotiate a contract with local authorities, suppliers, and other stakeholders before starting operations. The contract should map out responsibilities to effectively manage and mitigate the harm should an accident occur, even if not required to do so by law. From a government's perspective, the issuance of required permits or other government authorizations could be made dependent upon conclusion of such a "disaster-management-contract."<sup>120</sup> An agreement of this kind would be beneficial to all actors involved because the corporation, public authorities, and other stakeholders will be able to identify potential dangers and take action to prevent them. It also can improve a company's relationship to local communities, employees, and environmental NGOs.<sup>121</sup> Most importantly from a corporate standpoint, through engaging in a voluntary,

116. See Michael S. Puddicombe, *Why Contracts: Evidence*, 135 J. CONSTRUCTION ENGINEERING & MGMT. 675 (2009) (providing empirical evidence on how contracts can be used to manage risk and reward between project partners and how conflicts will be resolved).

117. Yooil Bae, Yu-Min Joo & Soh-Yeon Won, *Decentralization and Collaborative Disaster Governance: Evidence from South Korea*, 52 HABITAT INT'L 50 (2016) (tracing changes in South Korea's national disaster management and examining the management of a hydrofluoric gas leaking).

118. See Camilla Baasch Andersen, *Pre-Contractual Mediation in Negotiation*, in PROACTIVE LAW IN A BUSINESS ENVIRONMENT, *supra* note 8, at 155, 164–68 (suggesting the use of a mediator during contract negotiation in order to prevent problems during the performance phase of a contract).

119. Tracy L. Allen, *It's About Time- "Real Time" Conflict Solutions are Here*, 28 MICH. BUS. L. J. 31, 32 (2008) (describing "real time mediation" as fast and effective conflict resolution mechanism); Baasch Andersen, *supra* note 118.

120. See Vincent J. Foley, *Post-Deepwater Horizon: The Changing Landscape of Liability for Oil Pollution in the United States*, 74 ALB. L. REV. 515, 515 (2011) (analyzing the Oil Pollution Act of 1990 (OPA), which requires companies in the oil industry to submit evidence of financial responsibility sufficient to pay claims up to the OPA limits).

121. See Michael V. Russo & Paul A. Fouts, *A Resource-based Perspective on Corporate Environmental Performance and Profitability*, 40 ACAD. MGMT. J. 534, 551 (1997) (indicating that the "resource-based view of the firm can be applied fruitfully to corporate social responsibility issues").

proactive contractual relationship, the corporation may be able to share the risks and the associated financial burden with other stakeholders with an interest in a positive outcome, thereby providing it with an advantage over less proactive competitors.<sup>122</sup>

## 2. Proactive Law and Value Chains

At an organizational level, supply chains that encompass diverse participants can have an impact on quality and reputations.<sup>123</sup> Because modern corporate supply chains are far-flung and global, raw-material extraction, labor, assembly, packaging, and storage can all occur in different countries.<sup>124</sup> Value chains result in many social problems such as child labor, unfair wages, bribery, and pollution.<sup>125</sup> They also result in environmental problems like excessive extraction, farming, and fishing practices.<sup>126</sup> These practices are often legal in some countries and illegal in others.<sup>127</sup> Companies with global “sustainable brands” can avoid risking their brand reputation through a proactive approach in managing their global supply chain.<sup>128</sup>

There are several examples of proactive supply change management strategies. Nestle, Walmart, General Electric, and other companies who manage thousands of international vendors are adopting codes of conduct, mandated training programs, labor practices affidavits, and other tools to

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122. See Siedel & Haapio, *supra* note 10, at 670–72 (providing a framework for proactive contracting).

123. UNITED NATIONS GLOBAL COMPACT, SUPPLY CHAIN SUSTAINABILITY: A PRACTICAL GUIDE FOR CONTINUOUS IMPROVEMENT (2010), [http://www.bsr.org/reports/BSR\\_UNGC\\_SupplyChainReport.pdf](http://www.bsr.org/reports/BSR_UNGC_SupplyChainReport.pdf) (explaining the need for businesses to ensure that all suppliers in the chain are complying with national laws and taking “proactive measures to avoid environmental and social harm”). A classic example of a supply chain scandal hurting a company’s reputation is that of Shell Oil in Nigeria. Lynn S. Paine & Mihnea C. Moldoveanu, *Royal Dutch/Shell in Nigeria (A)*, Harvard Business School Case 399-126, Feb. 1999 (Revised October 2009), <http://www.hbs.edu/faculty/Pages/item.aspx?num=14320>. Another is that of Ikea and the use of child labor in India. Christopher A. Bartlett, Vincent Marie Dessain, & Anders Sjomani; *IKEA’s Global Sourcing Challenge: Indian Rugs and Child Labor (A)*, Harvard Business School Case 906-414, May 2006 (Revised Nov. 2006), <http://www.hbs.edu/faculty/Pages/item.aspx?num=33278>.

