WHY CSR SHOULD BE A LEGAL DUTY AND NOT FRAMED AS A SOCIAL OR ETHICAL ONE?

Alexandra Costa Pires
University of Milan

1.1 Definition of CSR and its relation with sustainable development

The known Brundtland Report ("Our Commom Future") disseminated the term sustainable development and provided its classic definition: "development which meets the needs of the present without compromising the ability of future generations to meet their own needs."

But as Sachs (2005, p. 5) points out the "intergenerational" concept of sustainable development has evolved, focusing less on intergenerational needs and more on the holistic approach linking economic development, social inclusion and environmental sustainability.

Indeed, sustainable development is currently linked to the idea of balance among these three pillars: economic growth, environmental preservation and social issues.

But it is important to put such balance in perspective; it is certain that the measures to achieve sustainable development have financial, geographical and time constrains, thus it seems reasonable to prioritize some practices that may not address all the pillars at the same time. In the end, it is less a question of balance, but rather a question of public will, priority needs and capabilities of each State and other stakeholders in this path. In other words, it does not seem possible to give the same weight for all of the three pillars by all the States all the time. More than balance, the concept of sustainable development involves priorities depending on a specific reality and overcoming limitations through new ideas and technologies with the commitment of all stakeholders, whose aim shall be the pursuance of economic development without the violation of human rights and degradation of the environment.

Virgine Barral complements the idea saying (2012, p. 383): "*To be able to function, the contents of sustainable development must evolve, the specificities of each situation and each set of circumstances must be taken into account, and this inherent malleability is not an obstacle to sustainable development's legal classification*".

Since 2000, the United Nations (UN) have been establishing some goals to guide the pursuance of sustainable development. It began with the eight Millennium

Development Goals[1] (MDGs), which were reviewed by the UN Summit of September 2015, that has set forth a new sustainability agenda of seventeen goals (SDGs)[2]. Among these goals, it is possible to verify that several of them, notably, inclusive growth, social equity and environmental protection are straightly related to or dependent on a new business attitude. The SDGs are ambitious and require coordinated action from the public and private sectors if they are to be achieved.

As Sjåfjell emphasize (2011, Regulating Companies as if the World Matters…, p. 117): "*Surely it is not companies, but policymakers and lawmakers, our parliaments and governments, who should do what is necessary to lead us into sustainable development. The responsibility of the state is incontestable. However, a part of that responsibility is considering the role of companies. The great significance of the function of companies within the global economy and the vast impact that the operations of companies today have, on an aggregated level, on society in general and on the biosphere and the atmosphere, means that a critical analysis of the purpose of companies and the regulatory framework within which they operate is crucial to a deeper understanding of the correlation between society and sustainable development. We cannot hope to achieve overarching societal goals without companies contributing to them*".

While this author emphasized the leading role of the State, despite of the essential contribution from companies, Porter & Kramer in the article published in the Harvard Business Review 2011 (p. 63) stated that "*companies should take the lead in bringing business and society back together*".

In view of the above, corporate social responsibility (CSR) could be defined as the translation of sustainable development in the private sector leading to the accountability of companies for human rights and environmental violations when performing their activities or pursuing their economic growth.

It seems acceptable to understand CSR as the application of the three pillars of sustainable development in the business management. CSR should aim at achieving sustainable development by companies by taking into consideration the social and environmental aspects in all business decisions.

Sacconi (2004, p. 11) defines CSR as an extended form of governance: it extends the concept of fiduciary duty from a mono-stakeholder setting (where the sole stakeholder relevant to identification of fiduciary duties is the owner of the firm) to a multi-stakeholder one in which the firm owes fiduciary duties to its stakeholders (the owners included).

This definition as fiduciary duties is consistent with the theory the author adopts to explain the purpose of corporate law. The answer to the question why do companies exist influences the conceptions and/or embracement of CSR, including the perceptions whether it shall be mandatory or voluntary.

1.2 The theories explaining the purpose of corporate law

Sacconi adopts the neo-institutional theory of the firm, according to which the firm emerges as an institutional form of unified transactions to remedy imperfections in the contracts that regulate the relations among the subjects who have made

[1] More information at http://www.un.org/millenniumgoals/.
[2] More information at https://sustainabledevelopment.un.org/post2015/summit.

investments in this coalition (investments such as assets, capital, labor, instrumental goods, consumption decisions).

