Northwestern Journal of International Law & Business

Volume 40
Issue 1 *Fall*

Article 2

Fall 2019

# Corporate Social Responsibility versus Shareholder Value Maximization: Through the Lens of Hard and Soft Law

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Vol. 40, No. 1
Northwestern Journal of International Law & Business

# Corporate Social Responsibility *versus* Shareholder Value Maximization: Through the Lens of Hard and Soft Law

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*Abstract*

*Even with a significant increase in the number of firms around the world engaging in corporate social responsibility ("CSR"), many people still perceive CSR as a voluntary commitment and shareholder value maximization ("SVM") as a mandatory requirement. This paper borrows the concept of hard law and soft law in terms of coerciveness and overturns the stereotype that SVM is a hard-law constraint and CSR a soft-law constraint. The paper first demonstrates that directors of the board are not obliged to maximize shareholder value even in the Anglo-American jurisdictions where shareholder primacy culture is more dominant. Next, the paper critically discusses an enforceable regulatory regime for CSR. After studying various countries' practices, this paper highlights three main forms of the hard-law approach for CSR: namely through (i) enacting mandatory CSR laws to directly promote socially responsible behavior; (ii) defining minimum standards for corporate behavior to deter socially irresponsible behavior, and/or (iii) mandatory disclosure of CSR-related issues. The conventional (economic) justification for CSR is subsequently challenged, i.e., why we should align CSR with SVM after the above misunderstandings are corrected. More importantly, in addition to overcoming the weakness of soft law's non-coerciveness, the hard-law approach will also provide additional grounds for furthering CSR.*

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I'm grateful to Perri 6, Frances Bowen and Martha Prevezer for comments and suggestions on an earlier version of this paper. Of course, all errors remain my own alone.

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## I. INTRODUCTION

Corporations have vast power over our daily lives — from consumption to entertainment — and, to a great extent, the ability to exercise social decision-making power.[1] Their responsibility should therefore not be limited to generating wealth for shareholders. In effect, increasingly more firms around the world have been engaging in corporate social responsibility ("CSR"). The popularity of contemporary CSR has spread to the world scene.[2] The consensus among various frameworks and definitions offered by academics and institutions is to conceptualize CSR as voluntary corporate commitments, either to meet a responsibility towards society and the environment, or to exceed society's expectations of conventional corporate behavior and improve community wellbeing of relevant stakeholders through discretionary business practices and contributions of corporate resources.[3]

However, the mainstream view of law and economics scholars in Anglo-American countries remains that corporate directors, who collectively act as the human organ of corporations, owe a legal duty to maximize shareholder interests.[4] Failing to do so amounts to a breach of directors' duties,[5] leading to disqualification and fines as well as other

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1 *See* JOHN E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW 22 (1993); *see also* RALPH NADER ET. AL., TAMING THE GIANT CORPORATION 23-25 (1976).

2 Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L J. MGMT. REV. 85, 86 (2010).

3 *See generally, e.g.*, PHILLIP KOTLER & NANCY LEE, CORPORATE SOCIAL RESPONSIBILITY: DOING THE MOST GOOD FOR YOUR COMPANY AND YOUR CAUSE (2005); *see also* Oliver Falck & Stephan Heblich, *Corporate Social Responsibility: Doing Well by Doing Good*, 50 BUS. HORIZONS 247, 247 (2007); Similarly, *see* Word Bank's definition of CSR (2004): "the commitment of businesses to behave ethically and to contribute to sustainable economic development by working with all relevant stakeholders to improve their lives in ways that are good for business, the sustainable development agenda, and society at large." HALINA WARD, PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE SOCIAL RESPONSIBILITY: TAKING STOCK 3 (2004).

4 *See* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 7 J. APPLIED CORP. FIN. 8, 8-9 (2001); s*ee also* PAUL L. DAVIES & SARAH WORTHINGTON, PRINCIPLES OF MODERN COMPANY LAW 502-503 (Sweet & Maxwell 10th ed. 2016). It is nevertheless noteworthy that the universal standards on best corporate governance practices developed by the OECD and World Bank both seek to embed the shareholder-oriented model around the world. Paddy Ireland & Renginee G. Pillay, *Corporate Social Responsibility in a Neoliberal Age in* CORPORATE SOCIAL RESPONSIBILITY AND REGULATORY GOVERNANCE 77, 91 (Peter Utting & Jose Carlos Marques eds., 2010). Professors Hansmann and Kraakman also famously claim "there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value", meaning the Anglo-American model of the corporation has triumphed over its more stakeholder-oriented German, French and Japanese models. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439, 468 (2001).

5 *See, e.g.*, Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Thorough*

adverse legal consequences. While CSR is perceived as voluntary actions that businesses can take to meet a responsibility over and above compliance with minimum legal obligations, shareholder primacy or shareholder value maximization ("SVM")[6] is perceived as a hard-law constraint on the board of directors. When the mandatory constraint with binding force clashes with the optional constraint in terms of compliance, the former will undoubtedly prevail.

A paradigm of hard law and soft law may help to explain such choice, as well as potential conflicts between CSR and SVM,[7] though the concept of hard/soft law is traditionally associated with public international law. Soft law usually refers to "any international instrument other than a treaty containing principles, norms, standards or other statements of expected behavior."[8] Its main features include "lack of precision, open-endedness, lack of enforceability, as well as the type of actors that engage in norm generation."[9] Soft law is also now used to cover rules of conduct that have no legally binding force.[10] Hard law, by contrast, refers to the binding law and instruments that create precise and uniform rules with a clear and predictable enforcement mechanism.[11] Rather than discussing their definitions or scopes, this paper utilizes the distinction between "hard law" and "soft law" in terms of their coercive power to explore their roles in constraining corporate behavior.[12]

CSR rules and codes of conduct, which provide corporations

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*Law and For Law*, U. Edinburgh Sch. L. Working Paper Series, No. 2009/03 (2009), http://ssrn.com/abstract=1369305.

6 According to Professor Bainbridge, shareholder primacy is not exactly the same as SVM. In his mind, SVM just means the corporate objective, whilst shareholder primacy also requires the ultimate control of the company resting in the hands of the shareholders in addition to shareholder value maximization; STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 8-10 (Oxford University Press 2008). However, as the ultimate purpose of shareholder primacy is to maximize shareholder value, this paper is not going to distinguish these two terms unless the context explicitly indicates.

7 If corporations were mandatorily required to consider all relevant stakeholders' interest, shareholder primacy would inevitably be challenged. Min Yan, *The Corporate Objective Revisited*, 38 BUS. L. REV. 14, 15 (2017).

8 Dinah Shelton, *International Law and Relative Normativity*, *in* INTERNATIONAL LAW 141, 165 (Malcom D. Evans ed., 2010).

9 Jean D'Aspremont & Tanja Aalberts, *Symposium on Soft Law*, 25 LEIDEN J. INT'L. L. 309, 309 (2012).

10 *See* Francis Snyder, *Soft Law and Institutional Practice in the European Community*, *in* 197 THE CONSTRUCTION OF EUROPE 198 (Stephen Martin ed. 1994). For instance, the *UK Corporate Governance Code* can be perceived as soft law due to its 'comply or explain' principle. In other words, the non-compliance or transgression can be justified by 'explain', which is different from the hard law as discussed below in Section IV.

11 *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L. ORG. 421, 421 (2000).

12 Indeed, both approaches are tightly linked. On the one hand, soft law may become hard law once state interferes to claim regulatory control; on the other the coerce power of the regulator is essential generating voluntary compliance for soft law.

normative guidance, are generally non-binding and lack formal sanctions for transgression or non-compliance. This means that these rules cannot be enforced when corporations fall short of the expected standard. Even Carroll, who incorporated legal responsibility into his pyramid of CSR,[13] would also agree with the voluntary nature of CSR. He admits that "the essence of CSR and what it really refers to . . . [are] the ethical and philanthropic obligations of the corporation towards society,"[14] which obviously extend beyond mere legal responsibilities. Following the hard and soft law distinction, contemporary CSR is best categorized as a soft-law constraint as its defining characteristic. On the contrary, SVM is deemed by many as a mandatory constraint due to the coerciveness of directors' legal duties and punishments for non-compliance, at least in Anglo-American jurisdictions.[15] It is argued that shareholders could enforce SVM against non-complying directors, and formal sanctions would be imposed for any non-compliance. Hence, SVM could be categorized as a hard-law constraint. Thus, it is hardly surprising to see that when engaging in CSR clashes with SVM, directors will choose to comply with hard law over soft law.[16] In other words, directors would only engage in CSR if it can be reconciled with shareholder interests.

The first main contribution of this paper is, therefore, to overturn the stereotype that SVM is required by hard law. A doctrinal approach is employed to clear up misunderstandings by examining both case law and statutory law in the U.S. and U.K. as liberal market economies.[17] Directors do owe legal obligations and fiduciary duties to the corporation to promote its success, but that is very different from maximizing shareholder value as long as we can correctly distinguish corporate interests from shareholder interests in the context of shareholder heterogeneity.[18]

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[13] Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. MGMT. REV. 497-505 (1979); Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, 34 BUS. HORIZONS 39-48 (1991).

[14] Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L J. MGMT. REV. 85, 90 (2010).

[15] *See infra* notes 55-56 and accompanying text.

[16] In Ireland and Pillay's words, when 'soft' law meets 'hard' law, the latter is likely to prevail. Paddy Ireland & Renginee G. Pillay, *Corporate Social Responsibility in a Neoliberal Age*, *in* CORPORATE SOCIAL RESPONSIBILITY AND REGULATORY GOVERNANCE: TOWARDS INCLUSIVE DEVELOPMENT? 77, 94 (Peter Utting & José Carlos Marques eds., 2010).

[17] PETER A. HALL & DAVID SOSKICE, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATION OF COMPARATIVE ADVANTAGE (2001). Another main argument is that in liberal market economics, CSR should be regulated by market forces rather than mandatory regulatory initiatives.

[18] Min Yan, *Agency Theory Re-Examined: An Agency Relationship and Residual Claimant Perspective*, 26 INT'L CO. & COM. L. REV. 139, 143 (2015).

The other main contribution of this paper is to overturn the stereotype that CSR is, or ought to be, a soft-law constraint from an institutional/regulatory aspect. This is in contrast to the existing research focusing primarily on the business perspective (e.g., self-regulation). After looking into various salient examples of countries' practices in mandating CSR, this paper summarizes three key forms of the hard-law approach to hold corporations accountable. The most radical form is to enact mandatory CSR law to require corporations to do more, such as CSR spending, for society and act towards a socially desirable end. The second form is to use other bodies of law such as consumer protection law, employment law, anti-discrimination law, environmental protection law, and others alike to regulate corporate behavior by setting or elevating the minimum obligations for the purpose of deterring designated socially irresponsible behavior. The third form is to introduce mandatory reporting on social and environmental performance, which could not only stimulate and strengthen public pressure but also make assessment and monitoring possible. The mandatory disclosure on CSR-related information can be used either discretely or together with other forms of the hard-law approach to help build more socially responsible corporations. In short, this paper endeavors to identify effective and enforceable approaches to promote and implement CSR more accurately, rather than explore new perspectives in theorizing on CSR.

