

Social Enterprises and Benefit Corporations in Brazil: Projects for Corporate Qualification and Capital Market Regulation



Calixto Salomão Filho and Rachel Avellar Sotomaioir Karam

Contents

1	Introduction	426
2	Legal-Economic Concepts	426
3	Principles of Economic Activity in Brazil	427
4	Social Enterprises in Brazil	429
4.1	Certified B Corps and the B Movement	431
5	Regulation and Self-Regulation to Promote Positive Impact	432
5.1	Legislative Bill to Create the Qualification of Benefit Corporations	432
5.2	Self-Regulation Projects	435
6	Conclusion	438
	References	439

C. Salomão Filho

Faculty of Law of the University of São Paulo, São Paulo, Brazil

Max Planck Institut für ausländisches und internationales Privatrecht, Hamburg, Germany

Institut d'études politiques "Science Po", Paris, France

R. A. S. Karam (✉)

Universität Hamburg, Hamburg, Germany

Erasmus Universiteit Rotterdam, Rotterdam, Netherlands

e-mail: rachel@teskadogados.com.br

© The Author(s) 2023

H. Peter et al. (eds.), *The International Handbook of Social Enterprise Law*,
https://doi.org/10.1007/978-3-031-14216-1_20

425

1 Introduction

The Davos 2020 Manifesto on the expanded purpose of a company in the Fourth Industrial Revolution,¹ the Business Roundtable² announcement that a company should serve everyone, the “Capitalism. Time for a Reset” Financial Times³ agenda, the cover of The Economist with the headline “What are companies for? Big business, shareholder and society,”⁴ among other publications, are symptomatic of a global movement for reassessing economic activity through the lens of multiple stakeholders and the active participation of businesses in the promotion of social and environmental solutions for the common good.

This article reviews this movement from the viewpoint of Brazilian jurisdiction, exploring the subjects of legal and economic concepts underpinning the impact of economic activities (Sect. 2); principles of economic activity in Brazil (Sect. 3); ways in which social enterprises have organized themselves under the existing legal formats available (Sect. 4); and alternatives being discussed in the regulatory arena (Sect. 5) by means of a draft bill for the establishment of the legal qualification of *Sociedades de Benefício* (Sect. 5.1) and proposals for self-regulation (Sect. 5.2), which could be implemented within the framework of the capital market. Lastly, a brief conclusion is presented (Sect. 6).

2 Legal-Economic Concepts

Historically, economic activity is carried out by organizations that put together individuals and resources converging toward a for-profit productive activity, such as industry, trade, or services.

However, the organization of individuals and capital for productive activities is subject to market failure identified by economists as “externalities.” Externalities are considered negative when they represent unintentional “losses” caused to other individuals or the collective, such as the use of natural resources, generation of waste, pollution, among other things, and are considered positive when the economic activity generates a common good to be enjoyed by all.

For some scholars, negative externality must be corrected by public policies that induce its producer to consider the harmful effects of the productive activity, in such a way as to carry it out by optimizing a balance between profit and the so-called marginal private costs, without exacerbating this impact on social costs.⁵

¹Full manifesto available online at: <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

²Full text available online at: <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

³Full text available online at: <https://aboutus.ft.com/en-gb/new-agenda/>.

⁴Available online at: <https://www.economist.com/leaders/2019/08/22/what-companies-are-for>.

⁵Cooter and Ulen (2011), pp. 39–40.

Others, such as Ronald Coase, pondering between the benefits of economic activity and its unintended collective effects, defended in his article entitled “The Problem of Social Cost”⁶ an approach based on the “total effect” of each action, believing in the power of the market and of negotiation to mitigate such externalities.

This article presupposes that both market (or business) solutions and public policies are insufficient. It is imperative that companies undergo structural transformations. These initiatives take on myriad forms and intensities.⁷ We will address only a relatively light instrument of structural intervention. It entails looking at business law as a way to ensure that a company’s purpose also includes promoting a positive impact on the surrounding society while at the same time providing effectiveness to these stated purposes (the latter being the hardest task, obviously).

This does not mean merely internalizing negative externalities of a company’s activities but rather proactively searching along its production chain or business model for ways to promote solutions to social and environmental problems while measuring and reporting its capacity to generate positive externalities.

3 Principles of Economic Activity in Brazil

Brazil’s constitutional law, civil law, and corporate law contain principles and obligations that combine the exercise of economic activity with collective interests.

Article 170 of Brazil’s 1988 Federal Constitution sets forth the General Principles of Economic Activity, among which are the social function of property (item III), the protection of the environment (item VI), and the reduction of regional and social inequities (item VII).⁸

⁶Coase (1960), p. 44.

⁷For some theoretical possibilities of structural intervention in companies see Salomão Filho (2015).