124. David Blanchard, *How to Manage a Global Supply Chain*, INDUSTRY WEEK (Aug. 15, 2012), <http://www.industryweek.com/supply-chain/how-manage-global-supply-chain>.

125. UNITED NATIONS GLOBAL COMPACT, *supra* note 123, at 26.

126. See Mario Schmidt & Regina Schwegler, *A Recursive Ecological Indicator System for the Supply Chain of a Company*, 16 J. CLEANER PRODUCTION 1658, 1658–64.

127. See Genevieve Mullet, *ISO 14000: Harmonizing Environmental Standards and Certification Procedures Worldwide*, 6 MINN. J. GLOBAL TRADE 379, 379 (1997) (lamenting the sometimes redundant and sometimes conflicting environmental regulations between countries).

128. UNITED NATIONS GLOBAL COMPACT, *supra* note 123.

mitigate sustainability problems.<sup>129</sup> For example, Nike faced serious accusations of child labor exploitation in Pakistan in the 1990's, sparking boycotts.<sup>130</sup> A decade later, Nike began improving labor conditions through monitoring programs, auditing, and enforcing compliance with its code of conduct.<sup>131</sup> In 2005, Nike became the first in its industry to release the names and locations of its factories in order to be transparent.<sup>132</sup> The company continued to develop "a strategic approach to corporate responsibility (CR) that emphasized value creation, collaboration with business units, and proactive strategic planning."<sup>133</sup>

Companies can strengthen corporate sustainability strategies in value chains with proactive legal tools. This can be done individually through implementation of supplier obligations in individual supply contracts, which Peterková calls "sustainability contractual clauses" (SCCs),<sup>134</sup> or through industry self-regulation in the form of industry standards, codes of conduct, or labels.<sup>135</sup> SCCs or codes of conduct can put pressure on suppliers to respect standards that go beyond local labor, safety, and environmental laws, thereby avoiding problems down the chain or even promoting socially responsible behavior.<sup>136</sup>

In this respect, supply contracts become a powerful legal vehicle to achieve corporate sustainability goals, due to their legal enforceability. Despite their growing use in the international business context, they have been scarcely addressed in academic literature and court decisions.<sup>137</sup> This gap can be attributed to the fact that legal research concerned with CSR typi-

129. See e.g., General Electric, *Supplier Expectations*, BUILDING THINGS THAT MATTER (Jan. 1, 2016), <http://www.gesustainability.com/building-things-that-matter/supply-chain/supplier-expectations/>.

130. Eugenia Levenson, *Citizen Nike*, FORTUNE (Nov. 17, 2007), [http://archive.fortune.com/2008/11/17/news/companies/levenson\\_nike.fortune/index.htm](http://archive.fortune.com/2008/11/17/news/companies/levenson_nike.fortune/index.htm).

131. *Id.*

132. *Nike Reveals Overseas Factory Names*, NBC NEWS (Apr. 13, 2005, 4:04 PM), [http://www.nbcnews.com/id/7480688/ns/business-us\\_business/t/nike-reveals-overseas-factory-names-locations/](http://www.nbcnews.com/id/7480688/ns/business-us_business/t/nike-reveals-overseas-factory-names-locations/).

133. Marc J. Epstein, Adriana Rejc Buhovac & Kristi Yuthas, *Implementing Sustainability: The Role of Leadership and Organizational Culture*, 91 STRATEGIC FINANCE, Apr. 2010, at 44.

134. KATERINA PETERKOVÁ, *SUSTAINABILITY CLAUSES IN INTERNATIONAL BUSINESS CONTRACTS* (2013).

135. *Id.*

136. This type of supplier relationship has been described as "political CSR," reflecting companies' initiatives to maintain high ethical standards, especially when dealing in foreign countries, and in the absence of government regulation. See Andreas Georg Scherer & Guido Palazzo, *The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy*, 48 J. MGMT. STUD. 899, 901, 907 (2011).

137. See M. P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 925–26 (2007).

cally concentrates on questions of global governance, while scholarship of contracts is typically not concerned about the social or environmental dimensions of contractual terms<sup>138</sup> and SCCs are almost never enforced in public courts.<sup>139</sup>

In contrast to individual SCCs, corporate and industry codes of conduct are not always legally binding. Therefore, codes of conduct have been questioned or criticized as marketing tools without legal enforceability.<sup>140</sup> However, it can be argued that corporate codes of conduct are often put in place to appease powerful stakeholders such as consumers or investors. Even if not legally binding, companies are pressured to comply with them for economic reasons.<sup>141</sup> Companies can also refer to corporate or industry codes of conduct in individual contracts with suppliers. In doing so the code can be made an integral part of the legally binding contract, and a supplier not respecting the code would be breaching his contractual obligations.<sup>142</sup> It has also been suggested in the literature that such codes could be used by courts to interpret vague laws or identify legal industry practices (as opposed to illicit practices),<sup>143</sup> and the breaking of codes of conduct has been found to constitute false advertising to consumers.<sup>144</sup>

