

Towards Sustainable Companies: Identifying New Avenues

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Sustainable companies, sustainable capitalism:

A new model built on the concept of directors duties.

by

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The trading company has been at the vanguard of the advancement of capitalism, which is presumptively regarded as based on progressive unsustainable levels of exploitation of earth resources, therefore, inherently hostile to sustainable development. Leading companies have also been associated with subversion of political systems, systematic and gross violations of human rights and social equity, promotion of inapt cultural models for advancing sustainability, even whilst professing to be ethical and socially responsible. The notion of the ‘sustainable company’ or ‘sustainable capitalism’ appears, therefore to be an oxymoron. However, the concept of corporate social responsibility has in recent time transmuted into the concept of ‘corporate sustainability’ - a term that is mostly discussed as a green speak, more of a slogan than a concept with substantive green content.

This paper is a comparative survey of the shareholder/stakeholder theories of corporate control and the concepts of CSR, Corporate Sustainability (CS) and the social and legal duties and roles of companies and their directors in delivering sustainable development. It argues that in order to do so there is a need for a new model of the trading company and Darwinian capitalism. It discusses the judicial evolution of the norms of corporate sustainability and critically examines the theme of society, corporate purpose and mission and outlines the framework for the new sustainable company. The paper examines the theories of corporate democracy, analyzes the concepts of corporate social responsibility and sustainability, considers the political economy of profit creation and makes a case for sustainable capitalism. It then sets out the company director’s legal duty of corporate sustainability and closes with a discussion of different typologies of the sustainable company.

Corporate Democracy

Shareholder Primacy Theory

The legal theories of shareholder primacy and control are at the heart of and a chief pillar of corporate law, corporate governance and the free enterprise system. They very neatly encapsulate theory and reality most of the time and even where they appear to have fallen into

disuse, as in the managerial company, they remain a useful justificatory fiction and device for raising capital, promoting business enterprise and economic development. These concepts have in recent times come under severe blows by the Stakeholder theory and the concept of CSR.¹ No longer, therefore, is it politically correct to echo Ostrander J. who very famously said in *Dodge v Ford Motors*;² ‘a business organization is organized and carried on primarily for the profit of stockholders... [thus directors are precluded] from conducting the affairs of the corporation for the merely incidental benefit of shareholders or for the primary purpose of benefiting others.’

Stakeholder Interest Theory

The stakeholder interest theory is that companies do not exist merely to provide profits but have responsibilities to a broader constituency than shareholders alone. They are more than economic institutions and must help society to solve some of its most pressing problems, some of which they helped to create in the first place – environmental degradation and pollution, unsafe products, discrimination or abuse of certain groups in society, inequitable domestic and global social divisions, etc. This amounts to responsible behavior (CSR).

The concept of CSR is fundamentally based on ethical considerations. Businesses are creatures of society with fundamental uses and roles. If social values and expectations of their roles change they have no option than to change if they must remain useful and retain any legitimacy. Again profits must be viewed in a long-term perspective as CSR activities ensure long-term sustainable profitability even if current CSR spending appears to reduce those profits. CSR is a useful tool for projecting a positive public image by companies. CSR can also be exploited as a business model and used for profit making. Business also has reciprocal duty since its activities give it enormous power to affect the environment, consumers, employees, community conditions, etc.

Stakeholder Participation Models

It has been argued that Japan gained ascendancy, through collective capitalism, an elaboration of managerial capitalism. Lazonick describes the features of collective capitalism as:

¹ For a review of various contrary arguments see Keay, *Shareholder Primacy in Corporate Law: Can it survive? Should it survive?*: <http://ssrn.com/abstract=1498065>. Also see, M.C. Branco & L. L. Rodrigues, ‘Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility’, *Electronic Journal of Business Ethics and Organization Studies (EJBO)*, Vol. 12, No. 1 (2007), 5.

² 204 Mich. 459; 170 N.W. 668.

*'(1) the organizational integration of a number of distinct firms(i.e., units of financial control)in pursuit of a common investment strategy, (2) the long-term integration into the enterprise of personnel below the managerial level, and (3) the cooperation of the state in shaping the social environment to reduce the uncertainty facing private-sector investments.'*³

The German model of the Two-tier board⁴ is but a close formal equivalence of the Japanese collectivist control model sketched above. The Two-tier board formally sits employee's representatives as Labour Directors and members of a ranking organ of the company.

The Japanese model and the two-tier board present two models of a stakeholder structure or democracy, if you like - a variant of the classical shareholder interest/control model and structure of Anglo-American law.

Corporate Social Responsibility, Corporate Sustainability

The concept of social responsibility of companies has evolved over time and has involved many themes in the process; philanthropy, employee safety and health, product liability and consumer protection, environmental pollution and more recently, human rights and sustainable development. This progression mirrors the changing socio-political environment and the consequential impact on the business environment. Whilst CSR appeared to require companies to act with conscience and be conscientious through acts of benevolent citizenship, CS appeared to be axiomatically linked to the quest for environmental conservation and inter-generational equity. Probably, owing to its greater ideological potency and currency, as well as emotive word games by corporatists to deflect popular distaste with unbridled profits and Darwinian corporate capitalism CSR and CS are increasingly touted as synonyms.

Corporate Social Responsibility

There is a myriad of definitions of CSR including the following that serve to highlight the fact that there is no ONE definition of the term as such:

³ *Business Organization and the Myth of the market Economy*, Cambridge University Press, 1993, 27 – 36.

⁴ For a classical examination of the subject see generally, Vagts, 'Reforming the modern corporation: Perspectives from the Germans', (1966) Harv. L. R. 80; for a critical comparison of the 'one-tier' and t 'teo tier' model see generally, C. Jungmann, 'The dualism of One-tier and Two-tier boards in Europe', 3 *European and Company Law Review* 426 (2006).

‘...incurring uncompensable costs for socially desirable but not legally mandated action’⁵

- *‘...involves voluntarily sacrificing profits, either by incurring additional costs in the course of the company’s production processes, or by making transfers to non-shareholder groups out of surplus thereby generated, in the belief that such behavior will have consequences superior to those flowing from a policy of pure profit maximization (profit-sacrificing social responsibility).’⁶*
- *‘...increased sensitivity to the impact of the company’s activities on third parties or a corporate concern with social issues more generally, without any necessary implication that a divergence from the profit goal is involved (social involvement).’⁷*
- *‘A mechanism for entities to voluntarily integrate social and environmental concerns into their operations and their interaction with their stakeholders over and above the entity’s legal responsibilities’⁸*
- *‘Actions of an organization to take responsibility for the impacts of its activities on society and the environment, where these actions:*

□are consistent with the interests of society and sustainable development;

□are based on ethical behaviour, compliance with applicable law and intergovernmental instruments; and □are integrated into the ongoing activities of an organization’⁹

Some prefer to use the term ‘corporate responsibility’ (CR) to avoid the assumption that it is limited to “social” concerns (strategic philanthropy and community relations). Others use ‘social’ responsibility to avoid the stigma that this topic only relates to businesses driven to place profit over social principle ‘... [Each] organization as it strives to achieve its mission and vision, [must] add value to the society which franchises its existence.’¹⁰

The World Bank defines CSR as:

⁵ V. Brudney, “The Independent Director – Heavenly City or Potemkin Village”, (1982) 95 Harv. L. Rev. 597 at 605

⁶ .E. Parkinson, *Corporate Power and Responsibility, Issues in the Theory of Company Law*, (1993), 261.

⁷ Ibid.

⁸ Standards Australia, quoted in Idowu & Fiho (Eds.), *Global Practices of Corporate Social Responsibility*, (2008), 464.

⁹ ISO Working Draft on Corporate Social Responsibility Standard, ISO/WD26000, *Guidance on Social Responsibility*: http://inni.pacinst.org/inni/corporate_social_responsibility/ISO26000Working%20Draft2.pdf

¹⁰ R.L.Heath & Lan Ni, “Corporate Social Responsibility”:

http://www.instituteforpr.org/essential_knowledge/detail/corporate_social_responsibility/

*'the commitment of business to contribute to sustainable economic development by working with employees, their families, the local community and society at large to improve their lives in ways that are good for business and development'*¹¹

The World Business Council on Sustainable Development defines it as:

*'...the commitment of business to contribute to sustainable development, working with employees, their families, the local community and society at large to improve their quality of life'*¹²

Yet another definition, says, that CSR means: *'respecting human rights; upholding core labour standards and ensuring decent working conciliations; taking environmental concerns into account; combating corruption; and maximising transparency.'*¹³

CR or CSR?

Waddock argued that there is a substantive difference between the impact of a company's strategies on its stakeholders and the environment from actions it takes to directly positively benefit society, hence a distinction between CR and CSR.¹⁴ However, one may ask not only whether the touted distinction is not just verbal or linguistic but whether it is practical, since method, impact and benefit on society may just be two sides of the same coin.