⁸Constitution of the Federal Republic of Brazil 1988, article 170: “*The economic order, based on the valuation of human labor and on free initiative, aims at ensuring a dignified life for everyone, considering the dictates of Social Justice, complying with the following principles:*

- I - National sovereignty;*
- II - Private property;*
- III - Social role of ownership;*
- IV - Free competition;*
- V - Consumer protection;*
- VI - Protection of the environment, even through differentiated treatment depending on the environmental impact of the products and services and their fabrication and delivery processes;*
- VII - Reduction of regional and social inequalities;*
- VIII - Pursuit of full employment;*
- IX - Favored treatment for small companies incorporated under Brazilian Laws and that have their Headquarters and Administration in the country.”*

The Civil Code⁹ points to the contract's social function as the boundary for the parties' freedom.¹⁰

In addition, Law n. 6,404/1976, which governs corporations, sets forth that the shareholders' controlling power must be used *in order to make the corporation accomplish its purpose and perform its social role*" with the controller having *"duties and responsibilities towards the other shareholders of the corporation, those who work for the corporation and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed."*¹¹

Likewise, in addressing management's attributions, article 154 of Law n. 6,404/1976 states that these must be exercised *to achieve the corporation's purposes and to support its best interests, including those of the public at large and of the social role of the corporation.*¹²

The explanation of the legal grounds supporting the corporation bill expressly mentioned the social function and responsibilities of the controlling shareholder, stating that *the exercise of the controlling power can only be legitimate if it helps the company carry out its business purpose and accomplish its social function, while respecting and tending to the rights and the interests of all those connected to the company and those working for it, the minority shareholders, market investors, and members of the community in which it operates.*¹³

The Bankruptcy and Recovery Law,¹⁴ by substantiating the relevance of promoting an institutional, judicial, and extrajudicial effort for the recovery of the economic feasibility of a productive entity, indicated that the preservation of the company also entailed maintaining its social role and the stimulus to economic activity.¹⁵

⁹The Brazilian Civil Code is Law n.10,406 published on January 10th, 2002.

¹⁰Civil Code, Art. 421. "*Contractual freedom shall be exercised within the boundaries of the social role of the contract.*"

¹¹The Corporation's Act is Law n. 6,404 published on December 15, 1976, article 116, single paragraph: "*A controlling shareholder shall use its controlling power in order to make the corporation accomplish its purpose and perform its social role, and shall have duties and responsibilities towards the other shareholders of the corporation, those who work for the corporation and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed.*"

¹²Corporation's Act, article 154: "*An officer shall use the powers conferred upon him by law and by the bylaws to achieve the corporation's corporate purposes and to support its best interests, including the requirements of the public at large and of the social role of the corporation.*"

¹³Corporation's Act Explanatory Memorandum No. 196 of June 24th, 1976, from the Ministry of Finance. Available at: <http://www.cvm.gov.br/export/sites/cvm/legislacao/leis-decretos/anexos/EM196-Lei6404.pdf>.

¹⁴Law n. 11,101 of February 9th, 2005.

¹⁵Law n. 11,101, "Article 47. *Judicial recovery aims at making it possible to overcome a situation of economic or financial crisis of the debtor, in order to allow maintaining the source of production, the employment of workers, and the interests of creditors, thus promoting the preservation of the company, its social role, and the stimulation of economic activity.*"

Therefore, there are express provisions in the Brazilian legal system binding the right of property, contractual freedom, controlling power, corporate management, and the preservation of the company to its social role.

Nevertheless, it is not entirely clear how these general principles are applied.

The social role, construed and applied according to the principle of preservation of the economic entity, does not fully encompass the promotion of the common good, insofar as it is restricted to mitigating damages that could otherwise be caused to workers, consumers, and the environment. In a new economy, directly engaged in effecting positive change, the focus must be directed toward creating tools to determine commitments, measuring results, and periodic reports. To that end, the principle of the social role of companies, as interpreted today by the jurisprudence, is insufficient.

4 Social Enterprises in Brazil

Brazil is a country marked by severe economic inequality and a high concentration of income. It is often ranked in studies and statistics among the ten countries with the largest economic gap in the world. The 2019 Gini index published by the World Bank¹⁶ computes a coefficient of 0.534 for Brazil, which in general terms indicates that less than half of the population holds all the country's wealth. This was before the pandemic crisis of 2020, so the number is expected to be higher, showing an even greater disparity among the citizens in the next Gini.

Putting the data in perspective, Brazil has 213.3 million inhabitants, according to a 2021 survey¹⁷ led by the Brazilian Institute of Geography and Statistics (IBGE), and an economy of around USD 1.9 trillion, as per the International Monetary Fund's World Economic Outlook Database¹⁸ of October 2021 (occupying the post of 12th largest economy in the world). Thus, economic inequality means poverty on a very large scale, with all its inherent challenges, most of which governments and philanthropy initiatives fall short to address.