The author agrees with the theory that defines companies as the result of the incompleteness of contracts pioneered by Sanford J. Grossman, Oliver D. Hart, and John H. Moore. A contract is incomplete, if it does not provide provisions that are conditional on some set of events (unforeseen).

Due to the incompleteness of contracts, someone has to make choices over events that cannot be contracted *ex ante*. So, the discretion to make decisions has to be granted to someone (authority), who will take such decisions (residual control rights). The residual control rights are allocated to the party who has made the most important investment. But this authority will only be accepted, if he/she takes into consideration the investments made by the other parties (the non-controlling stakeholders), avoiding opportunistic behaviors or investments appropriation.

Sacconi defends that the social contract is the device grounding CSR. Social contract shall be understood as the normative principle that entails agreement on a solution for cooperation and coordination problems, giving rise to a system of beliefs and mutual expectations about reciprocal behavior which induces convergence to an equilibrium. It provides a solution to compliance problems in situations where there is a divorce between individual self-interested rationality and social optimally. In other words, social contract justifies or explains the extension of fiduciary duties to all stakeholders, because it represents what they could accept voluntarily by a hypothetical fair agreement.

The social contract is influenced by the theory of the sense of justice developed by John Rawls, that could be defined as the desire to act upon general and abstract principles of justice as such that do not depend on other people's approval.

There are other theories that defend or not the embracement of CSR depending on the way the purpose of a corporation is understood.

In addition to the institutional view of companies and CSR as a social norm, there is the "team production theory" built by Margaret M. Blair and Lynn A. Sout (1999), according to which the corporations are not a bundle of assets collectively owned by shareholders who hire directors to manage those assets on their behalf, but a bundle of specialized investments from different people that give up control rights to a third party, an outsider (board), whose function is to allocate the resources in an optimal level, generating the higher possible output from the production. The corporate assets belong to the corporation itself and the control over those assets should be performed by an internal and independent hierarch whose job is to coordinate the activities of the team members, allocate the resulting production, and mediate the disputes among team members over that allocation, avoiding governance costs, coordination problems and free-riding costs. This hierarch is the board of directors, the ones responsible for making decisions on behalf of the corporation and resolving the conflicts between stakeholders. According to this theory, CSR can be seen as the value or fairness principle directing the board members' discretion in exercising their mediating function.

Lawrence E. Michtell (2007) embraces the stakeholder theory and says that the companies´ social responsibility is so important that it needs to be treated as something central to the corporation's business, not as something the corporation does in addition to its business. In order to do so, companies should revisit stock market short-termism and managers should have a space free from pressures of the stock market price

punishment for missed earnings and cease to externalize the costs of short-term performance on the rest of society.

Michael C. Jensen (2001) criticizes the stakeholder theory stating that if managers have to observe all the stakeholders' interests in the company's decision-making process they will not have a proper guidance, and therefore will be lost. Also, he emphasizes that such theory does not explain how the conflicts will be balanced. The author proposes a theory called "enlighted shareholders", according to it, value maximization should be the main purpose of the corporation, but in the process of value creation, management should make tradeoffs among competing constituencies, which would allow for principled decision making independent of the personal preferences of managers and directors. He defends that the conflict of interests of the different constituencies tends to disappear if the company adopts a medium-long term perspective to create value. The assumption is that all stakeholders could benefit from the creation of more wealth by a company.

According to our view, the principle of sustainable development demands a new reading of corporate law, and therefore the embracement of social responsible practices by companies.

Even though there are still controversies, the view that sustainable development is a general principle of law seems the more adequate one and it is the starting point of what we defend.

The concept of sustainable development has been originally conceptualized within the structure of international environmental law (Fitzmaurice, 2010). However, it is not confined anymore to the field of environmental protection and the international level.

Christina Voigt emphasizes that sustainable development is neither fully international, nor based on domestic law only, but that is both and shall be understood as a general principle of law[3]. In her words: "*As a general principle, sustainable development – in particular its key aspect of integration – plays an important role in the application and enforcement of international and national law, especially in the solution of legal disputes. General principles play a normative role not only with regard to determining state conduct or the design of a policy measure, guiding legislative or regulatory action. Principles also have a normative function if they are perceived as influencing directly or indirectly the outcome of judicial decisions* (…)"[4].