When SVM is perceived as a hard-law constraint, the effort to justify contemporary CSR through its role in advancing SVM is understandable as the former is at best ameliorative in nature. This perhaps also explains why contemporary CSR has largely been endorsed and promoted from its positive correlation with shareholder value.[19] However, after clarifying that SVM is not required by hard law, the conventional (namely, economic) justification for CSR, i.e., through a business case,[20] can subsequently be challenged. The lopsided emphasis on the reconciliation of interests between shareholders and other groups should also be reconsidered as conflicts of interests are not always reconcilable. On the other hand, the hard-law approach for CSR may itself provide further grounds for combating socially irresponsible conduct of business and help promote

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[19] *See, e.g.*, KEVIN T. JACKSON, BUILDING REPUTATIONAL CAPITAL: STRATEGIES FOR INTEGRITY AND FAIR PLAY THAT IMPROVE THE BOTTOM LINE (2004); CHRIS LASZLO, THE SUSTAINABLE COMPANY: HOW TO CREATE LASTING VALUE THROUGH SOCIAL AND ENVIRONMENTAL PERFORMANCE (2003); SANDRA WADDOCK, LEADING CORPORATE CITIZENS: VISION, VALUES, VALUE ADDED (2002); Connie Van der Byl & Natalie Slawinski, *Embracing Tensions in Corporate Sustainability: A Review of Research From Win-Wins and Trade-Offs to Paradoxes and Beyond,* 28 ORG. & ENV'T 54-79 (2015).

[20] Michael L. Barnett, *Stakeholder Influence Capacity and the Variability of Financial Returns to Corporate Social Responsibility*, 32 ACAD. MGMT. REV. 794-816 (2007); Paul Min-Dong Lee, *Review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead*, 10 INT'L J. MGMT. REV. 53-73 (2008); David J. Vogel, *Is There a Market for Virtue? The Business Case for Corporate Social Responsibility*, 47 CAL. MGMT. REV. 19-45 (2005).

more responsible corporate behavior.

The remainder of the paper proceeds as follows. Section II critically discusses the rise of SVM as well as its impact on the understanding of corporate function. Some of the inherent problems in SVM, especially the short-termism and inability to promote social welfare maximization, are also examined in this section. Section III argues that SVM is not a hard-law constraint and demonstrates that directors and their executives are not obliged to maximize shareholder value even in Anglo-American jurisdictions. Section IV critically explores room for CSR to take a hard-law approach. Section V discusses the implications of the new understanding of CSR and SVM in regard to the conventional rationale for contemporary CSR, as well as the danger of its business case reasoning. Section VI discusses the limitations of hard-law approaches for CSR and provides suggestions for future research. Section VII proffers the concluding remark.

## II. THE RISE OF SVM

Corporations were not born with a shareholder primacy. In the early days, corporations were seen as artificial entities that owed their existences to "the positive law of the state."[21] In addition to being able to grant charters for incorporation, the power of the state to forfeit the charter further justified state intervention in corporate activities.[22] Dependence on state action and demand of governmental concurrence determined that corporations must carry out some public or social function. Indeed, prior to general incorporation, incorporation purely for private interests was rare. In the U.K., the first trading companies with legal personality were created in the 16th century by royal charters and mainly used for overseas trading, exploration, and colonization. In the U.S., incorporation depended on the state's concession through special acts by the state legislature and was usually made for providing public utilities, such as public transport, financial institutions, and local public services between the late-18th century and mid-19th century.

The concession for incorporation was based on the special regulatory provisions put into corporate charters in order to protect the public from abusive practices. Typical provisions included "operations begin within some specified time," "works kept in good order and not abandoned," "tolls

[21] David Millon, *Theories of the Corporation*, 39 DUKE L. J. 201, 206 (1990).

[22] For example, English courts by prerogative of judicial writs of *quo warranto* and *scire facias* could dissolve unauthorized corporations or forfeit an abused charter. *See* Ron Harris, *The English East India Company and the History of Company Law*, *in* VOC 1602-2002 400 YEARS OF COMPANY LAW 217 (Ella Gepken-Jager et. al. eds., 2005). The US Supreme Court also confirmed that a corporation created by the special act of state legislature may lose its franchise "by a misuser or nonuser of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture" in the case *Terret v. Taylor*. 13 U.S. 43, 51 (1815).

to be within set minimum and maximum levels," "minimum capital paid in," among many others.[23] In other words, the privilege of incorporation was largely legitimized on the basis that corporations would serve the public good rather than simply private benefits. All of these considerations led corporations to be viewed as socially useful instruments to carry out public policy goals.[24]

With the advent of general incorporation law, almost all major restrictions on corporate activities were removed. Incorporation became a simple matter of registration. Individuals who intended to incorporate only had to comply with a few requirements set by law. On the ground that any lawful business was allowed since the late-19th century, the state incrementally lost the authority to require corporations to serve public interests. The validity of the concession theory was challenged, and corporations became to be perceived as creatures of private initiatives instead of the state power. The change implied the trend to emphasize individual incorporators' initiatives and hence, their private benefits. The role of corporate law was consequently reoriented from public law regulating social and economic problems caused by corporations to private law focusing on internal corporate governance problems.[25] Corporate law lost much of its public character, and at the same time, corporations lost much of their public function. The corporation's traditional obligations to the state or public were disregarded. Restrictions on accumulating economic interests for private individuals were altogether removed. In short, the public and social function of corporations faded, and social welfare became an irrelevant concept.

After the separation of ownership and control,[26] questions as how to best check managerial deviation and ensure accountability have centered on corporate law and corporate governance discourses. The agency theory,[27] among others, developed from contractarianism which regarded corporations as a nexus of contracts,[28] provided the momentum for SVM for the last half-century. Emphases have thereafter been placed on aligning the managerial interests with shareholder interests in order to control agency costs. The essence of the argument is that directors and their executives are appointed to run the corporation on behalf of and for the

23 *See* JAMES W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 39 (1970).

24 *See* Anant K. Sundaram & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 ORG. SCI. 350, 351 (2004).

25 David Millon, *Theories of the Corporation*, 39 DUKE L.J. 201, 213 (1990).

26 ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

27 *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. OF FIN. ECON. 305, 305 (1976).

28 Armen A. Alchian & Harold Demsetz, *Production, Information Cost, and Economic Organization*, 62 AM. ECON. REV. 777, 777-795 (1972).

benefit of shareholders.

The shareholder primacy position rejects corporations' function to further public welfare unless it is relevant to increase shareholder value. The internal relationship between shareholders, directors, and managers have replaced relationships between business and society to become the primary concern. Today, at least in the U.S. and U.K., in order to tackle the agency problem and ensure managerial accountability, SVM remains as the primary, if not the sole, corporate objective.[29]

### *A. Revisiting SVM*

Shareholder primacy requires corporations to be run in a way to maximize shareholder value after satisfying all other corporate constituencies' contractual or statutory claims. The board of directors and its delegates of daily management (i.e., executive officers) are therefore expected to follow this guideline, which is praised by supporters as a singular objective to enforce and monitor.[30] Despite it being recognized that the preferences of different shareholders are not identical, the argument is that in a given corporation at a given time, most shareholders are a reasonably homogeneous group with an analogous objective.[31]

However, the essential premise for SVM — shareholder homogeneity — is largely a false promise.[32] The divergence among shareholders can be very significant and therefore, should not be ignored. First of all, shareholders may have different expected holding periods. Although theoretically, the current share price should reflect the future value in a perfect market, practically the share price is not immune to manipulation owing to the failure of the efficient capital market hypothesis. Short-term shareholders tend to focus on immediate profits from fluctuations in the market by buying and selling shares with high frequency. In contrast, typical long-term shareholders tend to focus on long-term development by buying and holding shares regardless of the rise and fall of share prices. Thus, shareholders with different expected holding periods would unavoidably have heterogenous preferences over corporate decision-making. The former, in order to maximize short-term profits, may be more likely to pressure directors to adopt policies such as firing employees, reducing research and development ("R&D") expenses, or selling corporate assets, whilst the latter may sacrifice immediate profits for long-term

[29] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001); PAUL L. DAVIES & SARAH WORTHINGTON, PRINCIPLES OF MODERN COMPANY LAW 542 (10th ed. 2016).

[30] Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 7 J. OF APPLIED CORPORATE FINANCE 8, 11 (2001).

[31] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 70 (1991).

[32] *See, e.g.*, Grant Hayden & Matthew Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 452-460 (2008).

development.[33]

Second, the level of diversification determines differing risk preferences. Diversified shareholders care much less about firm-specific risks than undiversified shareholders. For instance, shareholders who invest in a given corporation without also diversifying would be sensitive to such risks. Not surprisingly, undiversified shareholders, opposite to fully diversified shareholders, may pursue projects with lower returns for reduced risks. The different expectations between inside and outside shareholders, hedged and unhedged, also demonstrates that shareholders may have heterogenous interests, thereby making it logically impossible to maximize all of them at the same time.[34]

Except for the general idea of maximizing shareholder interests, there is a lack of clear guidance for directors when different shareholder interests need to be balanced (i.e., lack of precision). In the business world, SVM is not infrequently interpreted to be maximizing share price, and failure to meet quarterly earnings targets are seen as a sign of managerial incompetence which, in the worst scenario, may lead to a career-threatening dismissal.[35] Despite, in theory, SVM meaning more than maximizing quarterly earnings, the essence of SVM remains to prioritize shareholder interests under all circumstances — even at the expense of others. For the sake of facilitating the following arguments, this paper adopts the slightly broader definition of SVM.

### *B. Could SVM Increase Social Welfare?*

One main reason to equate fulfilling profit-making responsibility in whole or in part to CSR is based upon the argument that maximizing shareholder value could ultimately increase social welfare. If SVM could maximize social welfare, SVM may be justified even if it is no longer a hard-law constraint. Those who believe SVM is in society's interest are largely founded on the agency theory.[36] The argument is that shareholders

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33 Short-term and long-term interests are indeed difficult to reconcile as shown in the following subsection. Suffice it to say here, long-term development, by training employees, investing in technology and improving customer service for example, requires non-neglectable upfront costs, which would be considered a negative factor under short-termism because the immediate profits would be impaired.

34 For example, inside shareholders like directors with shares may be more concerned about job security and prefer to maintain the *status quo* when facing a hostile takeover, even though the offer may be in the best interests of those outside shareholders in the sense of pushing up the return on shares. Or in the context of golden parachutes, inside shareholders who happen to be directors would have greater incentive to facilitate the merger even it is not in the best interests of outside shareholders. Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 583-593 (2006).

35 Alfred Rappapor, *The Economics of Short-term Performance Obsession*, 61 FIN. ANALYSTS J. 65, 69 (2005).

36 *See, e.g.*, Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOVERNANCE: AN INT'L REV. 11, 13 (2005).

as residual claimants *reap the marginal dollar* of the corporate profits and *suffer the marginal dollar* of any corporate losses. Such gain allocation rules allow shareholders to receive whatever is left from the income stream after satisfying fixed claimants and thereby ties their benefits to corporate performance. The wealth of residual claimants is maximized in the event that corporate wealth is maximized.[37]

However, the residual claimant argument is problematic. Shareholders in solvent corporations are not normally entitled to claim dividends or any profits. It is, in fact, the board of directors that has the sole power to decide when to distribute the *residual* profits and to whom. Today, boards of directors in most jurisdictions have the right to decide not to pay shareholder dividends,[38] and instead, deliver the 'residual' to non-shareholding stakeholders by retaining the profits for future business, increasing employee benefits, improving customer service, and expanding R&D, among others. Due to the separate legal personality of the corporation, shareholders are not able to direct corporations, including forcing the board to declare dividends and cannot receive anything, at least directly, unless the board decides to distribute dividends. Rules empowering directors to determine how to utilize and allocate assets in all major jurisdictions rebut the argument that shareholders are the residual claimants entitled to "every penny of profit left over after the firm's contractual obligations to creditors, suppliers, and employees have been met."[39]

Besides, stakeholders such as employees who have made firm-specific investments — i.e., those skills or assets that cannot be redeployed to alternative use without a loss of value — could also be treated as the residual claimants and residual risk-bearers. This is true because they could equally be incentivized to go the extra mile in order to be better off, e.g., by receiving bonuses on top of the fixed claims in the form of monthly wages. Indeed, multiple residual owners exist with differing priority levels.[40] Moreover, shareholders are not the only group that undertake residual risks, although financial economists often assert this as if it were a self-evident fact.[41]

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[37] As residual claimants, shareholders will obtain higher dividends and share value when the corporation is run well, and less or even losing all their investment if the corporation is run badly. Given such residual nature of shareholders, corporate wealth is maximized when shareholder value is maximized; and society as whole will be better off when all corporations' wealth is enhanced.