Corporate Sustainability

CS may be defined as:

*'...meeting the needs of a firm's direct and indirect stakeholders (such as shareholders, employees, clients, pressure groups, communities etc), without compromising its ability to meet the needs of future stakeholders as well.'*¹⁵

¹¹ World Bank Group's Department on Foreign Investment Advisory Service, Bank Group's Corporate Social Responsibility Practice.

¹² World Business Council of Sustainable Development (www.wbcsd.org)

¹³ Royal Norwegian Embassy, *CSR Uganda Country Note*:
<http://www.norway.go.ug/Embassy/Development/privatesectordevelopment/CSR-Uganda-Country-Note/>

¹⁴ S. Waddock, 'Building the Institutional Infrastructure for Corporate Social Responsibility' (Working Paper No 32, John F Kennedy School of Government, 2006) 5.

¹⁵ Thomas Dyllick and Kai Hockerts, "Beyond the Business Case for Corporate Sustainability", (2002) 11 *Bus. Strat. Env.*, 130, 131.

Another view suggests that: ‘... *not only organizations, but their constituents or stakeholders have responsibilities for advancing the sustainable development of societies.*’¹⁶ Another perspective says that:

*‘Corporate sustainability (CS) refers to a company’s activities - voluntary by definition - demonstrating the inclusion of social and environmental concerns in business operations and in interactions with stakeholders.’*¹⁷

The role of corporate decision making is emphasized in the following definition:

*‘... [Companies] need to go beyond the inclusion of economic criteria in their decision-making by examining ecological impacts such as those on the carrying capacity and biodiversity of ecosystems, and social impacts such as those on the culture and quality of life of diverse human social groups and their future generations.’*¹⁸

CSR or CS – Synonymous or Distinctive Terms?

It would appear that CS inherently requires a company to internalize ecological costs in its operations and to treat eco-efficiency as an imperative business ethic and ethos, whilst for CSR or even CR the emphasis appears to be avoidance of negative impact or careless degradation of the environment. However, this apparent distinction reflects degrees of the same thing rather than a true difference in nature and characteristics, for to avoid environmental degradation is but one part of the duty of advancing sustainable development.

The Idea of Corporate Sustainability and Classical Company Law

In this section we shall attempt to derive some of the imperative and logical ‘green’ principles or philosophies for engendering CS in companies borrowing from environmental science some of the main determinants of species and ecosystem sustainability.

Indefinite existence

The idea of sustainability would appear to suggest that companies have a duty or responsibility to society to exist and prosper *indefinitely* or *for as long as possible*. Peter Xuereb suggests that

¹⁶ S. Sharma, M. Starik(Ed.), *Stakeholders, the Environment and Society: New Perspectives in Research on Corporate Sustainability*, (2004),

¹⁷ Marcel van Marrewijk & Marco Were, “Multiple Levels of Corporate Sustainability”: <http://vanmarrewijk.org/pdf/021206131353.pdf>

¹⁸ S. Sharma, M. Starik(Ed.), n.16 above, 1.

law requires directors to ensure the continued existence of the company thus offering employment and protecting the interests of the company's employees generally.¹⁹ Joseph Fuller and Michael Jensen, also posit that, 'enlightened value maximization uses much of the structure of stakeholder theory but accepts maximization for the long-run value of the firm as the criterion for making the requisite tradeoffs among its stakeholders'.²⁰ The English House of Commons Trade and Industry Committee responsible for working on the eventual 2006 Company Act adopted the Enlightened Shareholder Value (ESV) philosophy which fundamentally rests on the same notion. It said appositely:

*'Those supporting ESV do so basically because they believe that company law exists to promote the long-term success of companies... We consider that the aim of the law should be to provide a framework to promote the long term health of companies, taking into account both the interests of shareholders and broader corporate social and environmental responsibilities.'*²¹

Does society have an independent interest in preserving the existence of flourishing companies? Does it, or should it have a power of veto over shareholders who take the improbable decision to liquidate the company and run with the money?

The case of *Deutch Borse* whose shareholders preferred to have the money rather than allow it to take over the London Stock Exchange in 2005 illustrates the issue. Incidentally, only 7% of its shareholders were German, 48% were British and 29% were Americans. Accounts have it that a German politician called for regulations to prevent such blatant shareholder capitalism and primacy.²²

¹⁹ P. Xuereb, 'Juridification of Industrial Relations through Company Law Reform' (1988) 51 *Modern Law Review* 157 at 165.

²⁰ J. Fuller and M. Jensen, 'Just Say No to Wall Street: Putting a Stop to the Earnings Game' (2002) 14 *Journal of Applied Corporate Finance* 41.

²¹ The White Paper on Modernising Company Law, House of Commons Trade and Industry Committee, Sixth Report of Session 2002 – 03, 9 – 10: <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/439/439.pdf>.

²² M. Skapinker, 'Fair shares? The FT Global 500 list is a snapshot of capitalism's Darwinian struggle, in which the fittest companies thrive. But the profit imperative has long been under siege from altruistic quarters.', *Financial Times*, 11 June 2005: <http://mountainwisdoms.blogspot.com/2005/06/fair-shares.html>.

Chancellor Allen of the Delaware Court of Chancery answered the question about Society's responsibility thus:

*'It is, [difficult] to justify precluding the shareholders from selling their stock at a large immediate profit on the ground that in the long run that will be good for them [and that Society's interests should be preferred in the short term].'*²³

In the Canadian case of *Gaétan Plourde v. Wal-Mart Canada Corporation*,²⁴ the Supreme Court of Canada held that no legislation existed in Quebec that prevented an employer from closing down its business even for 'socially reprehensible reasons'. The Court was probably only being practical and realistic, as you cannot force a businessman to keep his business open if he is determined to close it down, except of course you expropriate it from him.

What then is the legal norm for promoting the long-term existence of companies? In *Fulham Football Club Ltd. v Cabra Estates*,²⁵ the English Court of Appeal said that: '*the company is more than just the sum total of the members. Creditors, both present and potential, are interested...*' indicating by inference also, that the company is to be run for the present and potential members and it would only be logical to expect directors to have regard to the company as a continuing institution in the performance of their duties.²⁶ Also, in *Dawson International plc v Coats Patons plc*,²⁷ Lord Cullen said:

'What is in the interests of current shareholders as sellers of their shares may not necessarily coincide with what is in the interests of the company. The creation of parallel duties could lead to conflict. Directors have but one master, the company.'

²³ Ibid. Own words in parenthesis.

²⁴ SCC Case Information Summary 32342: <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=32342>

²⁵ [1992] BCC 863, C.A. at 876.

²⁶ Parkinson, n. 6, at 81; M. Doig, "Organisational Sustainability" : <http://www.unisa.edu.au/corpsocialresp/csr/sustainability.asp>

²⁷ (1988) 4 BCC 305

Both courts were restating classical company law that says that directors duties are owed to the company as a distinct legal entity, therefore, requiring loyalty to the company that must not be subverted by loyalty to any particular shareholder constituency in the company. This would justify management decision to, and be perfectly consistent with a view that the company could, defer short term profit (either under the proper purposes, benefit of the company or business judgment rules²⁸) in order to attend to strategic objectives, including CS initiatives, as a means of ensuring the sustainability of the company over a long period of time.²⁹

Yet, in *Greenhalgh v Arderne Cinemas*³⁰, Evershed M.R. cautioned that: *'the interests of the company as a whole does not mean the company as a commercial entity distinct from the corporators.'*³¹ However, when in the zone of insolvency directors must be careful to protect the interests of creditors, even at the expense of shareholders.³² Likewise, in appropriate circumstances mandated by public laws directors may have to place employee's interests ahead of shareholders interests.³³

Professor Alcock suggests that section 172 (1) of the English Companies Act 2006 by using the phrase '...for the benefit of its members as a whole' limits directors to a consideration of the interests of current shareholders and promotes the shareholder maximization ethic above the

²⁸ See for example, *Howard Smith Ltd. v Ampol Petroleum Ltd.* [1974] A.C. 821 at 835

²⁹ Professor Keay suggests appositely that:

'First, there is a commitment to maximise the entity. This involves, inter alia, enhancing the company's wealth, but unlike with profit maximisation, this is not always measured by how much profit has been made. The second part is to sustain the company as a going concern, that is, to ensure its survival and more. An important aspect of the model is that there is focus on the company as an entity or enterprise, that is the company as an institution in its own right.' - *Ascertaining the Corporate Objective: an Entity Maximisation and Sustainability Model* (2008) 71 MLR 663, 679

³⁰ [1951] Ch. 286; *Peters v American Delicacy Co. Ltd. & Heath*, 61 C.L.R. 457.

³¹ At 291.

³² E.g., see the Australian case of *Kinsela v Russell Kinsela Pty Ltd (in liq)*, (1986) 4 NSWLR 722.