From the moment that sustainable development is provided with a legal nature and is accepted as a principle of law, it should act as a parameter to States and also private persons in their activities. As a general principle of law, it imposes a different reading of the corporate objective, and therefore of corporate law. Indeed, the legal nature of sustainable development as a general principle of law shall transcend the

[3] In Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law (2009), the author rejects the "minimalist view" that general principles are principles of law recognized by civilized nations and common to most legal systems, being derived from municipal law only; she argues that general principles encompass principles induced from a wider variety of sources and that a legal norm becomes a general principle if a normative statement can be shown to be part of the 'common conscience' and as being based on an *opinion juris communis*. This brings the general principles of law close to the concept of instant customary law – customary law that is emerging without State practice but instantly by the articulation of the belief that a particular norm constitutes customary international law (see chapter 6).

[4] In Rule of Law for Nature. New Dimensions and Ideas in Environmental Law (2013), p. 155.

classifications in international or national systems and contributes to a new legal framework that shall hit inside the companies. After all, coherence in a legal system is paramount, and it would be nonsense the possibility of having States signing international commitments towards sustainability while letting companies located within their borders to adopt sustainable practices if, when and how they want.

It must be said that in several legal systems, it is already possible to find legislation regarding environmental and labor rights imposing some standards or limitations to be observed by companies in order to not let them harm such rights (Ryznar and Woody, 2014). However, it is not easy to find such limitations within corporate law, i.e., some standards or values to be pursued by the companies towards a more sustainable fashion of doing business. And in view of the current status of affairs that show constant violations of the environment and human rights, it seems that such specific and fragmented laws are not enough to protect those pillars.

Indeed, the existence of different laws, in different fields can open space for legal confusedness and uncertainty, making it inefficient to protect what it aims at.

It seems that corporate law has to evolve and address the topic in order to provide a more uniform and efficient framework to guide the ones in charge of economic activities. If the standards, limitations and procedures could be found in corporate law, the embracement of CSR would be smoothly, avoiding all the problems related to the fragmentation of law[5].

1.3 The reasons why CSR has to be a legal duty and not related to ethics

According to Sacconi's point of view (2004, Corporate Social Responsibility (CSR) as a Model of "Extended Corporate Governance"…), CSR may result from as an endogenously selected equilibrium institution, which starting point is the shared acceptance of a mental model of stakeholders' fair treatment, which is therefore self-sustaining.

The criterion able to identify the balance between the possible conflictual interests among the different stakeholders to maintain their cooperation with the firm is the social contract, already referred, that explain why agents join in a firm.

Ultimately, the social contract aims at reducing the costs of the hierarchical governance structure of the firm stemmed from the delegated authority, which is accepted provided that it observes fiduciary duties towards all the stakeholders.

The author highlights that this self-regulation mechanism is voluntary, but not discretionary, given that it represents the voluntariness presented in the embracement by the stakeholders of an explicitly *ex ante* announced standard for the firm´s management that will observe the fiduciary duties towards its stakeholders, and this observance shall occur even in unexpected situations.

---

[5] In this regard, it is interesting to read the conclusions of "The Sustainable Companies Project", drafted by the University of Olso. The aim of the Sustainable Companies Project has been to find out how to integrate environmental concerns better into the decision-making in companies. The fundamental assumption is that traditional external regulation of companies, e.g., through environmental law, is not sufficient. Their hypothesis, confirmed through research, is that environmental sustainability in the operation of companies cannot be effectively achieved unless the objective is properly integrated into company law, and thereby into the internal workings of the company. Check at http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/. Accessed on 05/17/2017.

This endogenous believe and motivations become the essential forces diving the implementation of the CSR model of multi-stakeholders' governance and explain why CSR may primarily rest on soft laws, social standards, codes of ethics and voluntary adoption of contracts (all of which self-sustaining norms).

As Sacconi (2012) summarized, the failure of stakeholders theory can be that it does not address the problem from the point of view of designing the institutional governance structure of the firm, i.e., the complex set of rights which establish the legitimate claims to be balanced by the managers in their decision-making processes, which the author believes can be resolved by the social contract.

Based on his view, Sacconi understands that a reform in corporate law is not necessary, left out the possibility to have impartial representatives of the stakeholders among the independent members of supervisory committees, the obligation to adopt social accounting and reporting rules, and the obligation to safeguard the trust and reputation of the firm (behavior negligent of the firm´s reputation among its stakeholders would be in breach of the principle of good management).

We dare to mention some critics to this theory. In our view, CSR shall not be framed as a social or moral choice. We believe it is necessary to have *ex ante* established some standards to guide corporate decision-making, but such standards have to be dictated by the law and not as a result of moral commitments towards other parties.