[38] Min Yan, *Agency Theory Re-examined: An Agency Relationship and Residual Claimant Perspective*, 26 INT'L COMPANY AND COMMERCIAL L. REV. 139, 142 (2015).

[39] Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. OF CORP. L. 719, 728 (2006).

[40] Lynn M. LoPucki, *The Myth of the Residual Owner: An Empirical Study*, 82 WASHINGTON U. L. Q. 1341, 1354-55 (2004).

[41] *See, e.g.*, MARY O'SULLIVAN, CONTESTS FOR CORPORATE CONTROL: CORPORATE GOVERNANCE AND ECONOMIC PERFORMANCE IN THE UNITED STATES AND GERMANY 50

With the collapse of the residual claimant argument, the correlation between generating maximum value for shareholders and increasing overall welfare no longer exists. By the same token, the argument that monitoring directors is in the best interests of shareholders from the perspective of lowering agency costs and maximizing corporate wealth becomes untenable. In effect, shareholder interests are not always in line with corporate interests. For example, a corporation is vulnerable to both idiosyncratic and systematic risks, whilst shareholders can be insulated from idiosyncratic risk by adopting diversified portfolios.[42] Therefore, when acting in the interests of shareholders, directors only have to take systematic risk into account, which may hurt corporate interests. In other words, maximizing corporate wealth does not necessarily increase shareholder value, and vice versa.

Corporations can indisputably provide value to more than just shareholders. Interest to creditors, salaries to employees, goods and services to customers, tax revenues to governments, and stability to communities are all values provided by the corporation. In this sense, by its nature, firm value will exceed shareholder value. Unfortunately, any value provided to non-shareholding stakeholders is explicitly excluded from the shareholder-oriented concept of corporate value.[43] Nevertheless, society includes not only shareholders but also other corporate constituencies. The implication of enlarging social welfare could be re-interpreted as the aggregate wealth of all stakeholders in the corporate context.[44]

The crucial issue is, apart from distributive injustice and difficulty in wealth redistribution,[45] that shareholders may externalize losses to other stakeholders, which would in turn lead to higher transaction costs and lower incentives for other stakeholders to contribute. To maximize shareholder value, directors could be pressed to siphon value from other corporate constituencies.[46] For example, Wal-Mart maintains low employee wages, which could be seen as transferring benefit from employees to shareholders. So, despite the situation of "making the pie bigger," another potential tactic

(2001).

[42] *See* John Armour & Jeffrey N. Gordon, *Systematic Harms and Shareholder Value,* 6 J. LEGAL ANALYSIS 35, 36 (2014).

[43] Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 644 (2006).

[44] REINIER KRAAKMAN ET. AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 22-23 (3d ed. 2017).

[45] Social psychologists have found that people are not only concerned about the fairness of the final outcome but also care about the fairness of the distribution process itself. Research shows people are more accepting of a poorer outcome as long as the procedure for distribution could be perceived as fair. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (Plenum Press 1988).

[46] *See* Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 87, 101 (2005); Andrew Keay, *Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model*, 71 MOD. L. REV. 663, 671 (2008).

to obtain more benefits is to take other stakeholders' portions. Indeed, there are many alternative ways besides enhanced corporate earnings, such as lowering labor costs or cutting R&D expenditures, in order to achieve the goal of increased dividends and capital appreciation. It is also possible to externalize excessive risks from shareholders to stakeholders. Thanks to the limited liability rule, shareholders will only suffer a fraction of the costs caused by the failure of risky programs but will obtain high returns if the *gamble* succeeds. Although most advocates of the shareholder model would agree that SVM should ideally be achieved through increasing corporate value rather than redistributing interests from stakeholders to shareholders, such a possibility should not be dismissed.[47]

Partly for this reason, Dodd concludes that a corporation run for shareholder interests does not automatically create value for other stakeholder groups or society.[48] On the one hand, shareholder value could be maximized by extracting value from other stakeholders without increasing corporate value; and on the other, the emphasis on the superior position of shareholders may impair the willingness and incentive of other stakeholders to contribute firm-specific investment. This will ultimately lead to lower productivity, harming society as a whole.

One may suggest a long-term view of SVM. However, it would be difficult in practice, as short-termism appears far more "attractive" compared to long-termism. The preference of corporate liquidity, the pressure of relative performance (namely, to surpass competitors), performance-based remuneration, and the quarterly report will all contribute to a short-term orientation. More importantly, shareholders are impatient. Such behavioral biases, i.e., present-biased preferences, determine that shareholders prefer to engage reward activities first and to delay immediate cost activities until later.[49] Therefore, when immediate costs with delayed rewards (i.e., long-termism) are juxtaposed to immediate rewards with delayed costs (i.e., short-termism), the latter will be favored.

It will be equally difficult to distinguish whether the inflated earnings are based on long-term or short-term strategy, and whether the decline of profits is based on long-term strategy or bad management. As Greenfield correctly points out, it is easy to show the numbers, but difficult for most investors to determine the reason for such numbers.[50] It would not be surprising to see manipulation in the business world. For example, camouflaging a short-term behavior as a long-term one until the bubble is

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[47] Indeed, these situations are not uncommon to happen. *See, e.g.*, Joseph Heath, *Business Ethics without Stakeholders*, 16 BUS. ETHICS Q. 533, 542 (2006).

[48] *See* E. Merrick Jr. Dodd, *For Whom are Corporate Managers Trustees*, 45 HARV. L. REV. 1145, 1152-53 (1932).

[49] *See, e.g.*, Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 109 (1999).

[50] Kent Greenfield, *The Puzzle of Short-Termism*, 46 WAKE FOREST L. REV. 627, 636 (2011).

burst. On the other side, long-term behavior — e.g., sacrificing immediate profits for long-term development — might not be readily recognized by the market. Decision-making focused on long-term behavior can easily be confused with, or thought of as, the result of incompetent management. And practically, it would also be difficult to quantify the long-term benefits in a precise way whilst the short-term costs are much easier to measure or *feel*. This could further result in long-termism being less attractive.

In short, on the grounds that shareholders are not the exclusive residual claimants or risk-bearers and have heterogenous interests, sometimes distinct from that of the corporation, it will not be convincing to argue that social welfare, which includes the interests of both shareholders and non-shareholders, can be maximized by virtue of maximizing shareholder value, let alone the quarterly share prices.[51] As a result, the best possible justification for SVM relies upon its hard law nature, as critically examined below.

## III. CHALLENGING SVM AS HARD LAW CONSTRAINT

The term 'law' is broadly used in this paper to include rules, civil regulations, and code of conducts, among others. One of the most fundamental and elementary functions of law in general is to prevent undesired behavior and secure desired behavior.[52] However, not all laws can be regarded as coercive. This is why we have to distinguish hard law, which is legally binding and enforceable, from soft law, which has no legally binding force but encodes aspirational goals or best practices. Coerciveness, as explained in the introduction above, determines whether non-compliance will lead to formal sanctions.

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[51] Consequently, time is ripe to seriously reconsider what the fundamental purpose of the corporation in today's age is. In particular, most shareholders, including institutional investors, only put an insignificant amount of their money into any individual corporation in terms of a diversified portfolio strategy, and they do not commit to a corporation in either moral or practical sense. *See* Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1414 (1993). The role of equity issues and physical capital in investment "is much less important than it was" in modern public companies at present. *See* JOHN KAY, THE KAY REVIEW OF UK EQUITY MARKETS AND LONG-TERM DECISION MAKING 24 (2012). Shareholder investment by way of purchasing stock does not contribute savings to a corporation or undertake the residual risk of a new/increased economic operation. This is exactly why Deakin argues that net contribution of new equity to the corporate sector has become negative. By contrast, stakeholders' firm-specific investment might be much greater and more valuable than the financial investment. However, it is beyond the scope of this paper to examine this question in detail. Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOVERNANCE: AN INT'L REV. 11, 15 (2005); *see also* MIN YAN, BEYOND SHAREHOLDER WEALTH MAXIMISATION (1st ed. 2018).

[52] *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 169 (1979).

### *A. Overview of Hard Law Approaches*

Hard law can be referred to as the legal framework that is legally binding and enforceable through the courts, which include domestic statutes, common law, regulations and international treaties. Typical examples include criminal law and tort law, where murder, assault, libel, and alike are prohibited, whilst duties of care are required when engaging in certain specific types of activities. In terms of corporations, hard law could equally prohibit certain forms of conduct such as harmful disposal of waste (e.g., by *UK Environmental Protection Act 1990*), or require certain forms of conduct such as filing accounts and reports with the registrar (e.g., by *UK Companies Act 2006*). Hard law compels corporations to do something it would not otherwise want to do or refrain from doing something it would otherwise do.

Complying with the law, for example, to change the way of waste disposal or prepare annual reports will normally require corporations to alter their original conduct of business and incur costs (or lose expected profits).[53] Fear of the potential sanctions may justify such compliance even if compliance would incur a financial loss. Hard law largely relies upon the punitive mechanism to secure compliance. It threatens firms to alter their original behavior and adhere to their duties fixed by law. Formal sanctions will be imposed on corporations if they have done what the law prohibits (e.g., illegally deposit harmful waste) or fail to do what the law requires (e.g., failing to file accounts). In sum, fines and imprisonment brought by sanctions for violating the law will normally outweigh the financial loss/cost incurred by altering corporations' original conducts of behavior. And it is always possible for policymakers to adjust the punishment to make it more appropriate. Thus, even from a purely economic and cost-benefit perspective, there are incentives for corporations to comply with the law in order to avoid adverse legal consequences.

Of course, there must be some conscientious businesses willing to do good regardless of costs, that will actively comply with the law and engage in voluntary activities beyond the minimum legal requirements. External rules and regulations would regress to mere reference if corporations were genuinely self-disciplined. Indeed, there would be no need to regulate their conduct of business since they would perform desired behavior and stop undesired behavior on their own initiative. Law has less effect on these types of corporations, and compliance is more like a matter of social learning and understanding of the core ideas expressed by such law.[54] By

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[53] Another good example is the holiday shopping legislation, which restricts shops' opening time. According to the *Sunday Trading Act 1994*, large shops in England and Wales must close on certain holidays and open only for 6 consecutive hours between 10am and 6pm on Sundays. Sunday Trading Act, 1994, c. 20 (U.K.).

[54] *See, e.g.*, William C. Frederick, *The Moral Authority of Transnational Corporate Codes*, 10 J. BUS. ETHICS 165, 173 (1991).

contrast, most corporations would see legal requirements as constraints, and these corporations are the main subjects of this paper.

Thus, our first main question is whether SVM is a hard-law constraint. Just like employment law mainly concerns employee protection and consumer protection law concerns consumer-related issues, corporate law, as discussed above, is considered to be the law primarily dealing with shareholder-director relationships and concerning shareholder interests. Corporate law protects shareholders amongst others by spelling out directors' legal duties and imposing liabilities for non-compliance. So, when directors breach their duty, it could lead to both civil and criminal consequences. Assuming that SVM is required by hard law, directors would breach their legal obligations by failing to maximize shareholder value.