These large-scale social needs permeate society as a whole and affect the way micro and small companies are organized. The lack of quality education, like basic mathematics and grammar; difficult access to specialized services of accountants and lawyers; and restricted availability of credit drive many businesses to exist informally, with no document or official registration at all.

Companies that do incorporate formally are organized as entities under the Civil Code or the Corporations Act, respectively. The map of enterprises in Brazil

¹⁶World Bank Gini index available at: <https://data.worldbank.org/indicator/SI.POV.GINI>.

¹⁷Brazilian Institute of Geography and Statistics population data available at: https://www.ibge.gov.br/apps/populacao/projecao/index.html?utm_source=portal&utm_medium=popclock.

¹⁸International Monetary Fund's 2021 World Economic Outlook Database available at: <https://www.imf.org/en/Publications/WEO/weo-database/2021/October>.

published by the Ministry of Economy shows a total of nearly 19 million active companies in the country,¹⁹ the vast majority of which are organized as limited liability companies or single-person entities, with the Civil Code as its main applicable law. They are often formed by people (mostly family owned) with highly concentrated controlling powers.

There is no specific corporate format to identify “social enterprises” in Brazilian corporate law. The enterprises that wish to expressly insert positive impact in their social object, connecting it with the fiduciary duties of the administrator and/or using an impact measurement tool, must do so by inserting the provisions in its bylaws.²⁰ In the absence of legal parameters, some companies organize themselves using a hybrid format where the activity is carried out simultaneously by for-profit and not-for-profit entities.

The concept of a social enterprise itself is still the source of much debate. The term most widely used is “impact business,” to which the ecosystem agreed on a definition that has no legal repercussions as *enterprise that has the clear intention of addressing a socio-environmental problem through its main activity (either the product/service and/or the form of operation). It acts according to the logic of the market, with a business model that seeks financial returns, and is committed to measuring the impact generated.*²¹ This concept identifies four criteria of a business to be considered of a positive impact, regardless of the legal format adopted by the enterprise: (i) intentionality of solving a social and/or environmental problem; (ii) impact solution being the main activity of the business; (iii) search for financial return, operating according to market logic; and (iv) commitment to monitoring the impact generated.

As the impact investment and business field started to grow and attract attention from multiple interests, the federal government introduced a 10-year strategy through Decree n. 9,977/2019, which provides for the National Strategy for Impact Investments and Businesses (ENIMPACTO). In this legislative decree, impact businesses are identified as *enterprises with the objective of generating socio-environmental impact and positive financial results in a sustainable way.*²² It is a broad concept, applicable to multiple different legal types, of both for-profit and not-for-profit structures, as well as to companies with an impact business model in their core and those that create positive socio-environmental impact through their value chain.

¹⁹Ministry of Finance. Enterprises Map available at: <https://www.gov.br/governodigital/pt-br/mapa-de-empresas>.

²⁰This is not so regarding *Sociedade Anônimas* (corporations). Although there is no mechanism yet to include the social purposes in the object of the society articles 116 and 154 are sufficient to bind controlling shareholders and managers to the social purposes of companies and to the protection of all interests mentioned in these provisions (including workers and communities).

²¹“What are impact businesses” (2019) available at <https://aliancapeloimpacto.org.br/wp-content/uploads/2020/03/ice-estudo-negocios-de-impacto-2019-web.pdf>.

²²Decree n. 9,977 published on August 19th, 2019 available at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D9977.htm.

The existing definitions neither create nor qualify the nature of legal entities in the country. There are, however, bills and draft bills that seek to qualify legal entities that assume this impact commitment, as is the case with the qualification of *Sociedade de Benefício*, as further explored in this article.

4.1 Certified B Corps and the B Movement

Long before the discussion on the concept of impact business or even legislative proposals on the subject, certified B corporations reached Brazil. In 2012, the B Corp global movement created in the United States by B Lab arrived in South America under the name of Sistema B. *Sistema B was born simultaneously in Chile, Argentina and Colombia in 2012, and it quickly expanded into Uruguay and Brazil.*²³

Currently, there are more than 4000 certified B corporations globally,²⁴ 792 of which are in Latin America²⁵ and 231 of them in Brazil.²⁶

Sistema B brought to Brazil the B movement's goal to redefine the concept of success in the economy by certifying companies that have their actions and impact measured by the tool of the B Impact Assessment,²⁷ so that not only financial success is considered but also the well-being of humanity and the planet.