Firstly, individuals are not rational and not always provided with moral devices that would allow them to adopt an impartial agreement and/or to be interested on a fair distribution. Practice has proved that on several occasions, people want the maximum possible surplus, even if it leads to decrease in the global surplus or the unsustainability of the firm.

Besides, this delegated hierarchy may abuse its authority, acting to preserve the interests of a certain class of stakeholders, and therefore acting without impartiality, especially when her/his remuneration is based on the profits of the companies (stock options, for example). In other words, it is not so rare that trust or the rules of the game are broken in front of conflictual interests.

Further, the view of CSR as a result of an endogenous agreement of its stakeholders would not explain or resolve problems related to the environment, given that there isn´t a direct stakeholder participating internally to the firm that could "represent" and bargain over this investment.

In fact, it is time to analyze what happens in concrete situations and think about new ways to seek core CSR and its real implementation. This is the reason we defend a mandatory approach of CSR. We support the establishment by the law of *ex ante* standards to guide the firms' management system and governance, ending the need to appeal to theoretical explanations or interpretations to allow the pursuance of responsible business practices.

Sjåfjell & Sørensen (2013) state that CSR can be an answer to change the business as usual, but the first measure to really impact such shift is to be mandatory. In their words (pp. 5-6): "*First, the promotion of CSR must encompass both the level of legal compliance and of action beyond compliance. The well-known business capture of CSR as voluntary, as a case of 'don't regulate us and we can talk about how we behave' does not suffice. This tends to lead to delimitation against legal obligations and an unwarranted Corporate Governance/CSR dichotomy. The implicit support of shareholder primacy entails that sustainable business, in the environmental and social sense, quickly*

will hit a ceiling. Second, CSR must be true or core CSR, dealing with the business of the company, how that is conducted and the impacts of that business. Third, CSR must entail an integration of environmental and social concerns in the decision-making of the company in such a way as to lead to an internalisation of externalities".

Even though a socially responsible behavior could in theory be shaped by the market or voluntary embracement, it seems that the market and the voluntary approach have not achieved satisfactory results on preventing the violations of the environment and human rights, otherwise the data regarding corporate-related human rights and environmental abuse would not be so alarming[6] and all the theoretical discussion to make companies to embrace CSR, including the efforts from UN, OECD, several NGO´s and countless other entities wouldn't exist.

Denozza & Stabilini (2013) pose a very interesting question about the possibility of having the market leading to CSR (p. 5): "*does it make sense to sponsor a system in which the choices of firms in socially relevant areas are exclusively or mainly conditioned by the pressure that their potential investors and consumers are able to exercise*?".

Another interesting aspect Sjåfjell highlights (2011, Why Law Matters…) is that voluntary CSR makes that many companies claim as credit on their CSR account involvement with issues unrelated to their business. The given example was oil and gas companies organizing computer classes for former drug addicts. Doing so, they can claim some positive reputation without changing any negative social and environmental impact of their actual activities. This type of practice is charity and not CSR, reinforcing the need of legal standards to distinguish CSR, implementing it in the core business and avoiding this type of "green-washing"[7].

---

[6] See, e.g., Wright, Michael. 2008. "Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse, available at: https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_44_Wright.pdf, accessed on 04/20/2017; D. Olsen, Tricia and Payne, Leigh A.. The Business of Human Rights: Patterns and Remedies in Corporate Abuses in Latin America, available at https://transitionaljusticedata.com/files/Olsen%20and%20Payne%202013.pdf, accessed on 04/20/2017; See data published in the European Union Coalition for Corporate Justice – ECCJ´s website://corporatejustice.org/priorities/11-business-human-rights; See the Commission Staff Working Paper, Sixth and Seventh Annual Survey on the Implementation and Enforcement of Community Environmental Law. Available at http://ec.europa.eu/environment/law/pdf/6th. Richard E. Smith wrote (2011, pp. 70/72/75): "*Global warming may make for excellent entertainment for political pundits, but the pollution created by business is real. Whether one does or does not believe that global warming is exaggerated, the fact remains that chemicals and pollutants are creating major health issues and environmental degradation. We know that the environment and humans can only absorb a limited amount of toxins before our biological systems deteriorate. These problems are not isolated to one type of industry or country either. Air pollution causes over two million deaths annually (…). Approximately a half billion people don't have access to safe drinking water (WHO, 2011) and water pollution takes over 5 million lives away each year (About.com, 2011). Simply put, the industrial age systems are not sustainable. (…) In order for corporations to evolve from the Industrial Age, they must embrace innovation. Corporations need to eliminate waste from their production practices, create products that are biodegradable, restore natural systems when possible (e.g. trees, clean water) and use clean energy. Capitalism and sustainability must and can co-exist. (…) Other sustainable business practices that should be leveraged by corporations include ´greening´ the supply chain and performing lifecycle assessments to improve processes and stakeholder relations; management principles such as organizational design, recruiting and retaining talent, and organizational learning improve corporate performance and ethical systems; and enforcing behavior through incentives and using technology to monitor and manage sustainability programs improves a corporation's financial management*".