*B. The United States*

Proponents of SVM often refer to the decision of the Michigan Supreme Court in *Dodge v. Ford Motor Co.* to demonstrate that generating maximal value for shareholders is enshrined in hard law.[55] Leo Strine, the Chief Justice of the Delaware Supreme Court, also wrote: "The corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders."[56]

A closer examination may, however, find SVM to be required neither by statutory nor case law in the United States. To begin with, the classic *Dodge* case mainly dealt with the relationship between the controlling shareholder and minority shareholders in a closely held corporation.[57] The actual holding is that Mr. Ford, as the controlling shareholder and CEO,

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[55] Mr. Ford, the CEO and controlling shareholder of the Ford Motor Co., announced a plan to stop paying out special dividends to shareholders, and instead take the profits and reinvest them in order to employ more workers and build more factories, which was aimed at employing more people and cutting the costs of the cars to make them affordable to more people. The Dodge brothers, as minority shareholders, sued to stop Ford's plans as they thought the purpose of the corporation was to maximize shareholder value.

The Michigan Supreme Court held that:

> "There should be no confusion of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. *A business corporation is organized and carried on primarily for the profit of the stockholders*. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to change in the end itself, to the reduction of profits, or to nondistribution of profits among stockholders in order to devote them to other purposes."

170 N.W. 668, 684 (Mich. 1919) (emphasis added).

[56] Leo E. Strine Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012).

[57] Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 167 (2008).

cannot stop the Dodge brothers as the minority shareholders from "demand[ing] proper dividends upon the stock they own."[58] The argument that a business corporation is organized and carried on primarily for the profit of the shareholders, i.e., SVM, is therefore merely *judicial dicta*. Stout argues that the court thought this case was mainly about the controlling shareholder breaching his fiduciary duties to the minority shareholders.[59] This is not inconsistent with the viewpoint to categorize this case as a minority oppression case.[60]

In effect, the court in *Shlensky v. Wrigley* upheld the directors' decision to protect the interests of the community, i.e., to keep the neighborhood from deteriorating, by not installing lights for night baseball games at Wrigley Field.[61] Despite night games earning the club, and arguably its shareholders, greater profits by increasing attendance, the court refused to hold the directors liable simply because they failed to maximize shareholder interests by pursuing additional revenues. The court instead supported the directors' consideration for the interests of local residents over shareholders. More recently, in *Burwell v. Hobby Lobby*, the U.S. Supreme Court perceived the corporation as a form of organization to provide protection for human beings and to achieve desired ends.[62] The duties of those who run the corporation, therefore, extend beyond assuring a return to investors.

With regard to statutes, another important source for hard law, corporate law codes in the U.S. do not mandatorily require SVM either. Under the Delaware General Corporate Law, the most representative and important corporate law in the United States, any lawful business purpose is permitted.[63] Moreover, a large number of states enact a "constituency statute," which explicitly authorizes corporate boards of directors to

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[58] *Dodge*, 170 N.W. at 685.

[59] Stout, *supra* note 57, at 167.

[60] *See, e.g.*, D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 320 (1998).

[61] 237 N.E.2d 776 (Ill. App. 1968).

[62] By responding the lower court judges' suggestion that the purpose of for-profit corporations "is simply to make money", the Supreme Court held:

> While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.

134 S.Ct. 2751, 2771 (2014).

[63] § 101 of *Delaware General Corporate Law* specifies: "A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State."

consider the interest of constituencies other than shareholders.[64] In states without such constituency statutes, case law on takeover also seriously takes into account the impact on non-shareholding stakeholders.[65] This clearly shows the interests of customers, suppliers, employees, creditors, and alike should all be considered during the decision-making.

Further, the *business judgment rule* shields directors and provides nearly irrevocable discretion to act in the best interests of the corporation, even where it means sacrificing shareholder interests, i.e., rejecting a lucrative hostile takeover offer. For example, in *Air Products, Inc. v. Airgas, Inc.*,[66] Airgas' board refused to sell the company to Air Products, Inc. despite being able to bring its shareholders a hefty profit. The business judgment rule provides directors (e.g., as those at Airgas, Inc.) with the shield for pursuing goals other than SVM, as long as they are not acting out of self-interest.[67]

### *C. The United Kingdom*

It is equally difficult to find any case law directly stating directors are required to maximize shareholder value in the United Kingdom. Directors are only required to run a corporation in a manner that furthers the best interests of the corporation as such. Whilst corporate interests are sometimes interpreted as the financial well-being of shareholders as a whole,[68] according to *Re BSB Holdings Ltd (No. 2)*, English law "does not require the interests of the company to be sacrificed in the particular interests of a group of shareholders."[69] This implies the U.K. corporate law also acknowledges the difference between shareholder interests and corporate interests. If corporate interests are in conflict with shareholder interests, the former should be given preference.[70]

In *Fulham Football Club Ltd v. Cabra Estates*, the court held that "the duties owed by the directors are to the company and the company is more than just the sum total of its members."[71] Accordingly, requiring directors to run a corporation in its best interest is not equivalent to maximizing shareholder interests, let alone maximizing share prices. The Canadian case *People's Department Stores v. Wise* may shed further light on the

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64 Lawrence E. Mitchell, *Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 579-580 (1992).

65 Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV INT'L L.J. 129, 145 (2009).

66 16 A.3d 48 (Del. 2011).

67 LYNN STOUT, THE SHAREHOLDER VALUE MYTH 30 (Berrett-Koehler Publishers 2012).

68 *See, e.g.*, THOMAS CLARKE, INTERNATIONAL CORPORATE GOVERNANCE: A COMPARATIVE APPROACH 281 (2007).

69 [1996] 1 BCLC 155, 251 (Eng.).

70 GEOFFREY MORSE, PALMER'S COMPANY LAW 2605 (Sweet & Maxwell 2014).

71 [1994] 1 BCLC 363, 379 (Eng.).

distinction between the two types of interests.[72] The Canadian Supreme Court held that the interests of the corporation should not be confused with the interests of the shareholders or any other individual stakeholder groups; the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment should all be taken into account when acting in the best interests of the corporation.[73]

Consideration for other stakeholders is formally acknowledged by tying it to the success of the corporation in Section 172 of the *UK Companies Act 2006*.[74] Directors are now required to have regard to a wider range of stakeholder groups in order to discharge their overriding duty to promote corporate success. The legitimate interests of stakeholders are not allowed to be frustrated simply for SVM. Rather, directors must also act in a *bona fide* way that they consider to be in the interests of these stakeholders.[75] At the very least, directors seeking to consider stakeholder interests when making corporate decisions will be protected.

Besides, Chapter 4A "Strategic Report" of Part 12 of the *Companies Act 2006*, in replacing Section 417 "Directors' Report," requires directors to prepare a strategic report including information relating to environmental and employment matters. In the case of listed corporations, further information about social, community, and human rights issues, as well as any policies of the corporation in relation to and effectiveness of these matters, is required to be disclosed as stipulated in Section 414C. The increasing requirement for disclosure of stakeholder-related information has the potential to nudge directors to consider more stakeholders' interests and any possible impacts. Though presently, stakeholders other than shareholders have no additional rights to be involved in corporate governance or to take action to challenge directors' ignorance of their interests, setting out such a non-exhaustive list of specific factors requiring consideration can "expand the grounds for judicial review of directors'

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[72] [2004] 3 S.C.R. 461 (Can.).

[73] *Id.*

[74] § 172(1)(a)-(f) stipulates: A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to —

> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.

[75] Sarah Worthington, *Shares and Shareholders: Property, Power and Entitlement: Part 2*, 22 COMPANY LAWYER 307, 309-310 (2001).

decision-making."[76]

In this regard, while directors owe fiduciary duties to the corporation to promote its best interest, maximizing shareholder value is not the directors' legal obligation at all. No statutory or case law forces directors of the board, or their executives, to maximize shareholder value regardless of any other issues, even in the U.S. and U.K., where shareholder primacy culture is more dominant. In contrast, as already discussed, it is legitimate for directors to sacrifice shareholders' financial interests for the interest of other stakeholders. Directors are only forbidden to exercise their power in bad faith or for irrelevant motivations — *e.g.*, for their own self-interest — so as to defeat shareholder interests. As a result, SVM is not a hard-law constraint as conventionally believed.

## IV. HARD-LAW APPROACH FOR CSR

Corporations have to comply with their legal responsibilities to operate. Mandatory legal obligations such as paying taxes, honoring contracts, complying with the minimum wage requirement, and banning child labor are set out by hard law as the bottom lines for conducting business. There is no flexibility for non-compliance. Obeying the law is an essential, though not sufficient, premise to be socially responsible. Consider tax avoidance, for example. Although one can evade taxes by illegal methods such as not disclosing assets, there are also lawful ways to avoid taxes or gain tax advantages by using artificial transactions and the like. These methods may go against the spirit of the law but do not necessarily break the letter of the law. From the perspective of the enormous social impacts of today's corporations, merely requiring them to comply with the bottom lines set out by the hard law sounds far from adequate.

Furthermore, the legal constraints may be seen as barriers to overcome, and it would be unavoidable for certain corporations to proactively seek loopholes in the law in order to take advantage of them. Businesses are, in fact, extremely good at circumventing such legal constraints by so-called creative compliance.[77] Consequently, apart from complying with the minimum legal requirements, corporations are also required to meet social expectations, including both explicit and implicit obligations.[78] In other words, corporations are expected to exceed the minimum legal obligations by integrating social, environmental, and other concerns into their business operations.

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[76] MORSE, *supra* note 70, at 2613.

[77] Doreen McBarnet, *Law, Policy and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies*, 15 J.L. & SOC'Y 113, 114-115 (1988).

[78] Oliver Falck & Stephan Heblich, *Corporate Social Responsibility: Doing Well by Doing Good*, 50 BUS. HORIZONS 247, 247 (2007).

### *A. Overview of Soft-Law Approaches*

Corporate self-regulations and codes of conduct in relation to CSR are essentially voluntary and legally non-binding, implying a lack of sanctioning for non-compliance.[79] Following the preceding discussion on the distinction between hard and soft law, CSR may best be categorized as a soft-law constraint. Undeniably, soft law plays an important role in regulating corporate behavior by offering many of the advantages of hard law, as well as avoiding some of its costs.[80] For instance, hard law normally lags behind social development, including both rapidly developing technology and evolving social norms, but soft law could provide more timely action.[81] Hard law is fundamentally reactive and will only be adopted to "regulate behavior that has offended changing societal expectations to such an extent that political forces mobilize to enact new legally binding standards."[82] In contrast, soft law, due to its very nature, could be comparatively timelier, more active, and perhaps also more flexible in dealing with new emerging issues.

Further, soft law in the form of civil regulations can bypass ongoing conflicts about state sovereignty, which have often restricted western governments from using trade policies to affect the domestic regulations of developing countries.[83] For example, the World Trade Organization ("WTO") typically does not permit market access to be linked to domestic labor or environmental standards since they would be perceived as trade barriers; but soft law in the form of civil regulations would not, as they do not fall under the WTO's jurisdiction.[84]

Apart from the ethical and moral forces,[85] corporate reputational capital may potentially provide an additional ground for soft law. Reputational capital can be interpreted as a long-term strategic asset that is operationally and financially valuable to corporations.[86] Corporations would suffer reputational harm when breaking social contract between

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[79] Andreas G. Scherer & Guido Palazzo, *The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy*, 48 J. OF MGMT. STUD. 899, 907 (2011).

[80] *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000).

[81] David Vogel, *Private Global Business Regulation*, 11 ANN. REV. OF POL. SCI. 261, 264 (2008).