Understanding the broad role of a business in society and giving new meaning to its products and services in favor of the development of the economy and society should be a path with no return. Contributing to this scenario, Sistema B leads several initiatives in Brazil that aim to build a favorable ecosystem for companies that use the strength of the market to provide solutions to social and environmental problems. Sistema B is an active member of the ENIMPACTO committee²⁸ and participates in public hearings on business regulation and self-regulation aiming at an increasingly higher standard of purpose, responsibility, and transparency.

For the certified B corporations, Sistema B also requires the adoption of two clauses in the bylaws, known as the "B Clauses." One is to insert in the social object clause that the activity is developed in connection with (i) *the short- and long-term interests of the company and its partners; and; (ii) the short and long-term economic, social, environmental and legal effects of the company's operations in*

²³Marquis (2020), p. 171.

²⁴Information on the global movement and the number of companies involved available at <https://www.bcorporation.net/en-us>.

²⁵B Corp Directory in Latin America and Caribbean available at <https://www.sistemab.org/en/b-corp/>.

²⁶Complete list of certified B Corps in Brazil available at <https://www.sistemabrasil.org/empresas-b/#buscador>.

²⁷Available at <https://bimpactassessment.net/>.

²⁸All ENIMPACTO committee activities available at <https://www.gov.br/produktividade-e-comercio-externo/pt-br/assuntos/inovacao/enimpacto>.

*relation to the employees, suppliers, consumers and other creditors of the company, as well as in relation to the community in which it operates locally and globally.*²⁹

Especially considering challenges in the Brazilian economic and social contexts, Sistema B can be credited with bringing forth a clear path for a new way of doing business that could otherwise have taken longer to be identified, if at all.

5 Regulation and Self-Regulation to Promote Positive Impact

Even though it is clear that the economic principles are an integral part of Brazilian law, in light of the lack of real effectiveness of the aforementioned mechanisms, a regulatory path for the incentive of impact businesses and purpose entities should be developed for structural measures that would effectively and lastingly ensure that goals for the common good can be met.

By revamping its structure, a corporation can provide the means to rescue and promote its broadest function.³⁰ That way, a safe legal landscape can ensure that funds are raised from investors interested in socio-environmentally responsible practices and that its officers, safeguarded by a specific legal framework, feel secure to take the steps they see fit to reach goals that are broader than short-term financial returns.

5.1 Legislative Bill to Create the Qualification of Benefit Corporations

Sistema B Brazil has been fostered since 2014 through a community of practice formed by volunteer lawyers known as B Legal Group, as well as studies and discussions on legal matters that are relevant to the economic-corporate arrangements of the new economy.³¹

As a result, the B Legal Group prepared a proposal for a preliminary bill that created a legal qualification such as the “Benefit Corporations” (*Sociedades de Benefício* in Portuguese), which, in technical terms, does not mean a new type of company but signifies a legal accreditation of existing types. To bear this qualification, the entity would not need to change its bylaws to add the qualifying elements, namely, (1) inserting positive social and environmental impact into its business purpose; (2) adopting governance instruments in the form of a chief impact director position, an impact committee, and coparticipation in the board of directors, in

²⁹B Clauses available at <https://www.sistemab.org/modificaciones-legales-brasil/>.

³⁰Comparato (1995), p. 4.

³¹Information about the B Legal Group available at <https://www.sistemabrazil.org/economia/>.

accordance with the size and the structure of each organization; and (3) periodically measuring and disclosing the impact report and management accounts.

The usefulness of setting up a legal framework for activities that combine profit with the purpose of positive socio-environmental impact has been extensively analyzed by a task-force workgroup of the G8³² dedicated to impactful investments, which resulted in a document titled *Profit with Purpose Businesses: Subject Paper of the Mission Alignment Working Group*,³³ totaling 20 recommendations on formalizing regulations on the matter.

There is consensus that laws and regulations must be used as facilitators, eliminating identified statutory constraints and fostering an environment of minimum common grounds in favor of developing and securing organizations dedicated to activities that reconcile profit with social environmental solutions.

The *Sociedades de Benefício* draft was incorporated in the legislative proposal n. 3284 presented in the Senate in September 2021, including general provisions, qualifying elements, management entities, and an impact report.³⁴

The positive social and environmental impact under the proposal is seen as having short-, medium-, and long-term repercussions, whether direct or indirect, upon the communities and the supra-individual interests surrounding the corporation, stemming from the benefit corporation's activities, with the requirement that management should take account of the impact in their decision-making.

The social and environmental impact extends further to the controlling shareholders and must be prioritized having the best interest of the corporation in mind in the event of any conflict with the interests of its partners, shareholders, and technical and consulting bodies.

The adoption of the legal qualification by the organization would also have a direct impact on the structure of its corporate governance. Three new elements are listed and become part of the administrative structure of the company, acting as instruments to ensure the effectiveness of the aggregate impact of the organization's activities: chief impact director, stakeholder committee, and a member of the board of directors appointed by the stakeholder committee.