[7] The author wrote (p. 8): "*Defining CSR as voluntary thereby may promote corporate social irresponsibility through the incentives for using CSR as marketing and even green-washing, in the fully understandable*

One more shortcoming of voluntary CSR concerns the executive turnover, and the risk of having some directors embracing CSR and others don't. When it is voluntary, the CSR approach is the approach of the one in charge to take decisions on behalf of the company and each one will have its own way and reasons to implement or not responsible practices. The law is really important in this regard to include CSR in the core business and not only in reports or discourses of directors who have learned the CSR speech without really implementing it.

Indeed, self-regulation has already proven that it is not enough and the general principle of sustainable development imposes the evolvement of the corporate legal framework.

As Denozza & Stabilini (2013) brilliantly point out: "*if it all comes down to the fact that who wants to do a good deed must be regarded as free to do it, we do not think that the issue opens any perspective of interest. Of course one can always discuss the limits within which this freedom can be exercised and how we should allocate the responsibility for these decisions among the various corporate bodies. However, since it is clear that we don't see legions of alleged victims of excessively socially responsible behavior by directors of their companies, this problem seems rather theoretical*".

Note in addition that CSR cannot be applied without the allocation of responsibility. Thus, it has to be previously defined how CSR will be executed and possible consequences of not having so. In other words, it is essential to have an instrument setting forth liabilities, also to sanction any choices that may not be consistent with the observance of other stakeholders´ interests. And the only enforceable mechanism to sanction is the law.

It is important to have some guidance in a uniform and general applicable instrument - the law, even though it shall be acknowledged that mandatory CSR may also have shortcomings. Nonetheless, taking into consideration the current environmental and social conditions, between the two possible scenarios, the mandatory approach seems to have more positive effects.

Mandatory CSR will have more significant impacts exactly in the corporations that haven´t embraced responsible business, given that it will be able to introduce important standards of practices and responsibilities, and consequently parameters for comparability as an important tool for continuous improving.

Mandatory CSR may be the only way to deal with transnational problems and group of companies, as well, in the other extreme, with small companies, whose managers not always have reputational or other types of incentives to voluntarily embrace it.

But the defended law imposing CSR has to be smart enough to properly answer who shall accomplish it and the relevant responsibilities and consequences. It is important to establish how far regulation can go when imposing CSR. And the law shall not say what sustainability means for each business, but establish some obligations that lead for its better understanding and pursuance.

---

race to win markets and achieve profit. Green-washing may go beyond misleading CSR reports – in the area of environmental disclosure research indicates that it is sometimes the worst companies that give the best environmental reports. Green-washing may also take place through the practice of transferral, with companies apparently acting responsibly in the richer parts of the world, while in fact basing their profits on irresponsible sub-contracts that they hope to conceal from their wealthier consumers".

Maybe one day, society will evolve to have state regulation only concerning the implementation of each company's code of conduct, but it seems that presently *ex ante* legal standards of performance are paramount, abiding companies to observe them, especially the ones who continue chasing profits disregarding the environment and the impact on people.

Some will say that the costs to implement mandatory CSR are high, but they are not higher than the risks and costs the society faces if business as usual continues with the constant environmental, social and economic disasters.

It is worth it to reproduce the straight to the point words of Surya Deva (2010, pp. 6-8): "*First, unless company law encourages or requires companies to do business in a sustainable way, we cannot bring changes in the corporate behaviour from the inside (i.e., in the process of corporate decision making). It is desirable to focus not merely on outcomes (e.g., that companies should not violate human rights or pollute the environment) but also on processes (i.e., guiding/informing decision-makers not to take decisions which might potentially abridge human rights or environmental rights). (…) Second, some changes in company laws are required because the premises on which fundamental principles of the company law ´of all economically advanced countries´ were based have changed drastically. Furthermore, the character and role of companies in society has changed significantly in recent decades: companies are now doing almost everything that states used to do*".