While codes of conduct are often characterized as soft law,<sup>145</sup> we suggest that they can also be used as proactive legal tools. By bringing value chain stakeholders into proactive communication about a code of conduct, organizations can detect environmental or social problems and allocate responsibility for preventing ecological destruction, develop effective disaster plans, and create sustainable solutions. Proactive strategies with respect to value chains can help organizations to assess and manage relationships with suppliers, customers, intermediaries, and business associates involved in value creation.

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138. See PETERKOVÁ, *supra* note 134, at 11 (citing Gunther Teubner, *In the Blind Spot: The Hybridization of Contracting*, 8 THEORETICAL INQUIRIES L. 51, 54 (2007)).

139. *Id.* at 10.

140. *Id.* at 100; see Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711, 716 (2009).

141. Andre Sobczak, *Are Codes of Conduct in Global Supply Chains Really Voluntary? From Soft Law Regulation of Labour Relations to Consumer Law*, 16 BUS. ETHICS Q. 167, 168 (2006) (arguing that from an economic perspective codes of conduct are not really voluntary).

142. *E.g.*, *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) (testing the legally binding nature of codes of conduct clauses).

143. See Sobczak, *supra* note 141, at 168.

144. *Id.* (referencing *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002)); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

145. See Park & Berger-Walliser, *supra* note 85, at 256 n.3 (defining soft law as “rules, standards, principles, and norms articulated in the language of law that are not legally binding but nonetheless are treated as having some legal authority”).

### 3. Proactive Law and Conflict Management

An important feature of proactive law is dispute pre-emption to avoid reaching litigation.<sup>146</sup> Proactive law recognizes that in the long run, conflicts and adversarial legal strategies are less likely to benefit either side and will result in economic, reputational, and emotional losses for all stakeholders involved.<sup>147</sup> Therefore, proactive law requires stakeholders to enter into communication about potential conflicts and seek solutions for how to deal with them before problems arise. By anticipating conflicts, proactive approaches allow organizations to avoid and deflect conflicts, and in turn reduce management and litigation or settlement costs. If avoidance is not possible, mapping out potential conflicts before they occur allows management to break large conflicts down into smaller, more manageable conflicts. Gaining a clear picture of potential conflicts allows organizations to plan and allocate resources for rapid conflict resolution, thereby reducing the overall impact and costs of potential conflicts if they materialize.<sup>148</sup>

Proactive law seeks to achieve these goals through “attention to legal clarity, early warning mechanisms, and enhanced collaboration” in the early stages of a relationship.<sup>149</sup> This includes clear understanding and alignment of diverging interests in contrast to protection of one-sided individual interests, which benefit one party but are detrimental to the other side.<sup>150</sup> The sustainability paradigm builds on this idea of bridging conflicting interests.<sup>151</sup> Sustainability requires organizations to reach compromises inside and outside the organization.<sup>152</sup> When a conflict arises, it needs to be resolved quickly and effectively in order to limit, in some cases, negative impacts on the environment or stakeholder relationships.<sup>153</sup>

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146. Berger-Walliser, *supra* note 9, at 30 (suggesting that the practice of proactive law can avoid getting to the stage of dispute resolution).

147. *Id.* at 27 (stating that the main objective of proactive law is helping stakeholders to reach their goals).

148. SHRIVASTAVA, *supra* note 17 (providing an example of Bhopal disaster caused by the leak of a deadly gas from Union Carbide pesticide plant in Bhopal, killing over 5,000 people and leading to multiple conflicts and law suits, which were later broken down into parts and sorted out via a variety of conflict resolution mechanisms, including inter-governmental negotiations, law suits in India and USA, victim compensation and relief works, etc.).

149. *Id.* at 30.

150. See Siedel & Haapio, *supra* note 10, at 668–69, 672–73 (featuring understanding as the first step in the “Manager’s Legal Plan” toward the use of law for competitive advantage).

151. See Sharma & Henriques, *supra* note 24, and accompanying text.

152. See Adam J. Sulkowski & Sandra Waddock, *Midas, Cassandra & the Buddha: Curing Delusional Growth Myopia by Focusing on Thriving*, J. CORP. CITIZEN, no. 61, 2016, at 61.