³³ C.f., S. Marshall & I. Ramsay, *Shareholders and Directors Duties: Law, Theory and Evidence*, Melbourne Law School, Legal Studies Research Paper No. 411, June 2009, at 16:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402143

stakeholder interest concept.³⁴ He, however, concludes that the use of the phrase ‘the likely consequences of any decision in the long term’; ‘...does imply that the “benefit of the members as a whole” could include future members where appropriate.’³⁵

A more persuasive framing of the notion or requirement of *indefiniteness*, or perhaps a more elegant term is “*Futurity*”. Futurity

*‘... implies that society, business organizations and individuals must not operate under competitive pressures to achieve short term goals which endanger long-term environmental protection and intergenerational development. Rather, business policy needs to be proactive and not reactive such that intergenerational considerations and long-term environmental protection are observed.’*³⁶

Hardiness – (innovation, adaptability, flexibility and relevance)

Sustainability requires hardiness or resilience, an ability to endure in spite of and even to thrive in adverse circumstances. In biological species this is often accomplished by complying with the law of ecosystem survival, by an ability to reinvent, *adapt* and stay *relevant* within the ecosystem. It requires a high degree of *flexibility* as rigidity in the face of dynamic and often irreversible change and evolution means extinction.

The modern company is essentially a vehicle for entrepreneurship and is, therefore, fundamentally built and managed on the basis of innovation. Daily management has to be innovative or else the company will be wiped out by competition and the dynamic changes in society and the business environment. This also requires innovation in products and services. All the time the company must find a way to remain relevant in its markets. It must display an ability to spot opportunities and trends for its extinction as well as to make profit. A.G. Lafley and Ram Charan argue that: *‘Innovation ... provides an edge in being able to enter new markets faster and deeper... The company that builds a culture of innovation is on the path to growth. The company that fails to innovate is on the road to obsolescence...When innovation is at the center of a*

³⁴ ‘An accidental change to director’s duties?’: http://usir.salford.ac.uk/3112/1/CA_2006.pdf, at 12.

³⁵ Ibid, at 13.

³⁶ E. E. Okafor, et al, (Eds.), “Environmental Issues and Corporate Social Responsibility: The Nigeria Experience”, (2008) 23(2) J. Hum. Ecol., 101, 102.

*company's way of doing things, it finds ways to innovate not just in products, but also in functions, logistics, business models, and processes.*³⁷ Innovation is required to foster the “Darwinian” entrepreneurial spirit required for sustained value creation.³⁸ It is also critical for reducing resource use and environmental impacts of businesses.

The emerging ethic of sustainable consumption is essential to the promotion of sustainability and as business opportunities are being created in the market for ‘green’ or ‘greener’ products. Environmental regulations are also becoming more pervasive and require companies to rethink old paradigms of operation, marketing and technology. Fulfilling social purposes and meeting the needs of society, including for sustainable development, is the new frontier for innovation, productivity, value creation and competitive advantage for well run companies. Another important consideration is the product end-of -life and issues about waste and pollution. This requires even more innovation at the design stage.³⁹

Classical company law has utilized several devices for facilitating and encouraging innovation and on-going relevance in and by the company. The famous *Cotman v Brougham*⁴⁰ objects clause is an illuminating example. Although, in law the objects clause primarily speaks to the capacity of a company to contract, yet the primary operational benefit may well be that of ability to adopt and embark on related or new businesses or new ways of doing business and competing in the market as quickly as possible. No wonder that at the present day it is no longer a relevant boundary.

A second useful device for fostering the principle of innovation in classical company law is that of the division of management powers between the shareholders and the board. This rule is based on the sound notion of ensuring not just specialization of functions but the practical point that the market place is dynamic and that company management must equally be dynamic and untrammelled in reacting to that fact.

³⁷ ‘Growth and Leadership: Why Innovation Matters’, *business.know-how*:
<http://www.businessknowhow.com/growth/innovate.htm>

³⁸ *Infra*, the next section of this paper.

³⁹ A.Nusca, ‘Experts weigh in: 35 lessons on corporate sustainability’, *Smartplanet.com*:
<http://www.smartplanet.com/business/blog/smart-takes/experts-weigh-in-35-lessons-on-corporate-sustainability/11092/>

⁴⁰ [1918] AC 514

It would be a very incompetent director that would fail to sufficiently understand the concept of sustainable development and the raft of changing laws, technology, consumer tastes and preferences and industry repositioning that is unfolding. It would surely be negligent not to change management paradigms, strategies, processes, people management, etc., to adapt to the changes and to position the company to exploit emerging opportunities. Failure to innovate would certainly lead to extinction. Allied to the need to innovate, of course is the notion of *continuous improvement*.

Frugality or Waste Minimization

Another implicit connotation or principle of CS is the need to reduce resource use, reduce the environmental foot print of companies in order to avoid over-stretching the carrying capacity of the earth and to conserve resources for future generations. In essence, **frugality** and **thrift** is required in the use of resources and management of the resources within the production, distribution and other processes in the company. Frugality means getting more value for less money spent, not just living cheap. Or better still, it is about how to turn (what would have been) waste to wealth. Of course, frugality and minimizing waste contribute directly to a positive bottom-line.⁴¹

The principle of frugality and thrift at least requires the following imperatives in corporate decision making and management.

1. That cost be reduced by eliminating waste⁴² and that inputs, production and management processes, design of product and services and their disposal reduce resource intensity and

⁴¹ Potential savings equivalent to 1 - 3% on revenue from reduced utility, materials and waste costs are identified by a study by Strandberg Consulting, 'The Business Case for Sustainability'; www.corostrandberg.com, December, 2009, 4.

⁴² Baumgartner speaks about dematerialization (waste reduction or resource productivity) and resources substitution (using more abundant resources) as mechanisms for meeting the principle of sustainable development; *Corporate Sustainability: Developing the business case*: http://wbw.unileoben.ac.at/download/texte/hongkong_2006.pdf, at 2.

use or rather, result in resources productivity – eco-efficiency⁴³ or better still, eco-effectiveness⁴⁴;

2. That negative externalities be internalized, at least as a matter of prudence, so as not to fall foul of the polluter pays principle of liability in environmental law⁴⁵. Indeed, “... so-called externalities actually inflict costs on the firm even in the absence of regulation or resource taxes.”⁴⁶
3. ‘[That] all information pertaining to raw materials, technologies and products [and a company’s impacts on the environment] that is relevant to society’s right to a say and that society demands must be made available to those affected.’⁴⁷ This is otherwise referred to as ‘Social accounting’ and is meant to enhance corporate accountability. A number of countries and international codes require environmental reporting although the accounting aspects are not yet fully formed⁴⁸.
4. That wealth creation should be based on a long-term view with the aim of ensuring steady growth in company prosperity over a long-term. The English House of Commons Trade and Industry Committee earlier referred to alluded to this consideration when they decided that: ‘... the proposed statement of directors’ duties in the White Paper does

⁴³ Eco-efficiency is a management approach that allows companies to produce desired goods and services in a manner that is resources, process and systems efficient and reduces the ecological footprints so as not to strain the carrying capacity of the environment. See generally, Jan-Dirk Seiler Hausman, et al, (Ed.), *Eco-efficiency and Beyond; Towards the Sustainable Enterprise*, (2004)

⁴⁴ “[The] concept of eco-effectiveness leads to human industry that is regenerative rather than depletive. It involves the design of things that celebrate interdependence with other living systems. From an industrial-design perspective, it means products that work within cradle-to-cradle life-cycles rather than cradle-to-grave ones.” – William McDonough and Michael Braungart, *The Next Industrial Revolution*:

<http://www.sustreport.org/downloads/ecefficiency.pdf>. It is a “...strategy for designing human industry that is safe, profitable, and regenerative, producing economic, ecological, and social value... This emerging movement of production and commerce eliminates the concept of waste, uses energy from renewable sources, and celebrates cultural and biological diversity” .- MBDC, *Transforming Industry: Cradle to Cradle Design*: http://www.mbdc.com/c2c_gkc.htm

⁴⁵ This principle approaches absolute liability for environmental harm by the company responsible for causing it.

⁴⁶ Porter and Kramer; ‘Shared Value: How to reinvent capitalism – and unleash a wave of innovation and growth’. January-February 2011, *Harvard Business Review*, 62, 68.

⁴⁷ H. Schnitzer& J. Research, ‘Shaping Sustainability on the Company Level’, *Die Dimensionen des nachhaltigen Wirtschaftens in Unternehmen*: <http://www.sdsap.org/data/shaping-sd.pdf>, 6.

⁴⁸ See generally, S. Zadek & M.Merme, ‘Redefining Materiality: Practice and effective policy for effective corporate reporting’, *AccountAbility-institute of social and ethical accountability*: <http://www.accountability.org/images/content/0/8/085/Redefining%20Materiality%20-%20Full%20Report.pdf>

*represent a step forward as, for the first time, it explicitly recognises that good managers will have regard to a broader range of considerations than value to shareholders, which on its own may lead to short-termism ...*⁴⁹

5. That profit be optimized, prudently and conservatively apportioned in compensation and dividend practices. That approach should favour capital accretion and strategic savings for the rainy day (building up healthy reserves) as a buffer for inclement times or for unforeseen contingencies and reparations. In the American case of *In re Citigroup*⁵⁰ shareholders claimed that directors practiced waste by paying a departing CEO \$68 million for the lesser of five years or until he commenced full time employment with another employer in exchange for non-compete, non-disparagement and non-solicitation covenants. The court opined that if compensation was ‘so disproportionately large as to be unconscionable’ it may indeed amount to waste and allowed the claim to proceed to trial.