1.4 What should the law provides for

When CSR is a matter of law, the standards that guide managers' conduct will necessarily change. It will no longer be a question of merely taking into consideration different interests of several stakeholders according to companies' own rules or managers' views and morals, but of following legal provisions demanding it and foreseeing how to do it. Thus, the questions that arise are: how the board and managers will be able to truly implement CSR and would them be personally liable if a stakeholder suffers damages occasioned by company's activities? Could a stakeholder seek the enforceability of a company´s policy or measure that ended up being amended or cancelled by the board?

The proposal is that the law should impose the following procedures or principles to be observed by managers in their decision-making processes:

1. They should be firstly required to do a profound due diligence obtaining relevant information about the business and assessing risks;
2. In order to map the risks and the impacts, they have to establish constant and periodic dialogs with the stakeholders affected by the company's activities. By dialog it is meant effective communication through which people can be actually listened, have the chance to present propositions and receive explanations when their justified and reasonable propositions are not adopted. Specifically regarding the employees, Marleen A. O´Connor (1993) highlights that it is important to let them effectively participate: "*it is time to review the centralization of information*"[8];

[8] The author defends participatory work programs and representation of the employees not in the board but through committees that managers have to consult and provide information to. She highlights the benefits of codetermination. However, she preferred what she calls "the neutral referee model", which

3. After knowing the risks and promoting periodic dialogs (periodicity to be monitored), the board has to be prepared to show how the decisions and policies are taken/chosen. They should add to sustainability reports (already mandatory in several jurisdictions) a ranking of values and priorities of the company and how conflicts among the different stakeholders were balanced in concrete situations;
4. Another parameter that the law should provide for is regarding the precautionary principle, i.e., the managers could not disregard in their decision-making process the risks of creating damages, even though the consequences were not totally clarified or proved by scientific data;
5. The board should also inform the financial impact of the measures implemented, separating the ones required by the law or agreements with public bodies from the ones they have decided to adopt in accordance with the priorities, values and possibilities of the company.

Regarding possible liabilities, it is worth mentioning that in the former predominant view that the companies exist merely to increase the shareholders' profits, the liability of directors was determined by the doctrine known as the business judgement rule, developed by American courts, according to which corporate directors have a protection against the bad fortune of the company. The risks associated with business are to be borne by shareholders, not directors, as long as they act in a not negligent way, according to the duty of care and duty of loyalty. The judges don't analyze the merits of corporate decisions, but solely the due care of directors.[9]

In mandatory CSR, the standards of conduct to guide managers shall not be so different, but broader.

It is important to highlight that we defend a mandatory approach of CSR, yet letting enough space to the board. It would be impossible to establish *ex ante* all the actions to be implemented and foresee all possible conflicts. It is defended an *ex ante* limitation of the discretionary of the board through procedural rules or general principles to guide their decisions and not exactly impose the content of managerial actions.

The present suggestion of how the discretionary of the board towards CSR should be regulated was in some extent already proposed by Denozza & Stabilini (2008). The context of the proposition was different though. The authors sustain that the theories that try to explain the role of corporate law and corporations' purposes are not clear in

---

although resembles the German system of codetermination by granting participation rights in recognition of the employees' investments of human capital, differs from it because workers would not have the right to attend board meetings; the neutral referee model offers workers indirect worker participation at the board level by altering the way that directors balance the interests of shareholders and employees (through Employee Participation Committees). She mentions that codetermination involves a potential threat that industrial conflict at the board level could seriously impede the process of directorial decision-making.

[9] In the article about the topic, Lindsay C. Llewellyn mentions the definition of the rule provided in the case Testing & Materials v. Corrpro Cos., 478 F. 3d 557, 572 (3d Cir. 2007) (internal quotations omitted): [the business-judgment rule] is "*a rule of law that insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interests of the corporation*".

defining *ex ante* the criteria to guide managers' actions, thus it would be better to shift the attention from the substance to the procedure. The first procedural rule they proposed was organized contacts between the board and the relevant stakeholders of the firm from which managers would be able to collect information concerning the instances of the various groups of stakeholders and to assess the interests at stake and the areas of potential conflicts between stakeholders and shareholders and possibly within the stakeholders themselves. The second rule should establish that the board must separately examine and motivate every decision contrary to the immediate financial interest of the shareholders[10].