153. See Allen, *supra* note 119 (pointing out the importance of time in conflict resolution).

In order to avoid future legal disputes, proactive legal strategy suggests contemplating, and, more importantly, preemptively eliminating potential conflicts before they arise. Though this may result in up-front costs, dispute preemption strategies will save valuable time and financial resources in the long run.<sup>154</sup>

#### 4. Proactive Law and Performance

The relationship between proactive law strategies and performance is a complex one. On one hand, initial adoption of proactive law strategies can benefit productivity. For example, it can help lower transaction costs through clear contract design in a contractual relationship.<sup>155</sup> In the context of environmental protection, a proactive approach can lower production costs through waste minimization, waste elimination, and pollution reduction through the use of eco-friendly raw materials.<sup>156</sup> It can also prevent the potential costs of government fines through careful compliance with environmental laws and regulations.<sup>157</sup>

Ideally, a proactive approach to law will help management discover new business opportunities.<sup>158</sup> Siedel and Haapio provide an interesting example of how a company's analysis of potential product misuse to avoid future product liability can help the firm to generate new business ideas.<sup>159</sup> Similarly, companies who actively monitor and cooperate with regulatory activities can develop strategies and new products, services, and production

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154. For example, in the context of medical malpractice, "early apology and disclosure programs report 50% to 67% success in avoiding litigation as well as substantial reductions in the amount paid per claim. Mediation boasts 75% to 90% success in avoiding litigation, cost savings of \$50,000 per claim, and 90% satisfaction rates among both plaintiffs and defendants." David H. Sohn & B. Sonny Bal, *Medical Malpractice Reform: The Role of Alternative Dispute Resolution*, 470 *CLINICAL ORTHOPAEDICS & RELATED RES.* 1370, 1377 (2012).

155. See generally Libby Weber & Kyle J. Mayer, *Designing Effective Contracts: Exploring the Influence of Framing and Expectations*, 36 *ACAD. MGMT. REV.* 53 (2011).

156. See, e.g., Berry & Rondinelli, *supra* note 83, at 42–43 (providing examples of innovative waste prevention).

157. See *id.* at 45.

158. See Siedel & Haapio, *supra* note 10, at 655 (proposing that by reframing legal concerns as business concerns firms "can perceive the [legal] process of searching for foreseeable uses [under product liability law] as a form of market research" leading to new product ideas); see also Bird, *Pathways of Legal Strategy*, *supra* note 76, at 33–38 (labeling this step "transformation" providing the biggest advantage because it is the most difficult for competitors to imitate).

159. SIEDEL & HAPIO, *supra* note 74, at 37 (discussing a hairdryer company that knows its product is being used for a wide variety of purposes and then taking from that information that a market exists for other products that expel hot air).

processes in anticipation of emerging environmental regulation.<sup>160</sup> Such a strategy can, once the regulation is in place, give the proactive company a first-mover advantage over competitors who instead wait to react to new regulations.<sup>161</sup>

Proactive law can support enterprise sustainability by integrating different issues related to environmental impacts. Currently, environmental impacts are assessed through a popular process known as an “environmental impact assessment.”<sup>162</sup> This process identifies positive and negative environmental consequences of a project from an engineering and technology perspective.<sup>163</sup> However, this approach is prone to biases and fraud.<sup>164</sup> Proactive law behooves taking into account many more stakeholder perspectives, including but not limited to those connected with customer contracts, supply chain issues, and finance, credit, and banking. Integrating this multitude of perspectives through proactive law can aid companies in avoiding future litigation by identifying and reconciling conflicts before they escalate.

At some point, the costs of implementing proactive law may have an adverse impact on productivity because pre-contractual or pre-regulatory collaboration is time-consuming, and redesigned processes, products, and business models will be costly. Therefore, proactive law strategies will likely generate higher costs in the short run, but to be more cost and time efficient in the long run due to fewer costs related to poor performance, bad quality, and conflict.

## 5. Stakeholder Communication & Sustainability Reporting

Communication is a central aspect of all the elements described above. As illustrated in Figure 1, a defining function of proactive law is to serve as a communication medium with stakeholders. Effective exchange of information with all stakeholders—both inbound collecting of concerns and suggestions as well as outbound sharing of management policies, plans, facts,

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160. J. Vanden Brink, *How to Develop the Market Opportunities Created by Government Regulations*, in *MARKETING STRATEGIES FOR A TOUGH ENVIRONMENT* 30, 37–38 (Peter J. LaPlaca & Newton Frank eds., 2011); see also Goldman Sachs, *Goldman Sachs Environmental Policy Framework*, CITIZENSHIP, <http://www.goldmansachs.com/s/environmental-policy-framework/> (last visited Nov. 14, 2016).

161. See Bagley, *supra* note 76, at 589–90 (citing LEE E. PRESTON & JAMES E. POST, *PRIVATE MANAGEMENT AND PUBLIC POLICY: THE PRINCIPLE OF PUBLIC RESPONSIBILITY* 4 (1975) and describing “anticipating, understanding, evaluating and responding to public policy developments within the host environment [as] a critical managerial task”).