The corporate governance principles of accountability, responsibility, transparency and integrity hold together the varying strands of company law. They encapsulate a principle of stewardship and responsibility according to the typology that identifies the two models of corporate governance as shareholder maximization and social responsibility.⁵¹ It provides the justification and explanation for the principle of *frugality* and *waste minimization*. Corporate property includes resources, information and trade opportunities. They are to be handled as a trust by directors and officers of the company.⁵² Enlightened shareholder value maximization theory, of course allows them to further social goals in order to increase long-term profits.

In addition, care and skill must be displayed in the handling of corporate property, as lack of diligence amounts to a betrayal of the trusteeship. Also majority shareholders must not

⁴⁹ Ibid, n. 21 above.

⁵⁰ 964 A.2d 106.

⁵¹ See generally, S. Arjoon, ‘Corporate Governance: An Ethical Perspective’:

<http://sta.uwi.edu/conferences/financeconference/Conference%20Papers/Session%205/Corporate%20Governance%20-%20An%20Ethical%20Perspective.pdf>, at 10.

⁵² A. Hicks & S.H. Goo, *Cases and Materials on Company Law*, (2008), at 314.

appropriate those assets by practicing fraud on the minority.⁵³ Furthermore, directors have a duty to avoid fraudulent and insolvent trading or risk a jail term. This of course, requires them to be aware of cash flows and the financial position of the company at all times, to manage finances frugally and to be careful in taking on more debt and fixing their own remuneration.

Risk Management

CS also connotes a precautionary approach, thus suggesting that there is an imperative for **risk management** that should be based on conservative principles and state of the art considerations, avoiding recklessness or excessive risk-taking. At the very least it requires a sustainability based approach to Enterprise Risk Management. Yilmaz and Flouris⁵⁴ argue that:

‘Managing for long-term success requires a full integration of the principles of sustainability into an organization's enterprise risk management processes... The Enterprise Sustainability Risk Management ESRM model helps managers to employ tools such as environmental management systems, cleaner production, environmental auditing, life-cycle assessment, and environmental accounting. These tools can be applied to reduce risk, reduce costs, identify opportunities, and enhance business reputation and stakeholder interest.’

Risk management is an integral part of corporate governance and directors have a duty to manage the company for long term and optimal success, a task that cannot be performed without robust risk management frameworks, processes and architecture.

Risk management relates directly to the directors duties of care and skill. In the American case, *Caremark International Inc. Derivative Litigation*,⁵⁵ the court held that boards of directors have a duty to monitor risks. Sustained or systematic failure to exercise oversight shows lack of good faith and will incur liability. Chancellor Allen opined that in order to show appropriate level of care and skill in ensuring compliance with regulatory regimes it was at the very least incumbent on the Board to ‘... assure that appropriate information and reporting systems are established by

⁵³ E.g., *Cook v Deeks* [1916] 1 A.C. 554 – where directors diverted to themselves contracts meant for the company. Also see the Nigerian case of *Kalo Dapcharima v Bornu Holding Co. Ltd.* 1969 (3) A.L.R. Comm. 112.

⁵⁴ “Managing Corporate Sustainability: Risk Management process based perspective”, *African Journal of Business Management* Vol.4 (2), pp. 162-171, February, 2010, at 168:
<http://www.academicjournals.org/AJBM/PDF/pdf2010/Feb/Yilmaz%20and%20Flouris.pdf>

⁵⁵ 698 A.2d 959 (Del. Ch. 1996).

management.⁵⁶ That case concerned employee criminality. It appears, however, that only a very high degree of lack of care almost bordering on inattention will do in cases involving business risks and an inability to predict the future and to evaluate business risks accurately leading to losses will not lead to liability since risk is inherent in the task of maximizing shareholder value.⁵⁷

Stakeholder Engagement

Another important element of CS or sustainable development is the concept and ethic of *meaningful participation* in building society and *long term engagement* with local communities, or those communities whose environment are more directly and materially impacted by the activities of companies. Porter and Kramer argue generally that ‘*Companies must take the lead in bringing business and society back together*’.⁵⁸

Sustainable development tends to be incremental and long term in scope and gestation. Therefore, ad hoc and uncoordinated acts of corporate philanthropy are too scattershot, immaterial and amount to a ‘pin in a hay stack’ effect that will not facilitate rapid economic development. This suggests that CS activities should be targeted and leverage on efforts by other stakeholders⁵⁹, including the subject communities themselves⁶⁰. The ‘go-it-alone’ approach of reputation driven activities and tokenistic charitable giving may not only be impractical but may actually be wasteful by failing to leverage synergies and alignment with existing policies of government and other civil society groups.⁶¹

⁵⁶ At 969 – 970.

⁵⁷ *In re Citigroup*; see n. 50 above. They would be liable only if, (per Chancellor Chandler): "the directors *knew* they were not discharging their fiduciary obligations or that the directors demonstrated a *conscious* disregard for their responsibilities such as by failing to act in the face of a known duty to act."

⁵⁸ *Ibid*, n. 23 above, at 64.

⁵⁹ M.E. Contreras (Ed.), *Corporate Social Responsibility in the Promotion of Social Development: Experiences From Asia and Latin America*, (2004), 160 -165; I.R. Bowler, et al (Ed.) *The Sustainability of Rural Systems: Geographical Interpretations*, (2002), 272.

⁶⁰ C.f., the Integrated Community Sustainability Planning (ICSP) model. E.g., see, “Integrated Community Sustainability Planning – A Background Paper” : http://www.cultureandcommunities.ca/downloads/FINAL_ICSP-Discussion-paper.pdf

⁶¹ C.f., Porter and Kramer, n. 46 above, at p. 76 also suggest that; ‘major competitors may also need to work together on precompetitive framework conditions, something that has not been common in reputation-driven CSR initiatives’

It is in this light that the much maligned⁶² Corporate Social responsibility Bill before the Senate of the National Assembly of Nigeria⁶³ may in fact highlight a seminal principle that because corporate sustainability requires active and sustained collaboration and synergy with other stakeholders there may be need for legislated, or at least negotiated umbrella or frameworks for an inclusive or Public-Private Partnership (PPP) approach for CS initiatives that reflect strategic national development priorities and partnerships.⁶⁴ Michael Hopkins makes the same argument:

*'It is better, much better, for a corporation (including non-profit ones such as NGOs) to assist a government in making its contributions either nationally, or internationally, more efficient and appropriate. This then ensures widespread and even coverage.'*⁶⁵

In many countries there exists a cordial synergistic partnership between governments, business and civil society to promote CSR. In some instances government incentivizes businesses by patronizing those that practice agreed CSR initiatives, or appoints an official to promote CSR. In other countries civil society groups or and governments award honours, prizes, or certifications, etc, to best practice firms.

Indonesian Companies Law⁶⁶ requires natural resources companies to undertake CSR programs. An attempt by the Indonesian Chambers of Commerce and Industry (Kadin), the Indonesian Women's Business Association (Iwapi) and the Indonesian Young Entrepreneurs Association

⁶² C.Uba, "Nigerian Firms Battle CSR Bill, *BusinessWorld*": <http://businessworldng.com/web/articles/562/1/Nigerian-Firms-Battle-CSR-Bill/Page1.html>; Mallen Bakers Blog, "Nigeria joins the 'CSR as Stealth Tax' movement" : <http://www.mallenbaker.net/csr/post.php?id=157>

⁶³ House Bill 164, A Bill for an Act to Encourage, Promote and Regulate the Concept and Practice of Corporate Social Responsibility by Business Concerns, Community, Organisations and Public Bodies, to Enable Voluntary Contributions, etc. to be Made by Any Such Organisations to Major National Challenges Such as Education, Energy, the Environment, Creation of Jobs and Enhancement of Employee Skills, Neighbourhood Regeneration, Agricultural Advancements, Reduction of Poverty, etc. and for Other Connected Purposes.

⁶⁴ A. Warhurst, makes a case for project level partnerships between government, business and civil society organizations that will pre- establish agreed partnership goals, monitoring and reporting systems and collaborative activities. See, "Corporate Citizenship and Corporate Social Investment: Drivers of tri-sector partnerships", *Journal of Corporate Citizenship*, Jan.2001, Issue 1, p. 59: alyson.warhurst@warwick.ac.uk; <http://users.wbs.warwick.ac.uk/ccu/>

⁶⁵ Hopkins, Michael. *Corporate Social Responsibility and International Development: Is Business the Solution?* London, GBR: Earthscan Publications, Limited, 2006, at 115. <http://site.ebrary.com/lib/lbsng/Doc?id=10167752&ppg=132>

⁶⁶ No. 40 of 2007.