The stakeholder committee or the impact committee can be a valuable governance instrument, through which partners and the management can objectively voice concerns when facing the repercussions of business activities on those collectivity affected, whether directly or indirectly.

Albeit optional, the committee can be created through a provision in the corporation's bylaws or even through a separate resolution. The governance committees enjoy great freedom of organization and management, allowing each company to

³²Made up of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, the European Union, and Russia—at that time under the management of the United Kingdom.

³³Social Impact Investment Taskforce. Mission Alignment Working Group. Profit-with-Purpose Businesses (2014). <https://gsgii.org/reports/profit-with-purpose-businesses/>.

³⁴Legislation bill and procedure available at <https://www25.senado.leg.br/web/atividade/materias/-/materia/149934>.

create them and make them up and use them in the best way possible within its management structure.

The coparticipation has its origin in the 1950s in Germany since the ineffectiveness of the so-called *Gemeinwohlklausel* (clause of common good) was realized, as determined in the German legislation of 1937, which compelled company management (*Vorstand*) to take decisions considering the common good of the people and the *Reich*, under penalty of being obliged to adhere to the conduct, removal of officers, or even civil liability³⁵—without ever defining the concept of “common good” and allowing it to be explored by governments and business people aligned with evil legal regimes such as the Nazis.

The postwar period of the 1950s gave rise to an environment suitable for nurturing the coparticipation model, which was devised to serve as a tool for resolving conflicts between the interests of shareholders and those of employees based on the assumption that both converged toward maintaining an enduring and profitable company.

In Germany, coparticipation takes place through a direct representation of workers on the board of directors, the percentage of seats being proportionate to the number of employees. An employee-appointed director has the same attributions as the other directors and may even be a trade-union representative:

Under German institutionalism, the definition of the social interest as different from that of the interests of the partners and the presupposition of their persecution by the corporate entities, does not eliminate the conflict of interests from the corporate dialectic. On the contrary, it reinforces them because it introduces, within the corporate entities, representations of effectively opposing interests.³⁶

The German model is especially interesting because it shows the possibility of introducing an effective model of participation and even coparticipation by other stakeholders in the high administration of the companies. It could and should serve as a model for initiatives aiming at transforming companies into companies with a purpose other than profit (companies with social and environmental positive impact).

With the benefit corporation proposal the intention is to create an instrument of effectiveness in promoting positive impact, participation means welcoming as a member of the management board, a representative or representatives of the interests of the *stakeholders*, or experts in the areas where the business activity has a potential impact. It is a governance policy that adds to the decision-making conclave the voice and vote of the main or residual recipients of products and consequences of the exercise of business activities. It still falls short of the scope and extent of, for example, the German coparticipation model, but it is a step in the right direction.

In the proposal for the qualification of *Sociedades de Benefício*, the impact report is integrated into the management report and will be subject to prior assessment by the internal bodies and to resolutions passed in the meetings of shareholders or members, in which management accounts will be scrutinized.

³⁵Frazão (2011), pp. 131–133.

³⁶Salomão Filho (2011), p. 37.

There is a concern that the governance instruments do not excessively encumber the activity and therefore gradually apply in accordance with the size of the company, the nature of its activities, and the complexity of the products and services it offers.

The governance measures aim at creating self-fulfilling and eligibility instruments for decision-making in the search for positive socioenvironmental impact. Similarly, they allow for more effective measuring and rendering of accounts at frequent intervals with respect to the impact, using third-party developed metrics.

In comparison with other studies and legislative projects on the matter currently existing in over 15 countries, the proposal for benefit corporations is the only one that adds a governance structure to the eligibility elements of the impactful businesses to ensure that the search for socioenvironmental impact is an effective and long-lasting practice, with adequate tools and tools compatible with the organization's economic capacity.

The proposed qualification is an element that is added to the types of entities that can rely on it. The legislative bill proposes that, when adopting the qualification, the company may add to its corporate name the identification "de Benefício," thus becoming a "Limited Liability Company de Benefício," "Corporation de Benefício", and so on, depending on the case.

The proposed law is concise in addressing the essential elements of impact businesses, is consistent with the existing legal system, and, given its corporate nature, preserves the entrepreneur's innovative initiatives. At the same time, it reveals itself as a framework and an important mechanism for setting the minimum elements for the benefit of the common good.

Finally, it should be noted that although the proposal raises the bar (in terms of governance, information, control of impactful practices, etc.), it does not affect the existing obligations of companies on the whole (whether nonaccredited corporations or benefit corporations). Thus, for instance, all other corporations and their controllers are required to carry on with their duties to the collective and the workers, as per article 116 of the Corporations Act (for corporations) and article 1,053 and its sole paragraph of the Civil Code (for limited liability companies). Indeed, the enactment is expected to serve as a model for improvement in governance and better regulations for the protection of stakeholders across all types of legal entities (just as how the New Market regulations of Bovespa in the past inspired changes to the Corporations Act).