162. See generally ALAN GILPIN, *ENVIRONMENTAL IMPACT ASSESSMENT: CUTTING EDGE FOR THE 21ST CENTURY* 1–8 (1995) (discussing the history of EIAs and how they are used).

163. *Id.*

164. See *id.* at 22–23.

and data—is essential to the operation of proactive law.<sup>165</sup> This importance is visually represented in Figure 1 by communication enveloping the organizational elements that have been specified above. It is impossible for proactive law to function without stakeholder communication.<sup>166</sup> This reality is also represented by communication bordering firm functions and proactive law. To articulate further how communication is a *sine qua non* to the four functional areas: meaningful supply chain contract terms that deal with dispute resolution or uncertainty, as described above, will need input from all stakeholders, especially technical and scientific experts, and cannot be done by lawyers alone.<sup>167</sup> Value chain management equally benefits from stakeholder communication. By bringing value chain stakeholders into proactive and comprehensive communications about future performance, organizations can detect environmental or social problems and risk factors, allocate steps and responsibility for preventing ecological destruction, develop effective disaster plans, and collaboratively develop alternative, innovative, and sustainable solutions.<sup>168</sup>

A systematized approach for communicating with stakeholders has emerged since the 1980s<sup>169</sup> and become mainstream.<sup>170</sup> Sustainability reporting—publishing information on an organization’s governance and impacts on the environment, economy, and society—is a type of soft law and intended to catalyze dialogue and action about stakeholder concerns.<sup>171</sup> Soft

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165. See Adam J. Sulkowski, *The Growing Trend of Voluntary Corporate Responsibility Disclosure and Its Implications for Real Estate Attorneys*, 38 REAL EST. L.J. 475, 479 (2010); Adam J. Sulkowski & Sandra Waddock, *Beyond Sustainability Reporting: Integrated Reporting Is Practiced, Required, and More Would Be Better*, 10 U. ST. THOMAS L.J. 1060 (2012-2013).

166. Sulkowski & Waddock, *supra* note 165.

167. *Id.*

168. See ANDERSON & WHITE, *supra* note 42.

169. See ROBERT G. ECCLES & MICHAEL KRZUS, ONE REPORT: INTEGRATED REPORTING FOR A SUSTAINABLE STRATEGY (2010); ELKINGTON, *supra* note 27 (discussing the trend of companies towards greater transparency and attention to a “triple bottom-line” of economic prosperity, environmental quality, and social justice in their reporting).

170. See, e.g., ERNST & YOUNG & THE CTR FOR CORP. CITIZENSHIP, VALUE OF SUSTAINABILITY REPORTING (2016), [http://www.ey.com/Publication/vwLUAssets/EY\\_-\\_Value\\_of\\_sustainability\\_reporting/\\$FILE/EY-Value-of-Sustainability-Reporting.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_Value_of_sustainability_reporting/$FILE/EY-Value-of-Sustainability-Reporting.pdf) (showing the value of sustainability reporting and indicating why many businesses practice it); see also GLOB. REPORTING INITIATIVE, REPORT OR EXPLAIN: A SMART EU POLICY APPROACH TO NON-FINANCIAL INFORMATION DISCLOSURE (2013), <https://www.globalreporting.org/resourcelibrary/GRI-non-paper-Report-or-Explain.pdf> (indicating why many businesses practice sustainability reporting and recommending that a Directive on sustainability reporting be issued by the new European Commission); Allen L. White, *Why We Need Global Standards for Corporate Disclosure*, 69 LAW & CONTEMP. PROBS. 167, 175–76 (2006).

171. See Adam J. Sulkowski & D. Steven White, *Financial Performance, Pollution Measures and the Propensity to Use Corporate Responsibility Reporting: Implications for Business and Legal Scholarship*, 21 COLO. J. INT’L ENVTL. L. & POLY 491, 496, 503–04 (2009); Cynthia A.

law concepts such as regulation by voluntary disclosure have the added benefit in a globalized economy of not being wedded to a jurisdiction's institutions nor laws.<sup>172</sup> They are also not grounded in common law or civil law traditions.<sup>173</sup> This offers an explanation for why sustainability reporting has become *de rigeur* for practically all large companies in every region of the world,<sup>174</sup> even if some culturally-rooted nuances are observable in how companies describe their motivations for disclosure.<sup>175</sup>

While this paper has focused on the aspects of sustainability as they are most commonly understood—namely, ecological and societal problems—sustainability reporting has the added advantage that materiality analysis encourages an organization to examine, evaluate, communicate, and address other risks in consultation with stakeholders.<sup>176</sup> If stakeholders tell an organization that they are concerned with cyber-security, the organization should critically examine its risks of being hacked and communicate what

Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 502 (2004) (stating sustainability reporting has created dialogues).