(Hipmi) to have the Constitutional Court outlaw the provision on the grounds that CSR should be voluntary failed. The Court in a majority opinion held that:

*'Environmental damage in Indonesia has reached a critical level... It's time for the state, along with society and businesses, to be responsible for the negative impacts of the damage...Investors, both domestic and private, have to build a harmonious relationship with society and their surroundings...Companies will contribute more to the society and environment if voluntary CSR programs are made mandatory...The definition of CSR is based on each country's culture... we need to develop our culture by enforcing mandatory CSR regulation.'*⁶⁷

A bill to mandate CSR was also introduced in the Philippines House of Representatives in 2009.⁶⁸

In India there is controversy over the attempt to enact a rule that would compel certain companies to set aside 2% of their profits for CSR activities of their choosing.⁶⁹ In Nigeria companies are required to contribute 2% of assessable annual profits to the Education Tax Fund (E.T.F.), which is used for complementary funding of educational institutions in the country.⁷⁰ Oil producing companies are also required to set 3% of their total annual operating budget to the funding of the Niger Delta Development Commission (N.D.D.C.), a statutory organization established to implement a development plan for the oil producing areas.⁷¹ These are by no means 'less CSR' simply because they are legislated obligations. However, the approach of obligatory funding of CSR activities are based on a conception of CSR as limited to philanthropy. They amount to bare taxation, which is at the base of the social responsibility pyramid, and may not serve to engender broader, autochthonous and holistic social responsibility in companies.

⁶⁷ 'CSR remains mandatory for firms, court rules', *The Jakarta Post*, Thursday, April 14, 2011: <http://www.thejakartapost.com/news/2009/04/16/csr-remains-mandatory-firms-court-rules.html>

⁶⁸ E. Lyon, '2010: more CSR legislation ahead?', *yardinectora*,

<http://yardinectora.wordpress.com/2009/12/17/2010-more-csr-legislation-ahead>

⁶⁹ See, S. Varma, 'Coercive social responsibility', *The Economic Times*, Feb. 18, 2011:

http://articles.economicstimes.indiatimes.com/2011-02-18/news/28615641_1_csr-social-responsibility-net-profit ;

'Premji against law to promote charity', *India Today Mobile*, Friday March 25, 2011:

<http://m.indiatoday.in/itwapsite/story?sid=133298&secid=110&subsecid=188>

⁷⁰ Education Tax Act No. 7, Laws of the Federation of Nigeria (L.F.R.), 1993(as amended).

⁷¹ Section 14 (2) (b), Niger Delta Development Commission (Establishment) Act, No. 6, L.F.R, 2006.

The legal norm of corporate sustainability is also promoted by statutory requirements for the reporting of environmental or social responsibility in many countries. Europe is an epitome,⁷² sometimes because of voluntary best practice convention, as in Germany⁷³ and Netherlands⁷⁴, or by legislation, as in the French Nouvelles Regulations Economique (New Economic Regulations Act) Law⁷⁵ and the Belgian Social Label Law of 2002⁷⁶. Other countries include Denmark,⁷⁷ Austria⁷⁸ and Sweden.⁷⁹ Another approach is through soft law, in part discussed above, meant to apply the force of corporate conscience and public opinion to influence adoption of CS principles, practices and activities by companies

Diversity

Apart from the features of sustainability discussed above, another implication of the concept for the management of companies is *diversity*. Just as biological diversity ensures a multiplicity and wide variety of life forms, thus outlawing monolithic structures and systems or monoculture which may lead to species and ecosystem extinction; it also provides essential redundancy which increases resilience.

This suggests that companies should practice staff diversity⁸⁰, multi-culturalism and perhaps, product diversity among other things.⁸¹ This must make sense as most employees are knowledge

⁷² EC Directive 2003/51/CE (June 2003) specifically invited companies to voluntarily adopt an explicit CSR policy and publish non-financial data of social and environmental impacts of their activities.

⁷³ See generally, *A Guide to CSR in Europe: Country Insights by CSR Europe's National Partner Organisations*, 19: <http://209.85.229.132/search?q=cache:reCPAdF7M9UJ:mapaaccionexterior.org/verdocumento.aspx%3Fid%3D38%26titulo%3DUa%2520Gu%C3%ADa%2520para%2520la%2520RSE%2520en%2520Europa+french+csr+legislation&cd=14&hl=en&ct=clnk>

⁷⁴ *The State of Sustainability Reporting in Europe: Commission Statement*: <http://www.sustainabilityreporting.eu/general/ec08.html>

⁷⁵ Article 116 of Act 2001- 420 of 15th May, 2001.

⁷⁶ See generally, B. Melckmans, *Strengths and Weaknesses of Belgians Social Label*: <http://library.fes.de/pdf-files/gum/00097.pdf>; S. Spillemaeckers, *The Belgian Social Label: A Governmental Application of Social LCA*: http://userpage.fu-berlin.de/ffu/calcas/Spillemaeckers_Belgian.pdf.

⁷⁷ Under an Act to amend the Danish Financial Statements Act adopted by Parliament on December 16th 2008 – Ibid.

⁷⁸ Ibid. n. 73 above, at 4.

⁷⁹ Ibid. n. 73 above, at 49.

⁸⁰ C.f., D. Crowther & L. Rayman-Bacchus, *Perspectives on Corporate Social Responsibility* (2004), at 212.

⁸¹ Henriques, Adrian; Richardson, Julie. *Triple Bottom Line : Does It All Add Up?: Assessing the Sustainability of Business and CSR*. London, GBR: Earthscan Publications, Limited, (2004), 30 - 32. <http://site.ebrary.com/lib/lbsng/Doc?id=10128901&ppg=46>

workers and companies require diverse streams and perspectives of knowledge to keep pace with and ahead of the fast developing and expansive scope of knowledge in an ICT driven world. Diversity, multi-culturalism provides differentiation of thinking and ideas that is a rich source of innovation. This is not to suggest that a formula as to the quantities or scope exists, nor is it to insist on enforced multi-culturalism. It only highlights the danger of cloned thinking that may serve as a poor source of innovative ideas, attitudes and skills. Diversity also better assists an organization to more closely track system complexity of markets and business environments.

Profit making and value creation in the sustainable company

The sustainability paradigm is not inherently hostile to the idea of profit or creation of surplus value.⁸² It implicitly assumes the use by the present generation of the resources of the earth. Indeed, it inherently requires a cost-benefit approach in order to apportion inter-generational equity and must incentivise activities that generate economic profit, return optimum value to economic agents so as to create surplus or wealth and reserves of value that can be enjoyed by future generations. At least it should not incentivise activities that destroy value. CSR that deemphasizes profit making or value creation is, therefore, unrealistic, and unsustainable. CSR activities must be resourced from economic profit streams in order to be sustainable, that is, to be of an optimum magnitude and length of intervention.⁸³

The sustainability paradigm, therefore, fundamentally requires sustainable profit and value creation by corporations. ‘Sustainable value creation has two dimensions—how much economic profit a company earns and how long it can earn excess returns.’⁸⁴ It requires more, not less competition⁸⁵ and innovation,⁸⁶ for these are the imperative conditions for creating sustainable

⁸² For a basic distinction between accounting profits and economic profits see, D. N. Fuller, “Value Creation: Theory and Practice”: <http://www.valueinc.com/Press/files/ValueCreation-TheoryandPractice.pdf>. Also see, K. A. Merchant & T. Sandino, “Four Options For Measuring Value Creation”, *Journal of Accountancy, Harvard Business School Executive Education*, August 2009: <http://www.journalofaccountancy.com/Issues/2009/Aug/20091518.htm>

⁸³ M. J. Mauboussin & K. Bartholdsen, “Measuring the Moat: Assessing the Magnitude and Sustainability of Value Creation” *Credit Suisse/First Boston Equity Research*, 1: <http://www.capatcolumbia.com/Articles/measuringthemoat.pdf>

⁸⁴ Ibid

⁸⁵ See, J. Kwak, “Baseline Scenario: The Problem with Profits”: <http://baselinescenario.com/2009/07/30/the-problem-with-profits/>

⁸⁶ See, J. H. Daum & K. F. Gruber, “ Sustainable Value Creation: Securing success and exploiting growth opportunities by turning business model innovation into a process” : http://www.iioe.eu/fileadmin/files/projects/Sustainable_Value_Creation.pdf

value or what Umar Haque terms ‘thick value’⁸⁷ – meaningful, sustainable value to customers, businesses and society. This is contrasted with ‘thin value’:

*‘Thin value is an economic illusion: profit that is economically meaningless, because it leaves others worse off, or, at best, no one better off... The clearest example of thin value, is, of course, banks: they invested [the American] national wealth in assets that turned out to be literally worthless... thin value is a mirage — and like all mirages, it ultimately evaporates. In the 21st Century, we’ve got to reconceive value creation.’*⁸⁸

Porter and Kramer talk about the ‘right kind of profits – profits that create societal benefits rather than diminish them.’⁸⁹ This appears to be the same thing as ‘thick profit.