5.2 *Self-Regulation Projects*

To say that an enactment favoring the organization of *Sociedade de Benefício* would be a step in the right direction does not mean closing one's eyes to the usefulness and efficacy potentially stemming from the adoption of self-regulatory measures.

The advantages of such a model could be especially enjoyed through private regulatory instruments geared toward promoting purpose practices among small

businesses. This is because issuing regulations tending to the specificities of small- or large-sized businesses, in light of the Brazilian legislative reality, can be difficult.

Given the importance of structuring financing mechanisms for activities that seek to meet socio-environmental purposes and considering the difficulties faced by small businesses to obtain resources, it would be particularly interesting to improve entry-market regulations to value the impact measures and, at the same time, lure investors naturally interested in a more conscientious entrepreneurial activity.³⁷

Self-regulation could contribute especially to the channeling of investment opportunities by way of capital markets, spearheading financial autonomy, and safeguarding the interests that a purpose entity seeks to protect.

There are two kinds of improvement that could be introduced through self-regulation: firstly, the creation of an Impact New Market,³⁸ where companies listed would be only those that could show within their governance relevant changes that would advance their social and environmental objectives (including, among other changes, the participation of members of the community and representatives of environmental nongovernmental organizations (NGOs) in the directing bodies of companies). The advantage of such an alternative is to give a positive screening to companies that incorporate social and environmental objectives in their internal corporate governance.³⁹

A second alternative that is being pursued would be to create within the existing self-regulatory environment—at B3, the *Bovespa Mais*⁴⁰—a listing segment for small purpose companies.

The *Bovespa Mais* appears to have been created to pave the way for companies of all sizes to seek out funding through a private placement.

This is an instrument devised to make up for the fact that in Brazil, due to the association between policies that strengthen conglomerates and those that provide a stimulus to capital markets, listed companies tend to have grown to a certain size and have turned to the market to raise funds.

³⁷We are referring here to investors interested in the so-called socially responsible investments, who find it difficult to pinpoint the potential recipients of the amounts, particularly due to the absence of a standardized system for disclosing information and understanding the concept of good socio-environmental practices. On this issue, see, for example, Benjamin (2008), p. 303.

³⁸The proposal of creating a listing segment with an impact focus was formally presented to BMFBovespa in September 2016 within the initiative of Review of Listing Segments Regulations. Available at https://www.b3.com.br/pt_br/regulacao/regulacao-de-emissores/atuacao-normativa/revisao-dos-regulamentos-dos-segmentos-especiais-de-listagem.htm. See also the text presented by por C. Salomão, S. Cerezetti e C. Brandão available at https://www.b3.com.br/data/files/D6/C2/74/3A/4C76751035EA4575790D8AA8/2016.08.29%20-%20Calixto_%20Cerezetti%20e%20Brandao.pdf.

³⁹See, for the theoretical justification for such an alternative, the discussions in Salomão Filho (2019).

⁴⁰Institutional information of the Bovespa Mais listing segment (2021). Available at: http://www.b3.com.br/pt_br/produtos-e-servicos/solucoes-para-emissores/segmentos-de-listagem/bovespa-mais/.

Small- and medium-sized companies, in turn, have been historically met with numerous challenges when seeking funds through direct placement. Generally, they have had to resort to bank loans at usually unfavorable rates of interest. The effects of this reality are even more deleterious when one takes into account the fact that close corporations are saddled with higher interest rates than listed corporations.⁴¹

It should be acknowledged that, even among publicly held corporations, true access to funding sources through the capital market is markedly restricted to the group of larger companies.⁴²

This scenario calls for urgent steps to be taken to enable companies to join the market and start to benefit, albeit in baby steps, from placing their securities in the primary market. An environment conducive to this can be called “entry market,” the importance of which has been stressed by researchers on the subject.⁴³

Entry markets, such as *Bovespa Mais*, not only have listing costs and market maintenance costs lower than those incurred by the companies that participate in the common market but also normally rely on a regulatory system that is simpler and sufficiently attractive to small-sized companies. These markets are marked by few admission requirements, less onerous continuous obligations, and the enforcement of but a few principles of corporate governance. Tax advantages are another possible feature luring investors.

A possibly interesting self-regulatory route for the purpose companies could entail creating a unique segment within the *Bovespa Mais*, specifically in tune with the business environment occupied by corporations that are formed with a purpose that goes beyond mere generation and distribution of profits. Some of the measures indicated for benefit corporations could be picked up, and other bolder features could be required, especially with regard to the disclosure of information and the participation of socially responsible investors as officers.