172. While stakeholder consultations and sustainability reporting is predominantly seen as a voluntary, since the 1990s several countries have gradually introduced mandates or encouragement related to sustainability-related disclosures. See Ans Kolk, *Trends in Sustainability Reporting by the Fortune Global 250*, 12 BUS. STRAT. & ENV. 279, 283–84 (2003).

173. The evolution of regulation-by-disclosure arguably grew out of responses to the 1929 collapse of stock markets, and was not a derivation of either the common law or civil tradition. See Sulkowski & White, *supra* note 171, 491–93.

174. KPMG's triennial study of the phenomenon regularly finds that approximately 95 percent of the largest 250 corporations in the world (the Global Fortune 250 or G250) engage in sustainability reporting. KPMG, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2011 6 (2011), [http://www.kpmg.com/ES/es/Actualidad/Novedades/Articulos/Publicaciones/Documents/CR\\_Report\\_2011.pdf](http://www.kpmg.com/ES/es/Actualidad/Novedades/Articulos/Publicaciones/Documents/CR_Report_2011.pdf) [hereinafter 2011 REPORT]. The number of companies in the G250 who had engaged in sustainability reporting (either in a stand-alone report or within the context of an annual report) grew from 64 percent in 2005 to 83 percent in 2008 (or 207 out of the G250). See KPMG, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2008 14 (2008), [http://www.kpmg.com/EU/en/Documents/KPMG\\_International\\_survey\\_Corporate\\_responsibility\\_Survey\\_Reporting\\_2008.pdf](http://www.kpmg.com/EU/en/Documents/KPMG_International_survey_Corporate_responsibility_Survey_Reporting_2008.pdf); KPMG, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2005 4 (2005), <http://www.gppi.net/fileadmin/gppi/kpmg2005.pdf>. This fact led KPMG to assert that such reporting had come of age and become *de facto* law for business. See 2011 REPORT, *supra* note 174, at 2.

175. See Adam J. Sulkowski et al., *Corporate Responsibility Reporting in China, India, Japan, and the West: One Mantra Does Not Fit All*, 42 NEW ENG. L. REV. 787, 796–98 (2008) (discussing how cultural values appear to color how managers discuss their motivations, with Western executives being more inclined to openly state that they engage in sustainability reporting for the sake of their shareholders, and Asian executives tending to emphasize a moral duty of being transparent to society as a whole).

176. E. LYNN GRAYSON ET AL., THE IMPACT OF ENVIRONMENTAL ISSUES ON BUSINESS TRANSACTIONS: LEADING LAWYERS ON MANAGING ENVIRONMENTAL REGULATION AND ENFORCEMENT FOR BUSINESSES, ENVIRONMENTAL REGULATORY CHALLENGES 6–7 (2013).

the company is doing to assess and assure the efficacy of its protections. Such disclosures have been shown to be effective in boosting the cyber-security efforts and performance of organizations.<sup>177</sup> As recent data security breaches in the private and public sectors have highlighted, cyber-security breaches are costly and damaging.<sup>178</sup> Thus, they should be openly and proactively addressed by both managers and lawyers, rather than addressed reactively in crisis mode.<sup>179</sup>

Scholarship of sustainability reporting and its drivers and impacts has advanced in recent years. For example, a causal link has been identified between having a “green” reputation and satisfied employees,<sup>180</sup> and between firm size and age and propensity to disclose environmental and societal impact information.<sup>181</sup> However, many questions still require answers. For example, under what conditions does sustainability reporting contribute to stakeholder dialogue that results in “win-win” solutions for the firm and those who experience side effects created by the firm, and what are the optimal roles for attorneys in that process? Another set of questions concerns whether mandating stakeholder consultations and sustainability reporting enhances or detracts from the beneficial effects of proactive

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177. Andrea M. Matwyshyn, *Material Vulnerabilities: Data Privacy, Corporate Information Security, and Securities Regulation*, 3 BERKELEY BUS. L.J. 129, 202–03 (2005) (explaining how, in the context of information security, mandated disclosures increase awareness of problems and supports systemic adoption of best practices for both corporations and consumers).

178. For example, the average cost of a data breach for a U.S. firm is \$4 million, and the annual growth rate in data breach incidents was recently found to be 64%. Berkeley Lovelace Jr., *Cost of Data Breaches Hits \$4 Million on Average: IBM*, CNBC (June 15, 2016, 6:00 AM), <http://www.cnn.com/2016/06/14/cost-of-data-breaches-hits-4-million-on-average-ibm.html>.

179. Adam J. Sulkowski, *Cyber-Extortion: Duties and Liabilities Related to the Elephant in the Server Room*, 2007 U. ILL. J.L. TECH. & POL'Y 1, 21–23 (2007) (explaining how cyber-security breaches, inadequate preventative measures, and related costs and liabilities are more routine than commonly realized, and are under-reported).