[82] JOHN M. KLINE, ETHICS FOR INTERNATIONAL BUSINESS: DECISION MAKING IN A GLOBAL POLITICAL ECONOMY 13 (Routledge 2010).

[83] *See* Vogel, *supra* note 81, at 265.

[84] Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. OF INT'L ECON. L. 575, 577 (2008).

[85] William C. Frederick, *The Moral Authority of Transnational Corporate Codes*, 10 J. BUS. ETHICS 165, 173 (1991).

[86] Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOKLYN J. OF INT'L L. 43, 67 (2010); *see also* GRAHAME DOWLING, CREATING CORPORATE REPUTATIONS: IDENTITY, IMAGE, AND PERFORMANCE (2001).

business and society.[87] Even though non-compliance with soft law would not be followed by adverse legal/formal consequences, the reputational sanctions may still to some degree pressure corporations to comply. While hard law provides incentives/disincentives through the threat of liability, soft law might use reputational capital to incentivize the compliance. Corporations could be rewarded through reputational gain for complying with a soft law or penalized through reputation loss for non-compliance.[88]

Soft law is not legally coercive, and there is no formal punitive mechanism for transgression. This determines that compliance with soft law largely depends on voluntarism, i.e., through voluntarily supplied participation, resources, and consensual actions, along with market forces. The instruments and mechanisms of soft law also implicate some form of normative commitment because it is equally the objective of soft law to prevent undesired behavior as well as to secure desired behavior. But the defining distinction between soft and hard law is 'coerciveness,' namely whether binding rules and formal sanctions are relied upon. As non-legally binding normative content, soft law cannot be enforced through the courts. The lack of such a deterrent effect means soft law cannot be relied upon as a general basis for enforcement or sanction to ensure the accountability of corporations to society.[89]

Of course, the role of soft law should not be rashly dismissed due to its voluntarism or inadequate punishment for transgression. The rule of reputational capital may make up the missing link between voluntarism and accountability.[90] Market participants such as consumers, employees, and suppliers, as well as the far-reaching and decentralized modern media can all be perceived as enforcement agents for soft law. The cruel reality is, however, that quite a few corporations are non-consumer-oriented or have monopolistic powers, which implies the mechanism of reputation sanction/reward may not work well with respect to them. Even for those corporations that are subject to the rule of reputation and other public pressure, conventional product attributes, such as quality and value for

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87 THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 233-236 (Harvard Business School Press 1999); Thomas Donaldson, *"Ethical Blowback": The Missing Piece in the Corporate Governance Puzzle — The Risks to a Company which Fails to Understand and Respect Its Social Contract*, 7 CORP. GOVERNANCE 534, 536 (2007).

88 Similarly, it is argued that soft law could provide "official credibility and impetus" for CSR development. JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 70-71 (2006).

89 For example, it is argued voluntary rules that are not directly binding make it difficult for companies to comply with them. Birgitte Egelund Olsen & Karsten Engsig Sorensen, *Strengthening the Enforcement of CSR Guidelines: Finding a New Balance between Hard Law and Soft Law*, 41 LEGAL ISSUES OF ECON. INTEGRATION 9, 10 (2014).

90 In particular, social, environmental and ethical issues are now seen as key sources of reputation risk. *See* McBarnet, *supra* note 5, at 10-12.

money, remain far more important determinants of purchasing behavior.[91] The risk of opportunism cannot be ignored either.[92] As noted, it would not be unlikely for corporations to use CSR cosmetically to catch potential customers' eyes rather than genuinely engaging in CSR activities.

There are potentially four different types of firms we should take into account. The first group are those that know the law and are willing to comply with it; the second group are those that do not know the law but would like to be law-abiding; the third group are those that know the law and do not wish to comply with it; and the fourth group are those that do not know the law and do not wish to be law-abiding.[93] Corporations in the first group are the least concerning as they are exactly the conscientious businesses that would comply on intrinsic grounds. Non-binding soft law will also be effective for corporations in the second group. In this case, the educational purpose served by soft law is in line with Frederick's argument regarding social learning of the core ideas expressed by such law.[94] The limits of CSR rules in the form of soft law are, however, apparent when dealing with corporations in the third and fourth groups. Soft law's lack of coerciveness will not effectively ensure their accountability or prevent them from externalizing costs to society. This is problematic, as for some corporations, it may be perfectly acceptable to conduct unethical practices to maximize profits as long as the letter of the law is not breached.[95]

As a result, we see that the presence of hard law is essential, especially when the risks of opportunism are high and compliance is difficult to monitor.[96] The compliance literature also shows that sanctions are essential for corporations' willingness to comply.[97] The most radical form for adopting a hard-law approach is to legislate CSR and make it mandatory in order to compel corporations to act towards a more socially desirable end, especially for the third and fourth groups above. The assumption is that

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[91] *See* John Parkinson, *Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame*, 3 J. OF CORP. L. STUD. 3, 12 (2003).

[92] The question here is why there remains a large number of companies that are not engaging in CSR activities if it is economically rational to do so.

[93] *See, e.g.*, Robert Baldwin, *Why Rules Don't Work*, 53 MODERN L. REV. 321, 324 (1990). The author categorized firms into: *i*) well intentioned, well informed; *ii*) well-intentioned, ill informed; *iii*) ill-intentioned, ill-informed; and *iv*) problematic firms which vary in intention or degree of knowledge.

[94] Frederick, *supra* note 54, at 173.

[95] *See, e.g.*, Albert Z. Carr, *Is Business Bluffing Ethical?*, 46 HARV. BUS. REV. 143 (1968).

[96] In other words, the likelihood of optimism by firms would dramatically increase in competitive markets without credible sanctions. Thomas McInerney, *Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 186 (2007).

[97] IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 39 (1992).

mandatory CSR could more effectively secure desired behavior as enforceability is assured by legal sanctions and/or threats. In addition, other bodies of hard law could also be utilized to elevate the bottom lines for corporations, and mandatory CSR disclosure may further nudge corporations to be more socially responsible. The remaining part of this section critically explores these three different forms of hard-law approaches toward CSR.

*B. Legislating CSR*

The hard-law approach, in contrast to soft-law, is to change the voluntary character of CSR. Rather than preventing corporations from doing certain behaviors by focusing on negative duties, mandatory CSR laws are designed to promote more socially responsible behavior by setting positive legal obligations for corporations to meet. While quite a few countries have incorporated CSR duties into their national law, from the perspective of precision and sanction as previously discussed in the hard/soft law distinction, only the Mauritian and Indian approaches can be categorized as a *real* hard-law approach.

The common goal for both Mauritius and India is to spell out a certain percentage of profits corporations must spend on CSR activities to avoid formal sanctions for non-compliance. In Mauritius, CSR clauses were inserted into the *Income Tax Act* in 2009,[98] under which every corporation, subject to a few exceptions, shall in every year set up a CSR Fund equivalent to 2% of its book profit derived during the preceding year.[99] The fund should be used to implement CSR activities in accordance with its own CSR framework.[100] The *CSR Guidelines* further clarify certain types of activities, such as contribution for religious activities, contribution to trade unions, political parties, and staff welfare costs, that cannot be classified as eligible CSR activities.[101] Among other sanctions, corporations that fail to comply are subject to compulsory deregistration.

Perhaps more famously, India's *Companies Act, 2013* specifies the mandatory contribution of a percentage of corporate profits to CSR activities. According to Section 135, corporations in India having a net worth of 5 billion rupees (circa $78 million, £60 million) or more, or turnover of 10 billion rupees or more, or a net profit of 50 million rupees or more during any financial year shall constitute a CSR Committee of the Board and ensure the corporation spends, in every financial year, at least 2% of the average net profits of the corporation made during the three immediately preceding financial years in CSR activities. A range of

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[98] *See* FINANCE (MISCELLANEOUS PROVISIONS) ACT 2009 § 21(d) (Mauritius).

[99] Book profit has been replaced by chargeable income since 2012.

[100] INCOME TAX ACT 1995 § 50L (Mauritius).

[101] RENGINEE PILLAY, THE CHANGING NATURE OF CORPORATE SOCIAL RESPONSIBILITY 248 (2015).

recognized CSR activities, from eradicating extreme hunger and poverty to promoting gender equality and ensuring environmental sustainability, are provided in Schedule VII of the *Act*.[102] Non-compliance without a justifiable explanation will lead to fines up to 2.5 million rupees against corporations and/or responsible corporate officers. In addition, corporate officers who are in default could face imprisonment for a term up to three years.

Both countries' CSR requirements are precise in specifying what amounts to eligible CSR activities in the eyes of the law. The coerciveness is easy to identify. Penalty, deregistration, and imprisonment, among other sanctions, will be imposed on corporations and/or responsible persons in cases of non-compliance. The main advantage of this form of hard-law approach is to force all subjected corporations to adhere to the CSR requirements by overcoming the weakness of the non-binding soft law. In effect, after the mandatory CSR law, there were significant increases in CSR activities and CSR spending among the subjected firms.[103]

Nevertheless, for those corporations that see legal constraints as barriers to circumvent, it is possible for them to act in accordance with the law by spending the minimum percentage of profits on prescribed CSR programs, but pay little regard to the underlying purpose (and continue carrying out socially irresponsible behavior). For instance, they may use profits obtained in a socially irresponsible manner to engage in CSR. It is equally controversial regarding whether CSR spending is the best proxy for responsible behavior. As noted by Gopalan and Kamalnath, many meaningful activities such as reducing the price of cancer medication, use of sustainable technologies, and others are not counted as CSR under the India *Companies Act* due to the restrictive nature of the CSR provision.[104]

It is worth noting that while mandatory CSR laws as a hard-law approach are different from traditional hard law as the former focuses more on positive duties in order to directly promote good behavior, once the CSR

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[102] It includes, "(*i*) eradicating extreme hunger and poverty; (*ii*) promotion of education; (*iii*) promoting gender equality and empowering women; (*iv*) reducing child mortality and improving maternal health; (*v*) combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; (*vi*) ensuring environmental sustainability; (*vii*) employment enhancing vocational skills; (*viii*) social business projects; (*ix*) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and (*x*) such other matters as may be prescribed." Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

[103] *See, e.g.*, Dhammika Dharmapala & Vikramaditya S. Khanna, *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013*, 4 (Coase-Sandor Working Paper Series L. & Econ., Working Paper No.783, 2016).

[104] Sandeep Gopalan & Akshaya Kamalnath, *Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials*, 10 NW. J. L. & SOC. POL'Y. 34, 85-86 (2015).

spending, for example, becomes a mandatory legal requirement, technically speaking, it will form a new bottom line for corporations. Put differently, when spending two percent of net profits becomes the new bottom line for all of those subjected corporations under India's *Companies Act* to meet,[105] any individual corporation can do more but cannot spend less than this obligatory minimum. It is unclear about the effectiveness of such a new bottom line for eliciting more positive behavior or promoting higher standards, such as spending more on CSR or engaging in more costly CSR without proportional (reputational and/or economic) benefits. Moreover, as soon as this mandatory CSR spending is mandated by law, from a narrow interpretation, it will be more appropriate to categorize it into legal responsibility rather than social responsibility. Such obligatory duty, in other words, may no longer be treated as CSR initiatives, although this has no material effect on the intended outcome.[106]

Countries, such as China and Indonesia, that introduced CSR duties into their national law, can at best be perceived as a middle course between soft-law and hard-law approaches. This is due to the lack of precision (namely, clear guidance) or punitive mechanism for non-compliance. Consider China, for example. Although China incorporated CSR into company law as early as 2005, its CSR clause, i.e., art. 5, lacks detailed contents or explicit guidelines for corporate conduct, as well as sanctions for transgression.[107] The sanction element of the CSR provisions in the *Indonesian Company Law 2007* (No. 40) and *Indonesian Capital Investment Law 2007* (No. 25) are clearer, encompassing from limiting business activities (and/or investment facilities) to freezing or even closing the business activities (and/or investment facilities);[108] but it remains vague as to which activities amount to fulfilling the required CSR duties as the Indonesian Law itself does not define CSR activities, the means of implementation, or the like.[109] However, introducing CSR into corporate

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[105] Unless they have a legitimate reason. In practice, however, it is highly unlikely for corporations to repeat their reason in the following years, so they have to make the required contribution to CSR activities.