Nevertheless, if this solution is to become a reality, it means tackling issues that are still controversial when one defends stimulating an entry market in Brazil.

One such issue is the need to come up with an underwriting structure willing to take on smaller issuances of bonds. Thus, it’s necessary to revert the financial deterrents connected with underwriting an initial public offering (IPO) for smaller

⁴¹ See data presented by Rocca (2001), p. 57.

⁴² Indeed, empirical research shows that 20% of the largest Listed Companies get 70% of the total amount of resources raised from outside sources (Rocca 2001, pp. 60–61).

⁴³ See Da Costa (1991), p. 19, de Medeiros (1991), p. 85 (which labels the Brazilian market as elitist, precisely in view of the difficulties faced by smaller companies in bearing the costs of listing and in obtaining liquidity for their papers), and Cantidiano (2007), p. 223. Even the CVM, in the Development Plan of the Securities Market, approved by Directive 86 of 1988, indicated, as one of the main objectives and goals, the “increase in the number of open companies, facilitating the access of small and medium enterprises to the securities market, through mechanisms appropriate to their size and structure.”

companies.⁴⁴ Conversely, it is true that the underwriter's job is to protect the issuer against important risks pertaining to the placement of securities and, precisely because of that, involves compensation that varies according to the characteristics of the company and the assessment of the risks involved in the transaction. One cannot, therefore, expect the same commissions to indirectly apply to renowned companies and companies with less or no status. On the other hand, if the costs necessarily incurred for the issuance of bonds end up rendering it impracticable, they represent an insurmountable barrier to entry and need to be challenged if one wishes to effectively clear the access routes to the market.⁴⁵ In fact, studies on tax incentives or regulatory structures more capable of protecting the interests of investors are of no use if the market effectively does not exist, a fact that depends on its true openness to the listing of issuers.

Lastly, it would also be important to reflect on funding mechanisms that do not restrict debt to corporate issuers. The adoption of the *sociedade limitada* (limited liability company) format, which represents most of the impactful businesses in Brazil, must not, in itself, impede access to resources that are potentially structured to meet the funding needs of companies aligned with socio-environmental values.

6 Conclusion

For the operation of the economic system to be improved, it is necessary to provide readily useful tools that promote entrepreneurial projects. For this initiative, the judiciary (through laws) and the stakeholders themselves must collaborate, pushing for and participating in the regulation and self-regulation of their activities, in line with sustainable development goals. For the inner workings of the economic system to be improved, useful tools to foster entrepreneurial initiative must be made available. For the initiative to succeed, the legislature (through enactments) and the interested parties must collaborate, exerting pressure for and promoting the regulation and or self-regulation of their activities in line with sustainable development.

The economic concepts and inherent legal principles under Brazilian law not only provide support for but are also aligned with a corporate legislative proposal offering an organizational structure that contemplates all stakeholders directly or indirectly affected by its activities.

The creation of benefit corporations could also benefit from self-regulatory complements, particularly developed with a view to attracting resources from

⁴⁴Data indicate that the costs of *underwriting* are usually 3 to 4% for companies with a better reputation, but can reach up to 10% in the case of less well-known companies interested in opening up capital (Rocca 2001, p. 78).

⁴⁵See Mendoza (2008), p. 281 (mentioning that the reluctance of *underwriters* in intermediating transactions of low value is an important obstacle for the entry to small issuers). In Brazil, the topic is extremely relevant for the proper development of the Brazilian Access Market.

socially responsible investors to companies listed in the stock exchange, both through the creation of new indexes and through a new access segment especially geared toward small-sized business entities that cater to the well-being of the myriad communities affected by their activities. These proposals, albeit presented, have not yet been incorporated into our self-regulatory environment.

They seem to be an important theoretical and practical path to be pursued in the near future around the globe through legal initiatives directed toward the creation of incentives and a friendly legal framework for enterprises with positive social and environmental impact.