180. Cassandra Walsh & Adam J. Sulkowski, *A Greener Company Makes for Happier Employees More So Than Does a More Valuable One: A Regression Analysis of Employee Satisfaction, Perceived Environmental Performance and Firm Financial Value*, 11 INTERDISC. ENVIL. REV. 4, 278 (2010).

181. See Christopher Hughey & Adam J. Sulkowski, *More Disclosure = Better CSR Reputation? An Examination of CSR Reputation Leaders and Laggards in the Global Oil & Gas Industry*, 12 J. ACAD. BUS. & ECON. 2, 24–34 (2012); Sulkowski & White, *supra* note 171; Lu Wei, Wang Wenjun, Adam J. Sulkowski & Jia Wu, *The Relationships Among Environmental Management, Firm Value and Other Firm Attributes: Evidence from Chinese Manufacturing Industry*, 10 INT'L J. ENVIL. & SUS. DEV. 1, 78–95 (2011); Jia Wu, Linxiao Liu & Adam J. Sulkowski, *Environmental Disclosure, Firm Performance, and Firm Characteristics: An Analysis of S&P 100 Firms*, 10 J. ACAD. BUS. & ECON. 4, 73–84 (2011). For examples of how sustainability data can help identify business opportunities or reveal problems worth correcting, see Adam J. Sulkowski & Nicholas Vardaro, *Sid Wainer & Son: A Growing Realization*, 2011 ACAD. LEGAL STUD. BUS. NAT'L PROC., <http://www.alsb.org/proceedings/2011-proceedings>.

communication.<sup>182</sup> It should also be acknowledged that in academia and in practice, some take a skeptical view by holding that sustainability reporting—much like any communications tool—can be abused and used as a “greenwashing” or misleading propaganda tool, rather than as a bona fide means of communicating objective vital signs and learning about stakeholder concerns.<sup>183</sup> Research into the misuse of stakeholder communication tools is also useful.<sup>184</sup>

To an extent, United States securities laws require sustainability-related disclosures, inasmuch as such information meets the threshold standard of materiality as defined in relevant jurisprudence.<sup>185</sup> Some assert that SEC guidelines have already improved transparency and hence, corporate performance, with regards to corporate greenhouse gas emissions.<sup>186</sup> However, the full utilization of sustainability reporting—especially the aspects involving stakeholder dialogue—is dependent on the discretion of firm management and its advisers.<sup>187</sup> It is a communications medium for proactive law tactics which, depending on how effectively the tactics are deployed, can be leveraged constructively to evaluate risks and cooperate with stakeholders of every variety to preempt conflict by agreeing upon mutually satisfying solutions.

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182. See Lucien Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 452–68, 476–90 (2004).

183. E.g., Rob Gray & Markus Milne, *Sustainability Reporting: Who's Kidding Whom?*, 81 CHARTERED ACCT. J. N. ZEALAND 66–70 (2002); Laufer, *supra* note 46.

184. E.g., Güler Aras & David Crowther, *Corporate Sustainability Reporting: A Study in Disingenuity?*, 87 J. BUS. ETHICS 279 (2009).

185. See Sulkowski & Waddock, *supra* note 165, at 1070–72 (2012–2013) (material information generally is defined as that which a reasonable investor would want to know, such that it may affect the decision whether or not to make an investment).

186. But see Jeffrey M. McFarland, *Warming Up to Climate Change Risk Disclosure*, 14 FORDHAM J. CORP. & FIN. L. 281, 281–301 (2009); Perry E. Wallace, *Climate Change, Fiduciary Duty, and Corporate Disclosure: Are Things Heating Up in the Boardroom?*, 26 VA. ENVTL. L.J. 293, 317 (2008) (providing a critical look at whether SEC guidelines are in fact improving corporate behavior regarding the environment); Elizabeth E. Hancock, Note, *Red Dawn, Blue Thunder, Purple Rain: Corporate Risk of Liability for Global Climate Change and the SEC Disclosure Dilemma*, 17 GEO. INT'L ENVTL. L. REV. 233, 234 (2005) (discussing SEC environmental disclosure requirements and whether they have had the predicted effect).

187. See Rob Gray, *Social, Environmental and Sustainability Reporting and Organisational Value Creation? Whose Value? Whose Creation?*, 19 ACCT., AUDITING & ACCOUNTABILITY J. 793, 803 (2006); see also Sulkowski, *supra* note 165, at 477.