Clearly, sustainable value creation demands survival of the fittest, albeit not on the basis of jungle or gutter tactics but that of creation of social value. In that wise profit cannot be the objective of entrepreneurship or industry competition. Porter and Kramer also recognize this truth and argue that: *‘The purpose of the corporation must be redefined as creating shared value, not just profit per se.’*⁹⁰

Rather, creation of social value through sustainable value creation must motivate companies to innovate, be eco-efficient, frugal and adroitly managed. Sustainable development requires optimum sustainable value creation by businesses as an imperative and will not accommodate the waste and inefficiency that results from sub-optimal value creation by laid-back or parasitic corporations and industry. Appositely, Andrew Sabitz and Karl Weber⁹¹ define a sustainable corporation as: *‘one that creates profit for its shareholders while protecting the environment and improving the lives of those with whom it interacts [and] operates so that its business interests and the interests of the environment and society intersect.’*⁹²

⁸⁷ “The Value Every Company Needs to Create”, *Edge Economy*, 10:46 AM Friday July 31, 2009: http://blogs.harvardbusiness.org/haque/2009/07/the_value_every_business_needs.html

⁸⁸ Ibid.

⁸⁹ See n. 46 above, 77.

⁹⁰ Ibid, n. 46 above, 64.

⁹¹ *The Triple Bottom Line: How Today’s Best Run Companies are Achieving Economic, Social and Environmental Success – and How You Can Too* (2006).

⁹² At x.

In other words, the economic responsibility of business must now go beyond maximizing profits⁹³ to creating optimum value and profits and contributing to, or promoting sustainable development in the community, society and country.⁹⁴ The concept of corporate citizenship demands responsibility and commitment to sustainable development on the part of entrepreneurs, capitalists and companies. That objective must become a core strategy of companies – a strategy of corporate sustainability:

*'The concept is about companies seizing opportunities and targeting capabilities that they have built up for competitive advantage to contribute to sustainable development goals in ways that go beyond traditional responsibilities to shareholders, employees and the law, and that internalize indirect socioeconomic and bio-geophysical effects as well as direct impacts.'*⁹⁵

A corporate sustainability strategy allows for alignment of CS with strategic management and value creation and makes it *'nonsensical to define performance excellence in business without CR at its heart.'*⁹⁶ There cannot be corporate sustainability without sustainable value creation and as we have seen, the concept of sustainable development does not accommodate waste and inefficiency, or sub-optimal value creation. It would, therefore, be difficult to agree that CS places *'a much greater emphasis on environmental, social, and economic performance and the public reporting on this performance'*,⁹⁷ than the need for profitability. It is probably more correct to argue that CS requires an optimum balance between both. There is need, therefore, for sustainable capitalism.

Is there a Director's "Duty to implement CSR"?

⁹³ C.f., Milton Friedman, "The social responsibility of business is to increase its profits", *New York Times Magazine*, 13 September, 1970, 122- 126.

⁹⁴ M. Wilson recognizes the importance of profits – "Corporate sustainability: What is it and where does it come from?" *Ivey Business Journal* March/April 2003, 1.

⁹⁵ A. Warhurst, "Corporate Citizenship and Corporate Social Investment: Drivers of tri-sector partnerships", *Journal of Corporate Citizenship*, Jan.2001, Issue 1, p. 61: alyson.warhurst@warwick.ac.uk; <http://users.wbs.warwick.ac.uk/ccu/>

⁹⁶ Steve Rochlin, Kathleen Witter, Philip Monaghan and Vicky Murray, "Putting the Corporate into Corporate Responsibility", p. 9, : <http://www.greenleaf-publishing.com/content/pdfs/af05roch.pdf>

⁹⁷ M. Wilson, n. 94 above, at 5.

As we have seen there is indeed a general legal duty placed on companies, and by implication on directors, to comply with social legislation that is equivalent to the duty of individual citizens to be law-abiding.⁹⁸ That, however, does not automatically or juridically mutate into a classical company law duty incumbent on directors, officers and shareholders. Generally, the legislature has shied away from introducing enforceable rights for employees and other stakeholders within the corporate democracy or organs of the company in Anglo-American Law. Are there any legal rules compelling or obligating managers of companies to have regard to these principles or the broad principle of corporate sustainability in the corporate decisions making process? The answer appears to be; yes!⁹⁹

In China companies owe a duty to their communities under Article 14(1) of the Chinese Companies Law.¹⁰⁰ Article 5 of the amended law (2005) provides that: ‘When undertaking business operations, a company shall comply with the laws and administrative regulations, social morality and business morality. It shall act in good faith, accept the supervision of the government and the general public, and bear social responsibilities.’

Earlier mention was made of corporate environmental reporting. Environmental reporting appears to operate largely at the level of social or communitarian obligations – the sphere of good citizenship or ethical values. It establishes the norm of corporate sustainability, and particularly in those countries where it is a legislated mandatory requirement, a principle or rule of public law. In South Africa the King II Code adopted by the Johannesburg Stock Exchange requires that: “...every company should report at least annually on the nature and extent of its

⁹⁸ Justice S. Whelan and L. Zwier, argue that ensuring compliance with such laws forms part of directors’ common law and statutory duties to act with due care and diligence; *Employee Entitlements and Corporate Insolvency and Reconstruction*, Research Paper, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2005, at 10.

⁹⁹ Many commentators take the opposite view. See generally, K. Kercher, “Corporate Social Responsibility: Impact of Globalisation and International Business”, *Bond University, Faculty of Law eJournal*, at p. 12: ePublications@bond.<http://epublications.bond.edu.au/cgej/4>

¹⁰⁰ 1994. It states that: ‘A company engaging in business operations must abide by the law and uphold professional ethics and strengthen the construction of the socialist spiritual enlightenment under the supervision of the government and the public.’ See generally, Gu Minkang , *Understanding Chinese Company Law*, (2008) , 156; Li-Wen Lin, ‘Corporate Social Responsibility in China: Window Dressing or Structural Change?’ *BERKELEY JOURNAL OF INTERNATIONAL LAW* [Vol. 28:1] ,available at: http://www.boalt.org/bjil/docs/BJIL28.1_Lin.pdf.

social, transformation, ethical, safety, health, and environmental management policies and practices.”¹⁰¹ King III Code of Governance Principles 2009 goes further to provide that ‘An independent assurance of sustainability reporting and disclosure is necessary.’¹⁰² It also stipulates that ‘*The interest of stakeholders should be taken into account in all decisions.*’¹⁰³

The Stakeholder Statutes of the United States¹⁰⁴ allow directors to take the interests of employees and other stakeholders into account in their strategic decision making.¹⁰⁵ Most of these are permissive but Connecticut and Arizona require directors to consider the interests of the employees, customers, creditors, suppliers, the community and society at large, ‘including the possibility that those interests may be best served by the continued independence of the corporation’.

Analogously, the 2001 Financial Services Reform Act of Australia requires disclosure in product statements of ; ‘the extent, if any, to which labour standards and environmental, social or ethical considerations are taken into account in the selection, retention or realization of the investments’¹⁰⁶ The Canadian Supreme Court also held in *Peoples Department Stores Inc (Trustee of) v Wise*¹⁰⁷ that:

‘... in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment’.

¹⁰¹ Committee on Corporate Governance (2002), 35.

¹⁰² Article 6.5.

¹⁰³ Article 8.1.

¹⁰⁴ E.g., The Pennsylvania Act of 23 December, 1983. Arizona, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Wisconsin, and Wyoming.

¹⁰⁵ See generally, J. Hanks, Jr, ‘Non-Stockholder Constituency Statutes: An Idea Whose Time Should Never Have Come’ *Insights*, December 1989, 20- 26. Also see, K. Hale, ‘Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes’ (2003) 45 *Arizona Law Review* 823 at 836.

¹⁰⁶ See, Henriques, Adrian; Richardson, Julie. N. 81, above, at 20.

¹⁰⁷ 2004 SCC 68, [42]

The most recent far-reaching hard law, company law provision prescribing a legal duty to have regard to sustainability issues, appears to be Section 172 of the Companies Act of United Kingdom, 2006¹⁰⁸ which requires directors to consider broad stakeholder interests as part of their duty to advance the success of the business. However, it is permissive or discretionary in character or tone. This legal rule of corporate sustainability is further strengthened by statutory requirements for reporting of environmental or social responsibility, that is, section 417 of the English Companies Act.¹⁰⁹

The criteria for directors decision making as spelt out in section 172 of the UK Companies Act is an elaboration of the various rules and principles discussed above and may in fact constitute the standard or best practice benchmark or minimum prudential standards for company directors all over the world at the present day. Company director's have an implied duty to act in the best interest of or to promote the success of the company, even in the absence of express verbiage in those identical words or terms in their national company law. Ignoring widely disseminated best practice about companies and sustainability, or those that can be discovered by keeping informed about latest trends and available knowledge would normally raise a presumption of lack of due diligence or reasonableness. Best practice or minimum standard is a question of fact and is no longer limited to 'minimum standards' principles established in national company legislation.