References

- B Impact Assessment (2022). <https://bimimpactassessment.net/>
- B Lab. B Corp Movement (2022). <https://www.bcorporation.net/en-us>
- B3. Bovespa Mais Listing Segment Regulation (2021). http://www.b3.com.br/pt_br/produtos-e-servicos/solucoes-para-emissores/segmentos-de-listagem/bovespa-mais/
- Bankruptcy and Recovery Act, Law n. 11,101 published on February 9th, 2005
- Benjamin J (2008) Socially responsible investment law. Oxford, Oxford
- Brazilian Institute of Geography and Statistics (IBGE). Population Statistics (2022). https://www.ibge.gov.br/apps/populacao/projecao/index.html?utm_source=portal&utm_medium=popclock
- Cantidian LL (2007) Aspectos Regulatórios do Mercado de Capitais (Regulatory aspects of the capital market). In: Bacha EL, De Oliveira Filho LC (eds) Mercado de Capitais e Crescimento Econômico – Lições Internacionais, Desafios Brasileiros (Capital markets and economic growth-international lessons, Brazilian challenges). Inside Cover, São Paulo, p 223
- Civil Code, Law n. 10,406 of January 10th, 2002
- Coase R (1960) The problem of social cost. The Journal of Law and Economics. The University of Chicago Press
- Comparato F (1995) A Reforma da Empresa (The reform of companies). In: Direito Empresarial: Estudos e Pareceres, São Paulo, Saraiva
- Constitution of the Federal Republic of Brazil (1988). Brasília, Distrito Federal
- Cooter R, Ulen T (2011) Law and economics. Addison-Wesley, Boston
- Corporation's Act, Law n. 6,404 published on December 15th 1976
- Corporation's Act Explanatory Memorandum No. 196 of June 24th, 1976
- Da Costa RT (1991) Mercado de capitais e capitalização de empresas (Crisis, capital market, and capitalization of companies). In: Velloso JPR (coord) A Modernização do Capitalismo Brasileiro: reforma do mercado de capitais (The modernization of Brazilian capitalism: capital market reform). José Olympio, Rio de Janeiro, p 19
- de Medeiros PT (1991) A estrutura do mercado de ações e o sistema de intermediação (The structure of the stock market and the intermediation system). In: Velloso JPR (coord) A Modernização do Capitalismo Brasileiro: reforma do mercado de capitais (The modernization of Brazilian capitalism: capital market reform). José Olympio, Rio de Janeiro, p 85
- Decree n. 9,977 published on August 19th, 2019
- Estrategia Nacional de Investimentos e Negócios de Impacto. <https://www.gov.br/produktividade-e-comercio-exterior/pt-br/assuntos/inovacao/enimpacto>
- Frazão A (2011) Função social da empresa: repercussões sobre a responsabilidade civil de controladores e administradores de S/As (Social role of the company: repercussions on the civil liability of controllers and administrators of public limited companies). Renovar, Rio de Janeiro

- Instituto de Cidadania Empresarial. Aliança pelo Impacto. Pipe Social. O que são negócios de impacto (What are impact businesses) (2019). <https://aliancapeloimpacto.org.br/wp-content/uploads/2020/03/ice-estudo-negocios-de-impacto-2019-web.pdf>
- International Monetary Fund. World Economic Outlook Database (2021). <https://www.imf.org/en/Publications/WEO/weo-database/2021/October>
- Legal requirement of B Clauses applicable to Brazil (2022). <https://www.sistemab.org/modificaciones-legales-brasil/>
- Legislation bill n. 3284/2021 (2021). <https://www25.senado.leg.br/web/atividade/materias/-/materia/149934>
- Marquis C (2020) Better business how the B Corp Movement is remaking capitalism. Yale University Press, New Haven and London
- Mendoza JM (2008) Securities regulation in low-tier listing venues: the rise of the alternative investment market. *Fordham J Corp Financ Law* 13
- Ministry of Finance. Enterprises Map (2022). <https://www.gov.br/governodigital/pt-br/mapa-de-empresas>
- Rocca CA (2001) Soluções para o Desenvolvimento do Mercado de Capitais Brasileiro (Solutions for the development of the Brazilian capital market). José Olympio, Rio de Janeiro
- Roundtable Redefines de Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’ (2019). <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>
- Salomão Filho C (2011) O novo direito societário (The new corporate law). Malheiros, São Paulo
- Salomão Filho C (2015) Teoria crítica estruturalista do direito comercial (Critical structuralist theory of commercial law). Marcial Pons, São Paulo, Buenos Aires, Madrid
- Salomão Filho C (2019) Inclusion gains in markets for scarce products. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386817
- Sistema B Brasil. Complete List of Certified B Corps in Brazil (2022). <https://www.sistemabrazil.org/empresas-b/#buscador>
- Sistema B Internacional. Certified B Corps Directory Latin America and Caribbean (2022). <https://www.sistemab.org/en/b-corp/>
- Social Impact Investment Taskforce. Mission Alignment Working Group. Profit-with-Purpose Businesses (2014). <https://gsgii.org/reports/profit-with-purpose-businesses/>
- The Economist. What companies are for. (2019). <https://www.economist.com/leaders/2019/08/22/what-companies-are-for>
- The Financial Times New Agenda ‘Capitalism. Time for a Reset’ (2019). <https://aboutus.ft.com/en-gb/new-agenda/>
- World Bank. Gini Index Data 2019. <https://data.worldbank.org/indicator/SI.POV.GINI>
- World Economic Forum. Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>

Open Access This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