When CSR is mandatory, there is no longer an obligation to justify decisions contrary to the immediate financial interest of the shareholders, but to justify any decision that can negatively impact stakeholders. And the idea is that the board has not only to promote dialogs and justification, but open the process of decision-making, showing the priorities, values, possibilities, strategies to resolve conflicts, financial impacts, and so on. Note that what it is important is not the report itself, but the integrated process of defining what is relevant and collecting the information to justify the decisions.

The suggested rules are a way to impose the board's responsibility to guarantee the internalization of externalities, and derive responsibilities if they don't do it. But it does not mean that directors should be personally liable if the aimed result is not achieved when all the procedures were respected and justifications were truly provided. The proposal entails a broader business judgment rule; this will protect board members as long as their actions are justifiable within the redefined purpose of corporations.

An important issue to be considered will be the composition of the board to ensure that the appointed directors will have sufficient knowledge and possibilities to comply with these new rules.

Some of the proposed suggestions have already been mentioned in soft law instruments, especially in the OECD Guidelines for Multinational Companies[11] and the UN Guiding Principles on Business and Human Rights[12], and these rules shall be transformed in hard law.

1.5 Conclusion

The mandatory view of CSR demands the law to establish some procedural standards or general principles to guide the board to implement CSR in corporate

---

[10] According to Denozza & Stabilini, the benefits of these rules would be (pp. 28-29): "*Firstly, it would lead to public disclosure of the corporate decisions that benefit stakeholders other than the shareholders of the firm. It could facilitate the functioning of reputation and market mechanisms that can push towards the inclusion of stakeholders' interests within corporate action. Secondly, disclosure would make possible an effective assessment of the corporate decisions in favor of stakeholders and the evaluation of the real impact of the same decisions on the different stakeholders and on shareholders and the effective application of sustainability projects, much more than the usual reports voluntarily published by firms that rarely contain verifiable data. Secondly, the duty to instruct and motivate decisions affecting the immediate financial results of the firm for its shareholders could create at least a certain limitation to the discretionary power of managers, not on the merits, but through a procedural constraint. Would be prevented from providing ex post justification for a decision contrary to the financial immediate interests of shareholders*".

[11] Available at http://www.oecd.org/corporate/mne/.

[12] Available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

decision making process. In this regard, dialogs, consideration of all relevant information, assessment of risks, disclosure, formal explanations, priorities ranking and financial impacts are the main tools to be observed by all companies.

We must be aware though that the reform in company law alone may not be sufficient to promote more sustainable corporate decision-making. It is paramount to have the right incentives to comply with the law, which we will tackle in a future paper.

References

Barral, Virginie. Sustainable Development in International Law: Nature an Operation of an Evolutive Legal Norm. (2012). The European Journal of International Law, Vol. 23, No. 2. Available at http://www.ejil.org/article.php?article=2292&issue=111. Accessed on 05/10/2017.

Bavoso, Vincenzo. Sustainable Companies Through Enlightened Boards: Combining Private and Public Interest in the Decision-Making of Large Public Firms (December 1, 2013). European Company Law, Vol. 11, Issue 2 (April 2014). Available at SSRN: https://ssrn.com/abstract=2362031 or http://dx.doi.org/10.2139/ssrn.2362031. Accessed on 05/12/2017.

Blair, Margaret M. & Stout, Lynn A. A Team Production Theory of Corporate Law, Virginia Law Review, Vol. 85, No. 2 (Mar., 1999), pp. 247-328, Published by: Virginia Law Review, Available at: http://www.jstor.org/stable/1073662, Accessed: 05/11/2017.

Denozza, Francesco & Stabilini, Alessandra. CSR and Corporate Law: The Case for Preferring Procedural Rules. (April 2008). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117576. Accessed on 05/11/2017.

Denozza, Francesco & Stabilini, Alessandra. The Shortcomings of Voluntary Conceptions of CSR. Orizzonti del Diritto Commerciale. Rivista Telematica, Edizione 2013/2, Anno I – 2013 – data di pubblicazione: 30 novembre 2013. Available at http://rivistaodc.eu/media/30924/denozza_stabilini_shortcomings.pdf. Accessed on 05/11/2017.

Deva, Surya. Sustainable Development: What Role for the Company Law? (November 21, 2010). International and Comparative Corporate Law Journal, Vol. 8, pp. 76-102, 2011; University of Oslo Faculty of Law Research Paper No. 2010-04. Available at https://ssrn.com/abstract=1712794. Accessed on 05/12/2017.