Failure to install reasonable and standard guidelines, doctrines, architecture and oversight processes¹¹⁰ in the company would presumptively mean that directors are also in breach of their duty of care and skill. For example, in *Caremark International Inc. Derivative Litigation*,¹¹¹

¹⁰⁸ S.O. Idowu & W.L.Fiho (Eds.), n. 8 above, 104 – 105.

¹⁰⁹ The section requires companies to include in their annual accounts a corporate environmental performance report including information about environmental matters (including the impact of the company's business on the environment) and any policies of the company in relation to those matters and the effectiveness of those policies. The review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include (a) analysis using financial key performance indicators, and where appropriate, analysis using other key performance indicators, including information relating to environmental matters.

¹¹⁰ I.e., regulatory compliance, environmental risks management and sustainable business strategies. C.f., International Institute for Sustainable Development, "The Sustainable Development Journey": BSD.global.com; www.iisd.org.

¹¹¹ 698 A.2d 959 (Del. Ch. 1996).

Chancellor Allen opined that in order to show appropriate level of care and skill in ensuring compliance with regulatory regimes it was incumbent on the Board to ‘... *assure that appropriate information and reporting systems are established by management.*’¹¹²

From an operational point of view, and not just as a legal box-ticking activity, paying regard to CSR or corporate sustainability issues is no longer just a reputational or compliance driven matter. It sits at the core of due diligence and good governance.

In other words, it may be argued that there is now placed on company directors an implied duty of care and skill or loyalty¹¹³ that requires them to comply with, or attain a ‘reasonable standard of sustainability’ in the actions and activities of the company, either as a core value of corporate governance, or as an imperative risk-management principle. In order to demonstrate the barest minimum of competence or fiduciary responsibility directors must subjectively evaluate the sustainability dimension in all aspects and ramifications of corporate decision making. In order to determine or assess whether directors have attained this minimum standard, only an objective benchmark of the reasonable ‘sustainability compliant’ director in comparable circumstances would suffice.

It is not being suggested that the concept of corporate sustainability will mechanically or automatically produce a cachet of policy directions or applicable decisions in any specific case.¹¹⁴ It is not even the case that there will not often be conflict between the various interests of shareholders and stakeholders, when directors are exercising their minds on specific issues.¹¹⁵

¹¹² At 969 – 970.

¹¹³ This is not a new argument – c.f., A, Von Tunzelmann & D. Cullwick, *Social Responsibility and the Company: A new perspective on governance, strategy and the community* (1996)-32.

¹¹⁴ Horrigan suggested that the ‘uncertainty’ of regulatory detail and guidance is not fatal as the courts could fill in the details over time – *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business*, (2009), at 218 – 219.

¹¹⁵ In *BCE Inc v 1976 Debentureholders*[2008] SCC 69, the Supreme Court of Canada aptly remarked that: “...in considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions.... Directors may find themselves in a situation where it is impossible to please all stakeholders... There is no principle that one set of interests – for example the interests of shareholders – should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.”

In the American case of *Herald Co. v. Seawell*,¹¹⁶ the court held that it was proper for directors to reject a takeover that was in their view harmful to other constituencies, such as employees and the community even though adverse to shareholders interests. This suggests that the overriding consideration is the overall interest of the company viewed against an intergenerational perspective of current and future shareholders and other stakeholders, in other words in the wider interest of society for sustainable businesses. In essence, companies laws require directors to take decisions in the interest of the company as a whole and the courts appear to indicate that this means that all such conflicts be ultimately resolved in favour of long term increase in company value. Indeed the English House of Commons explicitly chose the Enlightened Shareholder Value approach instead of the Pluralist approach in the matter of the 2006 company law reform.¹¹⁷

However, it is humbly suggested that it is now an implicit legal principle that unless directors advert their minds to all relevant matters and relationships of the company, including the impact of its actions on stakeholders and their interests there would be no way that they could be said to have made a prudent decision in the circumstances. They would have displayed a lack of due diligence, due process, or diligent consideration of all relevant options before deciding to act in one way or the other.

It is suggested that this implied duty of sustainability applies even in those common law countries where the list of concerns has not yet been explicitly extended by express legislation beyond the interests of shareholders and employees. Deviation from that standard would be

Ibid., Para. 40, 83 & 84.

¹¹⁶ 472 F.2d 1081 (10th Cir. 1972).

¹¹⁷The White Paper on Modernising Company Law, House of Commons Trade and Industry Committee, Sixth Report of Session 2002 – 03, 9 – 10:

<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/439/439.pdf>.

presumptively unreasonable and suggestive of negligence, or incompetence or both on the part of errant directors.¹¹⁸

It is on this basis of somewhat analogous but not as far-reaching reasoning that the Australian Corporations and Markets Advisory Committee (CAMAC) and the Parliamentary Joint Committee on the Review of the Corporations Act 2001 opined that the Australian law was probably equivalent to the English rule (section 172) any way (even though unwritten and yet to be so declared by judicial precedent), and decided that they would not recommend the express adoption of an equivalent of section 172 of the Companies Act of U.K.¹¹⁹.

In Nigeria, Ghana¹²⁰ and Zimbabwe¹²¹, for example, the wording and import of the Companies Act results in a position that is similar to the Australian one. The Nigerian Securities and Exchange Commission through moral persuasion has encouraged the growing practice of including Corporate Governance Statements in the Accounts as well.

However, there is a need for positively framed explicit statutory director's duty of care regarding issues of sustainability, including the conservation of the environment, as a matter of natural evolution, although this is now implicit as argued above.¹²² An explicit and positively framed duty will give the courts the power to examine, without any deferential attitude, the decisions and activities of directors in the light of objective standards and benchmarks of sustainability, a matter logically distinct from the field of business expertise that judges feel ill-suited to trench upon.

¹¹⁸ C.f., Philipp Schreck, *The Business Case for Corporate Social Responsibility: Understanding and Measuring the Impacts of Corporate Social Responsibility*, (2009), 66.

¹¹⁹ T. Clarke, *International Corporate Governance: A Comparative Approach*, (2007), 433.

¹²⁰ The Ghanaian Companies Code s 203(3)

¹²¹ The Zimbabwe Companies Amendment Act 1993

¹²² For similar views, see, Robert Hinkley, "Twenty Eight Words to Redefine Corporate Duties: The Proposal for a Code of Corporate Citizenship", *Multinational Monitor* Vol.2, No.'s 7 & 8 (July / August 2002).

In the absence of an explicit statutory duty it is easy for directors to plausibly argue, even if challenged, that before reaching the impugned decision they **duly** considered its possible impact on the environment and other stakeholder's interests; but were persuaded to take a decision that effectively gave primacy to short term interests of shareholders, anyway. Another way to put the point is that the duty of care should not merely be process-oriented or a box-ticking activity, but should be outcome oriented as well. The fact that reports on environmental performance are now widely and statutorily required, as in the U.K. Companies Act, underlines this observation.

In addition it must be remembered that the propriety, or otherwise of the exercise of director's duties is only open to challenge by shareholders, as this right is not available to other stakeholders. Noteworthy is section 260 of the English Companies Act 2006 that allows derivative action, in part for director's breach of duty, thus raising the possibility of claims of breach of duty based on environmental or social matters. Clearly, unless such members could show that the company as a whole was harmed they could not set up their own peculiar prejudice as justification for invoking the section.¹²³

Stakeholders Rights of Access to Justice

Parker argued that an 'Access to Justice Plan' to allow interested stakeholders to approach the courts to protest decisions that are adverse to their interests by companies of a particular size should be legislated into companies law.¹²⁴ Other commentators have suggested a right of access through the Director of Corporate Enforcement, particularly to avoid multiplicity of actions and that the notion of oppression of minorities should be extended to employees.¹²⁵

I would suggest that such law should first grant other stakeholders access to make their protest to the directorate of the company in their character as non-member stakeholders. Others have wondered aloud why stakeholders are not accommodated in the company structure or whether "fiduciary responsibilities and reporting requirements to groups other than shareholders need to be

¹²³ C.f., Louise Hine, 'Corporations' Changing Responsibilities: Environmental awareness from a legal standpoint', *The European Business Review*: <http://www.europeanbusinessreview.com/?p=531>

¹²⁴ Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy*, (2002), 227 -228.

¹²⁵ Olufemi O. Amao & Silvana Rendel- Beerli, "Corporate Social Responsibility (CSR), Company Law and Employees interest: The Case of Irish Company Law: A Note", at 6 -7. : <http://ssrn.com/abstract=998831>

formalized in company law”¹²⁶The next step might perhaps be to go the full hog of including a practical formula allowing them a seat on the Board in the Anglo-American model to represent their larger stakeholder interests. A precursor model already exists in the German and French Two-Tier Board company; after all even in Anglo-American Law the notion of the “Independent Directors” has become quite recognizable and acceptable.