[106] However, it is important to note the subtle change of the definition of CSR. For example, consider the European Commission. It changed the definition of CSR from "social and environmental activities that companies adopt on a voluntary basis" to "the responsibility of enterprises for their impacts on society," which, as noted by Knudsen and Moon, provides room for mandatory regulation to be included in the CSR. JETTE STEEN KNUDSEN & JEREMY MOON, VISIBLE HANDS: GOVERNMENT REGULATION OF CORPORATE SOCIAL RESPONSIBILITY IN GLOBAL BUSINESS (2017).

[107] Art. 5 of COMPANY LAW OF THE PEOPLE'S REPUBLIC OF CHINA (2005 NO. 42) stipulates: "when engaging in business activities, a company shall abide by laws and administrative regulations, observe social morality and business ethics, act in good faith, accept supervision by the government and the public, and bear social responsibilities."

[108] *See, e.g.*, art. 34(1) of LAW OF THE REPUBLIC OF INDONESIA NO. 25/2007 CONCERNING CAPITAL INVESTMENT.

[109] These issues are intentionally left to local governments as each provisional government has authority to manage its own province as pursuant to the *Indonesian Laws on*

law statutes can be more than exhortatory or educational, which is important in itself. On the one hand, it could provide corporate boards legitimacy in considering non-shareholder interests,[110] and on the other hand, room for potential judiciary intervention in the future.

It should also be kept in mind that there are strong objections against mandatory CSR laws, particularly in the West. Besides the deregulation movement, to ward off more direct government intervention or regulations is often cited as one of the main explanations for corporations to voluntarily engage in CSR. While the existence of mandatory CSR laws is unquestionable, it is not the main purpose of this paper to propagandize them. However, the potential of hard law as complementary to soft law in regulating CSR domains should be rightfully acknowledged. As the cases in Mauritius and India, or the middle courses in China and Indonesia show, there is definitely room for mandatory laws to prompt CSR.

### *C. Laws on Non-Financial Bottom Lines*

Other than legislating CSR to directly mandate positive legal obligations, the second form of hard-law approach is through using other bodies of law to set or elevate the social and environmental bottom lines for corporations to deter corporate irresponsibility. This form is not unfamiliar at all. The above-mentioned consumer protection laws, employment laws, anti-discrimination laws, and environmental protection laws can all be categorized into this form. Simply speaking, these laws mandate that corporations not to do harm to society by defining the minimum standards for certain behavior.[111] In particular, when soft law cannot effectively control the irresponsible conduct of business, the role of hard law to use its coerciveness through legal sanctions becomes more salient.

For example, overseas corruption and using forced labor are two of the most visible forms of unacceptable corporate behavior today. First, corporations engaging in corruptive activities can gain a competitive advantage and secure certain favorable action by a foreign government, but unfortunately, there are few effective anti-corruption legal instruments in many emerging economies. Considering the negative impact of corruption on economic development and society,[112] even if the corporations engaging

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*Autonomy*. *See, e.g.*, Patricia Rinwigati Waagstein, *The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications*, 98 J. BUS. ETHICS 455, 461 (2011).

[110] *See* Jingchen Zhao, *Promoting More Socially Responsible Corporations Through a Corporate Law Regulatory Framework*, 37 LEGAL STUD. 103, 123 (2017).

[111] It is argued that CSR is mainly about how companies make profits rather than about how they give them away. *See* Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law and for Law* (U. Edinburgh Sch. L. Working Paper Series, No. 2009/03, 2009), http://ssrn.com/abstract=1369305. Therefore, it would be important to ensure companies could make their profits in a responsible manner by referencing the minimum standards.

[112] Indira Carr & Opi Outhwaite, *Controlling Corruption Through Corporate Social*

in such activities in order to maximize their earnings per share do not directly violate any local law in a given jurisdiction, they are far from socially responsible. Secondly, using forced labor is also socially irresponsible and has long been discouraged by social norms. Although it is well acknowledged that many corporations are already taking actions to promote ethical business practices and policies that protect workers from being abused and exploited in their organizations, forced or compulsory labor is still in use, particularly in global supply chains.

Hard law can be used as a tool to deter and control these socially irresponsible behaviors. This subsection chooses the *Bribery Act* (2010 c.23) and the *Modern Slavery Act* (2015 c.30) in the U.K. as two recent examples to illustrate the role of hard law in shaping CSR by combating overseas corruption and forced labor. To start with, due to the damages of corruption and the incompetence of self-regulation in this area, the *UK Bribery Act* was passed to help deal with international bribery and prevent transgressions. The *Act* applies not only to large multinational corporations but also to small and medium-sized enterprises ("SMEs").[113] It defines what amounts to corruptive activities and makes it clear that such activities are strictly prohibited. Prosecution and other criminal consequences will be imposed if corporations or responsible persons fail to comply.[114]

In addition to the person who is directly involved in the corruptive activities, the corporation will also be subject to prosecution if an associated person bribes another person intending to obtain or retain business or an advantage in the conduct of business for that corporation.[115] As a result, corporations will not only be deterred from proactively proceeding corruptive activities but also pressured to put in place adequate bribery prevention procedures to prevent associated persons from undertaking such conduct. In order to mitigate bribery risks, it is now common for corporations to proactively adopt *adequate procedures* as a full defense to a charge under Section 7 of the *Bribery Act*.[116] This could ultimately promote

*Responsibility and Corporate Governance: Theory and Practice*, 11 J. CORP. L. STUD. 299, 300 (2011).

[113] § 7(5) of the *Act* specifies relevant commercial organisation include any company incorporated under the law of any part of the U.K. and which carries on a business (whether there or elsewhere), or foreign company which carries on a business in any part of the U.K.

[114] For example, § 11 of the *Act* specifies maximum 10-year imprisonment or fine or both for an individual guilty of offence. In other words, great legal deterrence is used to decrease the number of non-compliance.

[115] Bribery Act 2010, § 7 (U.K.).

[116] For example, a 2015 survey commissioned by the U.K. Ministry of Justice and the Department for Business, Innovation and Skills, shows even for SMEs, a large number (42% of 500 SMEs surveyed) stated that they had already put bribery prevention procedures in place. *See* ROB WARREN, ALICE LARGE & MARK TWEDDLE, INSIGHT INTO AWARENESS AND IMPACT OF THE BRIBERY ACT 2010: AMONG SMALL AND MEDIUM SIZED ENTERPRISES (SMES) (2015), https://www.gov.uk/government/publications/impact-of-the-bribery-act-2010-on-smes. The impact on the larger firms is of course more salient.

a higher standard for the conduct of business by explicitly prohibiting this socially irresponsible behavior.

Thanks to globalization, outsourcing workforces to countries with cheap labor costs has become increasingly popular and easier. It may not necessarily be the corporations themselves using forced labor, but other businesses in their supply chains doing so. Instead of purely relying on the corporations' own initiative, the *UK Modern Slavery Act* was introduced in 2015 to make sure that those they do business with are not exploiting vulnerable people. In particular, Section 54 of the *Act*, the transparency in supply chains clause, requires businesses with a global turnover of £36 million or more and that supplies goods/services in the U.K. to produce and publish an annual slavery and trafficking statement.[117] These corporations have to disclose each year the actions they have taken to ensure that both their business and supply chains are slavery-free. Failure to comply with the requirement to publish slavery disclosures, among others, will lead to potentially unlimited fines.[118] Again, the coerciveness of hard law ensures adequate compliance, helping to mitigate the employment of forced labor across the supply chains.

There are many more regulatory initiatives to ensure corporations operate responsibly. One more recent example is the *EU Regulation 2017/821*,[119] which specifies supply chain due diligence obligations for importers of *tin, tantalum and tungsten, their ores, and gold* originating from conflict-affected and high-risk areas, where minerals are mined in conditions of armed conflict.[120] These so-called conflict minerals are sold or traded to finance armed groups and security forces, fuel forced labor, and other human rights abuses. More than merely encouraging corporations that trade minerals from conflict zones such as Democratic Republic of Congo and adjoining countries to be socially, economically and environmentally responsible, the *Regulation* is enacted to force the E.U.

[117] In accordance with § 54(2) of the *Act*, the Secretary of the State for the Home Department set the turnover threshold for companies to do the reporting every year after consultations. *See also* HOME OFFICE (U.K.), MODERN SLAVERY AND SUPPLY CHAINS GOVERNMENT RESPONSE 16 (2015).

[118] Meanwhile, a person guilty of the offence for forced or compulsory labor could face imprisonment for life. *See* § 5(1) of the *Act*. Moreover, the *Modern Slavery Act* has been used to prosecute 285 defendants and convict 38 offenders between 2015 and 2017; *see* SECRETARY OF STATE FOR THE HOME DEPARTMENT, INDEPENDENT REVIEW OF THE MODERN SLAVERY ACT: FINAL REPORT, 2019, HM 100, at 61 (U.K.).

[119] Regulation (EU) 2017/821 of The European Parliament and of the Council of 17 May 2017.

[120] According to art. 2(d) of the *Regulation*, supply chain due diligence is defined as "obligations of Union importers of tin, tantalum and tungsten, their ores, and gold in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high-risk areas to prevent or mitigate adverse impacts associated with their sourcing activities." http://data.europa.eu/eli/reg/2017/821/oj.

smelters and refiners of these minerals and metal to act responsibly by adhering to its rules and procedures. In order to comply with supply chain due diligence obligations and disclosure obligations, smelting and refining firms sourcing from the conflict-affected and high-risk areas are required to check that what they buy is sourced responsibly and does not contribute to conflict or other related illegal activities.[121] These corporations have to put in place systems and processes to make sure they are able to identify, manage, and report on risks in their supply chain based on *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.[122] Again, the minimum standard is elevated by hard law here to prevent potentially irresponsible behavior.

While it is perhaps too soon to know specifically how effective these hard-law approaches are to discourage corporate irresponsibility or stimulate actions towards a more socially desirable end, they have at least proved once again that it is not rare to adopt regulatory tools to promote CSR. Setting or elevating the minimum mandatory obligations of corporations to society and providing incentives/disincentives through the threat of liability can fill the governance void. As a result, regardless whether they act proactively or reactively, corporations have to change their original conduct of business to be less irresponsible. Though the mandatory minimum standards may account for only a small part of the total set of mechanisms to ensure socially responsible behavior, they are undoubtedly the core of the overall framework of control.

### *D. Mandatory CSR Disclosure*

The third form of the hard law approach is the mandatory disclosure of CSR-related matters. Unlike legally mandated financial reporting, non-financial reporting, which usually covers environmental, social, and governance information, has long been voluntary. In fact, as mentioned above, the market force on CSR will be less effective without this information on a transparent and unbiased basis. One way to ensure adequate CSR disclosure and overcome the low take-up of the voluntary reporting initiatives is to require corporations to disclose CSR-related information mandatorily.