### C. Implications for Practice & Future Research

Corporate strategy works best when it can rely on legal certainty.<sup>188</sup> As emphasized in proactive law literature, corporations need to better appreciate the capacity of law and attorneys to add value beyond their roles in litigation. Therefore, our paper also calls for more cross-professional collaboration between managers, lawyers, and all stakeholders inside and outside the firm. By applying proactive law precepts to stakeholder interactions, including customer and supplier contracts, banking relationships, and credit management, companies can develop stronger business relationships and more conflict resistant approaches for their business activities. On a broader level, companies can use proactive strategies and precautionary principles to anticipate business risks. They can insert early warning signals into company systems and processes to alert managers of impending problems. This can raise the general level of vigilance and help avoid failures and expensive damage control.

Our analysis was exploratory and needs to be followed-up with empirical testing. The following testable hypotheses reflect the relationship between proactive law and the four organizational elements depicted in this Article. We suggest that future empirical work address the hypotheses that (1) when pursuing sustainability, organizations facing highly uncertain environments will experience greater benefits from using (and are therefore more likely to use) proactive law strategies; (2) when aspiring to be sustainable, organizations with long and complex value chains and greater attendant risks will experience greater benefits from using (and are therefore more likely to use) proactive law strategies; (3) when pursuing sustainability, conflict management costs will decrease with the use of proactive law strategies; and (4) when pursuing and implementing sustainable practices, organizational performance will increase with the use of proactive law strategies.

Additionally, there is need for more detailed legal analysis and development of innovative legal instruments to support organizational sustainability. One area that comes to mind is corporate governance. New corporate forms such as the benefit corporation model—arguably a manifes-

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188. See Paul M. Swamidass & William T. Newell, *Manufacturing Strategy, Environmental Uncertainty and Performance: A Path Analytic Model*, 33 *MGMT. SCI.* 509 (1987); see also Birger Wernerfelt & Aneel Karnani, *Competitive Strategy Under Uncertainty*, 8 *STRATEGIC MGMT. J.* 187 (1987) (analyzing the trade-offs between acting early and acting later after the uncertainty is resolved, and trade-off between focusing resources on one scenario and spreading resources on several scenarios by taking into consideration the nature of uncertainty, industry economics, intensity of competition, and the position of a firm relative to its competitors).

tation of proactive law concepts—have been adopted in many states.<sup>189</sup> The benefit corporation model could be analyzed as a legal tool for companies to ensure that they reach their sustainability and other social goals.<sup>190</sup> Future research could focus on certain high impact industries such as the energy sector. In-depth case studies could bring to light best proactive practices, identify spaces for improvement, and suggest and test new proactive legal tools or mechanisms for their effectiveness in preventing ecological crisis and supporting corporate sustainable development. Empirical research is also needed to show whether proactive law helps improve local, state, federal, and international environmental laws and their applications.

Another avenue for future research concerns the use of proactive law for competitive advantage, such as analyzing first-mover advantages for companies using proactive legal strategies. In that context, another research question that arises is whether some proactive law strategies adopted by big businesses, involving technology adaptations, can harm smaller companies that do not have the same financial means to implement the same techniques. Conversely, are proactive law approaches inherently cheaper and more attractive to smaller companies with fewer financial resources? On an organizational level, it would be useful to learn about the organizational and communication dynamics that facilitate successful proactive law applications; for example, top-down versus bottom-up approaches.

## V. CONCLUSION

Today's business environment is inseparable from the greater context of ecological and societal crises. With the increasing degradation of ecosystems, businesses are looking for ways to pre-empt and avoid environmental damage while assuring prosperity. Post-disaster cleanups and liability allocation can rarely undo harms caused to natural systems and people. They are also much more expensive than pre-disaster prevention measures are to implement.

Proactive law concepts can help organizations overcome some of the challenges of adapting to a degrading ecosystem and striving to achieve sustainability. Within this Article we identified law as one of the factors that influence organizational behavior. We analyzed how the emergent con-

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189. Alicia E. Plerhoples, *Representing Social Enterprise*, 20 *CLINICAL L. REV.* 215, 226 (2013).

190. See J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 *U. MIAMI L. REV.* 1 (2011); see also Blount & Nunley, *supra* note 43, at 6; David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation's Feel-Good Governance Giveaways*, 16 *U. PA. J. BUS. L.* 233, 259–61 (2013); Hiller, *supra* note 43, at 7.

cept of proactive law could help organizations avoid ecological disasters and become more sustainable. We examined precepts of proactive law. We offered a theoretical model that illustrates how proactive law facilitates communication. Finally, we suggested several specific proactive law tactics for ameliorating corporate contributions to ecological and societal crises and for encouraging efforts to achieve sustainability. In doing so, we have created a framework for further study and discussion of the role of proactive law in legal and organizational studies.

Proactive law approaches offer promising opportunities to support corporate sustainability. So far, research at the intersection of policy, legal, and management approaches to corporate sustainability is highly under-represented in both legal and management literature. Our future research propositions offer avenues for interdisciplinary theoretical and empirical research in the areas of organizational sustainability, governance, and business law.