However, I would further suggest, in modification to Parker and Amao, et al, that the idea should not be to unduly complicate corporate managerial decision making, create an avenue for forum shopping, or confer right bearing quasi-membership on other stakeholders in companies but to hold companies accountable to society to promote sustainable development. The right of protest by and access to justice for other stakeholders should, therefore, be narrowly drawn and confined only to actions that are inimical to the company’s interest qua the company¹²⁷, rather than confer positive rights on stakeholders in their character only as such.

Need for an explicit duty of sustainability?

Although, section 172 of the English Companies Act, 2006 is commendable in letting in a consideration of stakeholder interests, there is no reason why companies’ law cannot be more direct or explicit in fostering sustainable development. Creditor’s rights are explicitly protected in companies’ law by several devices, including the prohibition of insolvent trading, capital maintenance, rules on debentures and securities, etc. Investor protection in regard to prospectus, true and fair accounting rules, mergers and acquisitions, etc., also abound. Of course, shareholder protection devices are replete in the law. Those provisions reflected the imperative considerations of an earlier time and socio-economic environment, particularly, a realization of the importance of creditors and investors in companies as pre-eminent stakeholders in the creation of wealth through the form of the limited liability company.

¹²⁶ Judy Brown, Comment on “*Social Responsibility and the Company: A new perspective on governance, strategy and the community*” by A. Von Tunzelmann & D. Cullwick”: <http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj09/9-adrienne-von-tunzelmann-with-david-cullwick-social-responsibility-and-the-company-a-new-perspective-on-governance-strategy-and-the-community.html>

¹²⁷ Amao & Rendal-Beeeri seem to accept this point, *ibid*, at p. 6.

In light of new social, economic, environmental and political realities in the global economy it is perhaps time to adjust companies' law again and to treat emerging stakeholders with equivalent concern and the pre-eminence they deserve in the matrix to create social value through the enduring vehicle of the limited liability company.¹²⁸ The somewhat plaintive comment below captures the sentiments and justification for that proposition:

*'We don't want companies who just listen to stakeholder concerns, but dismiss these when it contradicts the shareholder value model; we want companies who are prepared to make difficult choices – real trade-offs between financial and social outcomes. Companies must, therefore, be governed by a wider set of stakeholders.'*¹²⁹

What may be required, therefore, is an explicit duty to protect against harm to the environment, which will have the effect of giving director's the power they may need in appropriate cases to trump the legitimate, although seemingly selfish financial expectations of shareholders, or right to exercise power to appropriate value for them ahead of and to the exclusion of other stakeholders, subject to creditor protection rules¹³⁰. *'The duty would be imposed on directors, rather than the company, to send a clear message to directors that they are responsible for ensuring that the culture within ... companies develops towards setting in practice systems and policies that are sustainable and respect ... natural resources.'*¹³¹

More properly, since it will then no longer be possible to accuse directors of breach of their duty of care to the company by having regard to the need to protect the environment, a duty of negative content; an explicit statutory duty to promote sustainability and environmental conservation, will have the character of a rule of positive content requiring directors to place the sustainable development norm above the short-term profit-making norm and to seek to create truly sustainable value and synergy with sustainable development initiatives in society. In that wise sustainable development, or more properly corporate sustainability (viewed as deriving from and additive to sustainable development), will assume the character of the primary

¹²⁸ R. Baxt, 'Just to whom do Directors Owe Their Duties? Will This Conundrum Ever Be Satisfactorily Resolved?' (2002) 30 Australian Business Law Review 445, 447.

¹²⁹ Henriques, Adrian; Richardson, Julie, Op. cit. n. 81 above, p. 88.

¹³⁰ See also, R. Baxt, 'Avoiding the Rising Floods of Criticism: Do Directors of Certain Companies Owe a Duty to the Community?' (2000) 16(11) Company Director 42, 42.

¹³¹ J. McConvil & M. Joy, 'The interaction of directors' duties and sustainable development in Australia: setting off on the uncharted road', Melbourne University Law Review, April 2003.

objective for business rather than a narrow definition of and short term horizon to profit or maximization of shareholder's interest.

The question is: should the rule require 'environmental conservation'? An alternative formulation to 'foster sustainable development' may appear to be too wide for now in view of the still evolving nature of the concept.¹³²

McConvil and Joy¹³³ appear to favour the former approach and recommended the following verbiage for the new director's duty:

- (1) *A director or other officer of a corporation must exercise their powers and discharge their duties to ensure that the corporation interacts with the environment in a sustainable manner.*
- (2) *For the purposes of subsection (1), a corporation will be taken to be interacting with the environment in a sustainable manner if it takes all steps reasonably practicable to reduce its ecological impact and increase its resource efficiency*

In addition, a guidance note would be annexed stating that the Precautionary principle would govern the interpretation of the section so as to obviate any arguments by directors of being blindsided by absence of scientific certainty or knowledge on any particular matter or threat to the environment. They propose that this new duty would apply only to companies that employ 100 people. They also argue for a new 'environmental judgment rule' analogous to and overriding the 'business judgment' and equivalent common law rules. In order to avoid 'busybody' litigation seeking injunction to compel directors to act in one way or the other under section 1324¹³⁴ of the Australian Corporations Act they would prefer that explicit prohibitory language restricting that right to Australian Investment and Securities Commission (ASIC) and Environment Australia is added as an amendment to the section.

¹³² C.f., J. McConvil & M. Joy, Ibid.

¹³³ Ibid .

¹³⁴ The section extends standing to sue to any 'person whose interests have been, are or would be affected' by contravention of the Corporations Act. This was a particular concern as well during the review of the English Company Law; Company Law Review Steering Group, *Modern Company Law: For a Competitive Economy Developing the Framework*, DTI (March 2000), paras 3.30–3.31.

However, will a concentration on environmental conservation not be too narrow, in view of the fact that human rights or social egalitarianism is an important plank for sustainable development? Perhaps the better formulation will be a duty to advance “corporate sustainability, which as we have argued requires new management practices and principles for managing companies and also appears to be holistic enough to capture the various dimensions of corporate responsibility to stakeholders. Yet, it is sufficiently discrete in terms of robustness of concepts, principles and rules. It is also sufficiently flexible to accommodate evolutionary changes, particularly of the overall concept of ‘sustainable development’. The new rule could explicitly list the broad areas to be advanced by directors as including:

1. Shareholder value optimization;
2. Creditor protection;
3. Human rights and social equity;
4. Environmental conservation;
5. Corporate Governance and ethical accountability to society.

Horrigan does not think that it is fatal to the argument for such a duty if explicit or detailed legislative or regulatory guidelines, as laid out above, are not spelt out.¹³⁵ He would even be satisfied with a broad legislative duty rather than an itemization as laid out above.

Conclusion

The case for a legal or statutory duty of corporate sustainability has been made in the foregoing pages. Does that imply that all businesses will automatically and always comply with such minimum legal standards? The obvious answer is; No! The province of willing compliance and exceeding of the minimum bar will then become the new model or typology of CSR. Does that validate the argument that CSR must be exclusively based on voluntarism or initiated and coerced by market forces alone? Again, the answer is; No! CSR is actually potent and growing because of the mutual self-reinforcement arising from the interaction of cultural or societal norms and regulation. Secondly, markets tend to allocate resources to their most profitable uses

¹³⁵ See n. 114 above.

and the needs of social equality and inter-generational equity are likely to be ill-served by market forces alone.¹³⁶ Voluntarism also produces irregular, inconsistent standards, practices.

Theoretically, with the optimum mix of cultural and legal norms the zone of compliance to sustainable corporate management and corporate sustainability by businesses will enlarge, thus quantitatively or qualitatively decreasing the scale and scope of environmental degradation, abuse of human rights and social inequality. In other words the emergent cultural norms of corporate sustainability require to be ‘uploaded’ into the legal and regulatory template consciously and deliberately in order to promote sustainable development. Michael Porter, in his book,¹³⁷ advanced the proposition that smart environmental regulations could enhance a nation’s competitiveness, suggesting a win-win relationship between corporate sustainability and national development, as well as the value of not leaving everything to voluntary initiatives and soft law. Hopkins¹³⁸ goes as far as to recommend that companies should work hand in hand with governments to promote economic and social development, and in developing countries also work on poverty reduction and ensure that their tax monies are used wisely.

The trickier problem is to ensure a unity of objective and action by all countries and companies, basically. This is because sustainable development initiatives may well create competitive advantage for the firms and the nations that follow the creed of corporate sustainability eventually, yet there is the possibility that nations and companies pursuing lower standards may well attract more investment and rents in the short run. Global sustainable development will not be enhanced by that type of scenario since deleterious activities by even a few can undo all the heroic green achievements by the many.

¹³⁶ This point is made by Ikerd, *Sustainable Capitalism: A Matter of Common Sense*. Bloomfield, CT, USA: Kumarian Press, Incorporated, 2005, 63 – 66:<http://site.ebrary.com/lib/lbsng/Doc?id=10141035&ppg=121>.

¹³⁷ *The Competitive Advantage of Nations*, Free Press, 1998.

¹³⁸ See n. 65 above at 116.