In effect, an increasing number of countries have already mandated the disclosure of CSR-related information following the increased social pressure and demands for more transparency and accountability. France is the first country to mandate a triple bottom line (i.e., financial, environmental, and social) reporting for its largest corporations by Article 116 of *Nouvelles Régulations Economiques 2001*, a broad-ranging update

[121] *See* arts. 4 & 7 of the *Regulation.*

[122] This Regulation will come into full force on January 1, 2021, and detailed sanctions for non-compliance are left to individual member states to lay down.

of French corporate law.[123] The legal obligation for reporting social and environmental activities can be seen as a means of encouraging firms to promote CSR. Sufficiently detailed, precise, and comprehensive information regarding human resources, community involvement, and the environment are required to be disclosed in order to adhere to the mandatory requirement. For example, recruiting processes; use of subcontracting/outsourcing; rationales for recruitment; layoffs/redundancies; length of workday/work hours and their rationales; amount of overtime; efforts to mitigate effects of corporate restructuring; history of pay rates; health and safety conditions; social benefits; integration into the local community; contacts with NGOs, consumer groups, educational institutions, and impacted populations; consumption of water, energy, raw materials/natural resources; use of land; use of renewable energy; initiatives for energy efficiency; emissions of wastes into air, water, and land; emissions of odor and noise; and environmental management are required disclosures. In other words, it is difficult for corporations to do selective reporting under such a disclosure scheme.

This is followed by Denmark, where large businesses are required to report on CSR in their annual report by the *Act amending the Danish Financial Statement Act (Accounting for CSR in large businesses)* in 2008.[124] The law forces large corporations in Denmark meeting any two of the three criteria namely: (*i*) total assets/liabilities of EUR of 19.2 million, (*ii*) net revenue of EUR of 38.3 million, (*iii*) an average of 250 full-time employees, to account for their work on CSR including their CSR policies and how the corporation translates its CSR policies into action. From 2013, further requirements to report policies regarding respecting human rights and reducing climate impact were added. Similarly, in the U.K., as discussed in the preceding section, directors of the board are now under a duty to produce a *strategic report*. The mandatory disclosure is required to include information relating to the environment and employees. Further information regarding social, community, and human rights issues, as well as any policies of the corporation in relation to these matters and the effectiveness of those policies, are required to be disclosed for the listed corporations. Moreover, in 2014, *Directive 2014/95/EU* laid down the rules on disclosure of non-financial and diversity information by large public-interest companies with more than 500 employees across the E.U.[125] Since 2018, these large companies are required to include information in relation

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[123] Mary L. Egan, Fabrice Mauleon, Dominique Wolff & Marc Bendick Jr., *France's Mandatory "Triple Bottom Line" Reporting: Promoting Sustainable Development Through Informational Regulation*, 5 INT'L J. ENV'T, CULTURAL, ECON. AND SOC. SUSTAINABILITY 27, 34 (2009).

[124] Danish Act No. 1403 of 27 December 2008.

[125] It covers approximately 6,000 large companies and groups affected across the E.U., mainly including listed companies, banks, insurance companies, and other companies designated by national authorities as public-interest entities.

to environmental protection; social responsibility and treatment of employees; respect for human rights; anti-corruption and bribery; and diversity on corporate boards in their annual reports.[126] And many more countries have mandated CSR disclosure through their stock exchange's listing rules, such as China (Hong Kong Stock Exchange), Singapore (Singapore Stock Exchange), South Africa (Johannesburg Stock Exchange), and Malaysia (Bursa Malaysia).[127]

Contrary to mandatory CSR laws which prescribe a change in the underlying behavior and force corporations to engage in CSR activities directly, mandatory CSR disclosure is mainly about disclosing corporations' CSR policies and activities, if any. The problem is that corporations may choose not to work on CSR and thereby disclose that they have not engaged in any CSR-related activity, which is lawfully allowed in Denmark, for example. The mandatory CSR disclosure is not to mandate corporations to adopt CSR policies or to engage in CSR activities. Such a duty is discharged as long as corporations honestly disclose any CSR-related information, even if this means no CSR activities at all.

However, a clearly defined mandatory CSR reporting framework would at least prevent corporations from providing selective information that concentrates on positive aspects. Apart from stimulating and strengthening the public pressure on corporations to improve their social and environmental performance, the so-called greenwashing or window-dressing risk can also be mitigated. This is because customers and other members of society can more readily assess and compare corporate social performance based on the increased transparency and comprehensiveness of the information disclosed. The mandatory disclosure could also help establish an atmosphere allowing businesses to pay more attention to their impact on the environment, society, and others. After establishing such a reporting framework, directors and managers have better information about the impacts of their corporate activities, and might, of their own accord, adopt higher standards.[128]

From a regulatory perspective, it will certainly be more effective to combine mandatory disclosure with other forms of the hard-law approach like mandatory CSR duties, as the disclosures should make it easier to assess whether such duties are fulfilled. The transparency and comprehensiveness provided by mandatory disclosures could help

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[126] EU Directive 2014/95/EU on Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, available at <http://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:32014L0095> (last accessed Nov. 11, 2019).

[127] *See, e.g.*, Felicia H. M. Liu, David Demeritt & Samuel Tang, *Accounting for Sustainability in Asia: Stock Market Regulation and Reporting in Hong Kong and Singapore*, 95 ECON. GEOGRAPHY 362, 365-366 (2019).

[128] *See* John Parkinson, *Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame*, 3 J. CORP. L. STUD. 3, 4 (2003).

monitoring and enforcement of CSR-related duties. In fact, other forms of the hard-law approach discussed above often rely upon disclosure to ensure compliance such as the mandatory CSR spending in India and the anti-slavery duty in the U.K. Therefore, mandatory CSR disclosure can be either used independently or together with other hard-law approaches.

## V. RE-THINKING THE RATIONALE FOR CONTEMPORARY CSR

When SVM is perceived as a hard-law constraint, it is hardly surprising to see that all corporate activities are pressured to be in line with it. Premised on the principle of shareholder primacy, contemporary CSR is not aimed at unsettling the mainstream view that the company is private and a shareholder-oriented institution.[129] Thus, contemporary CSR is ameliorative in nature, and its main objective is to "temper the effects of the increasingly ruthless corporate pursuit of 'shareholder value,'" without challenging or unsettling the shareholder primacy principle.[130] Although corporate directors can engage in CSR beyond contractual or legal requirements, such as installing an unmandated pollution control device to mitigate some of their company's negative externalities, they have to justify how this extra spending can be aligned with maximizing residual profits of the corporation under SVM. In other words, they must align their social interests with shareholder interests. This is also why managers have an overall tendency to interpret CSR in a manner consistent with SVM.[131]

### *A. Business Case for CSR*

The business case reasoning is perhaps a perfect reflection of such alignment. By providing corporations with an economic rationale,[132] the business case reasoning aims to justify CSR from its instrumental function to increase corporate residual profits and shareholder value. Put differently, in order to comply with shareholder primacy or SVM as a hard-law constraint, CSR has been endorsed and promoted on the basis of its positive correlation with enhancing long-term shareholder economic gain.

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[129] Paddy Ireland & Renginee G. Pillay, *Corporate Social Responsibility in a Neoliberal Age*, CORP. SOC. RESP. & REGULATORY GOVERNANCE 77, 94 (Peter Utting & Jose Carlos Marques eds., 2010).

[130] *Id*. at 78.

[131] *See, e.g.*, Brendan O'Dwyer, *Managerial Perceptions of Corporate Social Disclosure: An Irish Story*, 15 ACCT., AUDITING & ACCOUNTABILITY J. 406, 419 (2002); Christopher Marquis & Cuili Qian, *Corporate Social Responsibility Reporting in China: Symbol or Substance?*, 25 ORG. SCI. 127, 131 (2014). Or considering the economic responsibility to pursue profitability is more important than responsibility relating to environment, social, and other issues. *See, e.g.*, Lei Wang & Heikki Juslin, *The Impact of Chinese Culture on Corporate Social Responsibility: The Harmony Approach*, 88 J. BUS. ETHICS 433, 434 (2009).

[132] Shelley L. Brickson, *Organizational Identity Orientation: The Genesis of the Role of the Firm and Distinct Forms of Social Value*, 32 ACAD. MGMT. REV. 864, 864 (2007).

The focus on CSR's organizational-level effect on profits rather than its macro-social effects causes the normative orientation of the research to be overlooked. Emphases are disproportionately placed on the correlation between CSR and corporate financial performance.[133] Despite a significant body of empirical studies attempting to find a conclusive answer, results on the relationship between CSR and corporate financial performance are far from consistent. Existing research shows a very mixed picture; some claim the relation between the two are positive,[134] while others claim it to be negative.[135] Apart from this weakness, the underlying question is whether firms should engage in CSR if it is to their financial detriment. Many fear that the pressure to improve social performance is outweighed if engaging in CSR clashes with SVM.[136] Even many expenditures may redound to the long-term benefit one way or another; the dilemma is inevitable, particularly in the context of hostile takeover and change of corporate control.[137]

The essence of business case reasoning remains enlightened self-interest and emphasizes what businesses get out of CSR or how they can

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[133] *See* David J. Vogel, *Is There a Market for Virtue? The Business Case for Corporate Social Responsibility*, 47 CAL. MGMT. REV. 19, 19-45 (2005); Michael L. Barnett, *Stakeholder Influence Capacity and the Variability of Financial Returns to Corporate Social Responsibility*, 32 ACAD. MGMT. REV. 794, 794-816 (2007); Min-Dong P. Lee, *Review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead*, 10 INT'L J. MGMT. REV. 53, 53-73 (2008).

[134] *See, e.g.*, Sandra A. Waddock & Samuel B. Graves, *The Corporate Social Performance-Financial Performance Link*, 18 STRATEGIC MGMT. J. 303, 314 (1997); Marc Orlitzky, Frank L. Schmidt & Sara L. Rynes, *Corporate Social and Financial Performance: A Meta-analysis*, 24 ORG. STUD. 403, 403 (2003).

[135] *See, e.g.*, Joshua D. Margolis & James P. Walsh, *Misery Loves Companies: Social Initiatives by Business*, 48 ADMIN. SCI. Q. 268, 274 (2003); Peter Wright & Stephen P. Ferris, *Agency Conflict and Corporate Strategy: The Effect of Divestment on Corporate Value*, 18 STRATEGIC MGMT. J. 77, 77. (1997). Moreover, the inconsistent evidence may even imply that no correlation exists between CSR and corporate financial performance at all. *See, e.g.*, Abigail McWilliams & Donald Siegel, *Corporate Social Responsibility: A Theory of the Firm Perspective*, 26 ACAD. MGMT. REV. 117, 117-18 (2001); Abigail McWilliams & Donald Siegel, *Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?*, 21 STRATEGIC MGMT. J. 603, 603 (2000). The mixed picture is not difficult to understand when we come back to the real business world. If engaging in CSR could guarantee better corporate performance, why do many corporations remain unwilling to do it?

[136] Carroll and Shabana distinguish a broad interpretation from a narrow interpretation regarding the business case for CSR, and they hope to utilize such a broad view to increase the acceptance of the business case for CSR even when only an indirect or unclear link between CSR and corporate financial performance exists. The question, however, remains even adopting their broad view. Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L. J. MGMT. REV. 85, 93 (2010).

[137] *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

tangibly benefit from engaging in CSR.[138] This reflects a fundamental distinction between SVM and CSR, namely whether the ultimate goal is for shareholders only or whether CSR is also in shareholders' interests. If engaging in CSR arises from a profit motive, then undercutting CSR for ultimately higher corporate financial performance and shareholder gain becomes justifiable. In other words, when seeing CSR activities and initiatives as an investment, a positive relationship must be established in order to justify the so-called business case.

*B. The Danger*

The real danger of aligning CSR with SVM is to render CSR a mere instrument to further shareholder value, which tends to overlook its intrinsic, normative value. Relying upon a business case to justify the do-good behavior may, in other words, lead to confusion between means and end, particularly when the business case weakens or disappears.[139] Moreover, contemporary CSR, which is ameliorative in nature, always tends to downplay the irreconcilability of the interests between shareholders and other groups. However, sometimes the clash of interests is inevitable, and if the business case is the guiding star under such a context, then the choice may be pursuing the immediate and perhaps lucrative business opportunities and comprising the CSR standards.[140]

Indeed, activities only with profit-maximizing motivation should not be defined as CSR.[141] As pointed out by Walters, social responsibility refers to corporate goals, not corporate strategies — to ends, not means.[142] The business case does, however, overemphasize the instrumentality and treat CSR as a means, not an end. The impact of social performance on financial performance will then be the limit of their interest in social performance.[143]

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[138] There are numerous studies searching the benefits of engaging in CSR, and these benefits can be summarized into: (*i*) creating positive moral capital by increasing employees' moral, productivity, and retention; (*ii*) creating public goodwill which may provide a form of protection or insurance to shareholder wealth; (*iii*) developing inimitable resources from the resource-based view; (*iv*) lowering transaction cost by increasing companies' trustworthiness. Paul K. Shum & Sharon L. Yam, *Ethics and Law: Guiding the Invisible Hand to Correct Corporate Social Responsibility Externalities*, 98 J. BUS. ETHICS 549, 549-50 (2011).

[139] In other words, social and environmental performance are not seen as an end but as a means to increase corporate profits, for instance, through increased competitive advantage.

[140] The question is: if improving corporate social performance caused financial detriment, is there any incentive for companies to engage in CSR under the conventional wisdom?

[141] *See* Kenneth J. Arrow, *Social Responsibility and Economic Efficiency*, 21 PUB. POL'Y. 26, 27 (1973); Jerry L. Mashaw, *Corporate Social Responsibility: Comments on the Legal and Economic Context of a Continuing Debate*, 3 YALE L. & POL'Y. REV. 114, 115 (1984).

[142] Kenneth D. Walters, *Corporate Social Responsibility and Political Ideology*, 19 CAL. MGMT. REV. 40, 41 (1977).

[143] Another related issue is about publicizing CSR activities for achieving the intended

Overcoming the stereotype that SVM is a hard-law constraint, however, allows us to reconsider the necessity of so-called business reasoning. Advantages brought by increased efficiency can be diminished by negative externalities and unchecked social costs caused by pursuing SVM. The narrowly defined efficiency makes all benefits to society or stakeholders other than shareholders as costs. But our world cannot be just about pecuniary outcome or efficiency. Privatizing interest at the expense of the larger good is not consistent with fundamental human values, which should be furthered and enhanced by corporations, in addition to their function as wealth generators. CSR must reflect responsibility for the wider societal good[144] and further humanitarian and other altruistic objectives, highlighted in the *Burwell v. Hobby Lobby* case in 2014, which is fundamentally different from profit-maximizing behavior. Hence, CSR should be an end rather than a means.

Moreover, if corporate directors no longer view SVM as a hard-law constraint, they will be free from the pressure to maximize shareholder value. It will be more likely that these directors find a better way to serve the best interest of the company and society as a whole, especially considering that SVM is not the best means to maximize social welfare, due to the collapse of the residual claimant argument.[145] While public pressure and market forces could be good reasons for engaging in CSR, the significant impact of corporations on society and the environment are more fundamental to the call for corporate accountability. When pressed to choose between financial goals and societal goals, a more integrated and balanced approach must be adopted. It should become possible to expend corporate resources for socially beneficial purposes without any profit motive.

Apart from the normative case for CSR, robust regulatory regimes provide further grounds for deterring undesired behavior while securing desired behavior. For example, when CSR is required by hard law, engaging in CSR will become the starting point. The hard versus soft law lens used in this paper could also allow researchers to move away from aligning CSR with SVM and provide a new battleground for future CSR debate and research.

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outcome such as increasing reputation and goodwill. However, it would not be impossible for a corporation to emphasize an action or product in advertising instead of disclosing the total effect that a corporation has on the environment. For example, a corporation that fails to deal with its pollution performance may choose to only provide information on the positive aspects of its social and environmental performance such as involvement with environmental charities without mentioning the pollution at all.

[144] Dirk Matten & Jeremy Moon, Implicit *and* Explicit *CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility*, 33 ACAD. MGMT. REV. 404, 405 (2008).

[145] *See supra* Section II.

## VI. LIMITATION OF HARD-LAW APPROACH AND IMPLICATION FOR FUTURE RESEARCH

As is well-established, one size does not fit all. While there are many successful cases to introduce mandatory CSR, there are also unsuccessful ones. For example, introduced in 2007, Nigeria's *Corporate Social Responsibility Bill*,[146] which sought to establish a CSR commission "to collect a compulsory 3.5 percent CSR spend from corporations" on cultural and educational activities. Similar to the Indonesian case, where business communities fiercely opposed the introduction of a mandatory CSR provision by citing its negative effects on corporate costs, this Nigerian *Bill* also faced formidable opposition.[147] Not as lucky as Article 74 of the *Indonesian Company law*, which was finally passed in 2007 after narrowing down the scope from all companies to just companies that have an impact on natural resources, the proposed Nigerian *Bill* was never passed in the Nigerian National Assembly.

Mandatory CSR that compels corporations to spend a percentage of corporate profits for CSR initiatives and programs is perceived as another form of corporate tax. Opponents of mandatory CSR laws find that mandatory CSR spending is meant to lessen the government's responsibility to the social welfare or shift the government's job to corporations. Worse, forcing a corporation to tackle tasks beyond its specialization will cause damage to itself as well as society.[148] It is believed that corporations are better placed to decide where to spend the CSR funds and use them in a more effective way than the government.[149]

Although we have demonstrated both the possibility and necessity to adopt hard-law approaches on regulating and promoting CSR beyond strengthening external market pressure on corporations to improve their social performance, this paper is by no means proposing to replace the soft-law approach with the hard-law approach altogether.[150] The benefits of the

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[146] A BILL FOR AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF THE CORPORATE SOCIAL RESPONSIBILITY COMMISSION (2007 No. C 1241).

[147] Nojeem Amodu, *Regulation and Enforcement of Corporate Social Responsibility in Corporate Nigeria*, 61 J. AFRICAN L. 105, 113 (2017).

[148] *See, e.g.*, PETER F. DRUCKER, POST-CAPITALIST SOCIETY (Butterworth-Heinemann 1st ed. 1993).

[149] A further subtle distinction between the Nigerian approach and Mauritian and Indian approach is how to spend corporate revenue on CSR activities. While the *Nigerian Bill* proposed to establish a public CSR commission to regulate corporations' CSR activities, the Mauritian and Indian approach allows more room for corporations to decide their own CSR activities rather than solely relying on the external regulator. External regulators normally have insufficient knowledge of internal working of individual corporations, let alone to use the CSR activities to build competitive advantage. *See* Michael E. Porter & Mark R. Kramer, *The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78, 78 (2006); JANET DINE, THE GOVERNANCE OF CORPORATE GROUPS (2000).

[150] Just as only relying upon the soft law approach is problematic, solely relying upon the hard law approach would be equally problematic.

soft-law approach and disadvantages of the hard-law approach, as discussed above, shall be rightfully acknowledged. In addition to the increased enforceability brought by hard law, the compliance costs (e.g., minimum spending on CSR, reporting costs, etc.) and limitations (e.g., under-inclusive and over-inclusive regulations) cannot be ignored. Thus, hard law should supplement, not supplant, soft law.[151] With the credible sanctions provided by hard law, i.e., the coercive power in general, voluntary compliance for soft law may also be commensurately strengthened.

Interestingly, the case examples analyzed in Section IV show that developing countries are more likely to adopt the more radical form of the hard-law approach, namely legislating CSR laws, while Western developed countries prefer using other bodies of law as side-constraints or imposing mandatory disclosure to push corporations to act toward more socially desirable ends. This may partly be related to the fact that developed countries with developed market mechanisms are able to enforce soft-law constraints more easily compared to developing countries without such mature market mechanisms.[152] In other words, when market forces cannot effectively discipline corporate behavior, governmental and regulatory forces may then play a larger role and become the dominant drive for CSR development. Hence, future empirical research may study: (*i*) which form of the hard-law approach is most effective in relation to promoting socially responsible behavior; (*ii*) which form of the hard-law approach fits for a particular type of country or institutional framework, and (*iii*) how to best balance the hard-law and soft-law approaches in achieving the optimal effectiveness and efficiency.

However, any empirical work on examining the effectiveness of either the hard-law or mixed approaches may find difficulties in choosing a means of measurement. It seems we still tend to keep using corporate financial performance as the only proxy for effectiveness. For example, Schwartz and Carroll still suggest using long-term financial performance to verify their new *Value-Balance-Accountability* model empirically.[153] But one of the central arguments of this paper is about the irreconcilable aspect of the relation between CSR and SVM. As a consequence, if we continue to use corporate performance or share prices as the proxy to evaluate the effectiveness of the hard-law approach, then we may again fall into the old

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[151] By the same token, while the soft law approach is valuable to promote more responsible corporate behavior, it can hardly work alone without any support from the hard law approach.

[152] *See, e.g.*, Min Yan, *The Role of Government and Regulation in Corporate Social Responsibility — The Case of China*, Queen Mary Sch. of L. Legal Studies Research Paper No. 321/2019, 28-29 (2019), http://ssrn.com/abstract=3462622.

[153] Mark S. Schwartz & Archie B. Carroll, *Integrating and Unifying Competing and Complimentary Frameworks: The Search for a Common Core in the Business and Society Field*, 47 BUS. & SOC'Y 148, 173 (2008).

deadlock.[154] Corporations, and their directors, must deal with contradictory yet interrelated demands and should no longer avoid tension by a lopsided focus on profitability. A more inclusive evaluation system (e.g., encompassing employment rate, success on product markets, corporate growth, etc.) rather than a simplified economic model needs to be designed for any credible, empirical surveys of this type in the future.

## VII. CONCLUSION

Just as corporations' social and public functions have faded since the late 19th century,[155] the function of today's corporations is changing again. At the very least, the board of directors should be advised that there is no hard law forcing them to focus solely on shareholder interests, but instead, even in the United States and the United Kingdom, with strong shareholder primacy cultures, they are not only allowed, but in fact required by law to run their corporations for both shareholders and stakeholders.

More importantly, CSR must not be merely ameliorative but should stand to challenge shareholder primacy. As we currently see in India and Mauritius, perhaps in the future engaging in CSR initiatives or spending on CSR activities will be the new bottom lines for corporations. Apart from mandatory CSR laws, other bodies of law can also be employed to elevate the bottom lines for corporate behavior continuously. Mandatory CSR disclosure as another viable way could be used either independently or together with the other approaches to help nudge corporations into behaving more socially responsibly. There are, of course, legitimate reasons to keep encouraging corporations to take their own initiatives to act more responsibly through their discretionary business practices. It is, however, time for us to squarely face the regulatory power in the hard law and flexibility in the soft law to explore the best approach to promote CSR and constrain social irresponsibility.

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[154] For example, by using the conventional corporate accounting practice at present, only the value provided to shareholders accounts for corporate value, whilst value to other stakeholders is regarded as expenditure or cost to the firm. Nevertheless, as repeatedly emphasized in Sections II and III, shareholder interests are far from the only positive value to the corporation, let alone to society as a whole.

[155] *See* Akant K. Sundaram & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 ORG. SCI. 350, 351 (2004).