Fitzmaurice, Malgosa. The Principle of Sustainable Development in International Development Law. International Sustainable Development Law – Vol. I. (2010) Available at https://www.eolss.net/ebooklib/sc_cart.aspx?File=E6-67-03-02. Accessed on 05/10/2017.

Francé-Gómez, Pedro. Some Difficulties in Sacconi's View about Corporate Ethics. Journal of Business Ethics, January 2003, Volume 42, Issue 2, pp. 165–180. Available at https://link.springer.com/article/10.1023/A%3A1021923601821. Accessed on 05/22/2017.

Jensen, Michael C.. Value Maximization, Stakeholder Theory, and the Corporate Objective Function. Published in Journal of Applied Corporate Finance. (Fall 2001). Available at http://papers.ssrn.com/abstract_id=220671. Accessed on 05/06/2017.

Llewellyn, Lindsay C. Breaking Down the Business Judgment Rule. (Spring 2013). Commercial & Business Litigation, Vol. 14 No. 3, American Bar Association, 321 N Clark St, Chicago, Illinois. Available at http://www.winston.com/images/content/1/5/1535.pdf. Accessed on 05/18/2017.

Mitchel, Lawrence E.. The board as a path toward corporate social responsibility, June 13, 2007. Electronic copy available at: http://ssrn.com/abstract=996683. Accessed on 05/12/2017.

O'Connor, A. Marleen. Human Capital ERA: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation, 78 Cornell L. Rev. 899 (1993). Available at: http://scholarship.law.cornell.edu/clr/vol78/iss5/3. Accessed on 05/08/2017.

Poter, Michael E. & Kramer, Mark R.. Creating Shared Value: How to invent capitalism – and unleash a wave of innovation and growth. Harvard Business Review 89, 2011, pp. 62-77.

Ryznar, Margaret and Woody, Karen E.. A Framework on Mandating versus Incentivizing Corporate Social Responsibility (April 9, 2014). Marquette Law Review, Vol. 98, No. 4, pp. 1667-1694. Available at https://ssrn.com/abstract=2423141. Accessed on 05/05/2017.

Sacconi, Lorenzo. A Social Contract Account for CSR as Extended Model of Corporate Governance (Part I): Rational Bargaining and Justification (December 2004). Trento University Economics Discussion Paper No. 10. Available at SSRN: https://ssrn.com/abstract=731647 or http://dx.doi.org/10.2139/ssrn.731647. Accessed on 04/18/2017.

Sacconi, Lorenzo. A Social Contract Account for CSR as Extended Model of Corporate Governance (Part II): Compliance, Reputation and Reciprocity (December 2004). Trento University Economics Working Paper No. 11. Available at SSRN: https://ssrn.com/abstract=731603 or http://dx.doi.org/10.2139/ssrn.731603 . Accessed on 04/18/2017.

Sacconi, Lorenzo. Ethics, Economic Organisation and the Social Contract. EconomEtica No. 41, July 2012.

Sacconi, Lorenzo. Corporate Social Responsibility (CSR) as a Model of "Extended Corporate Governance". An Explanation Based on the Economic Theories of Social Contract, Reputation and Reciprocal Conformism. 2004. Liuc Papers No. 142, serie etica, Diritto ed Economia, 10, suppl. febbraio 2004.

Sachs, Jeffrey D. The Age of Sustainable Development. Columbia University Press, 2015.

Sjåfjell, Beate. Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation (March 2, 2011). European Company Law, Vol. 8,

Nos. 2-3, pp. 56-64, 2011; University of Oslo Faculty of Law Research Paper No. 2011-04; Nordic & European Company Law Working Paper No. 10-26. Available at SSRN: https://ssrn.com/abstract=1774759. Accessed on 05/02/2017.

Sjåfjell, Beate & Anker-Sørensen, Linn. Directors' Duties and Corporate Social Responsibility (CSR). (September 9, 2013). Hanne Birkmose, Mette Neville & Karsten Engsig Sørensen (eds.). Boards of directors in European companies – reshaping and harmonising their organisation and duties. Kluwer Law International (2013). University of Oslo Faculty of Law, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2013-26; Nordic & European Company Law Working Paper No. 10-40. Available at SSRN: https://ssrn.com/abstract=2322680. Accessed on 05/02/2017.

Smith, Richard E.. Defining Corporate Social Responsibility: A Systems Approach for Socially Responsible Capitalism (2011). Master of Philosophy Theses. 9.http://repository.upenn.edu/od_theses_mp/9. Accessed on 04/12/2017.

Voigt. Christina (editor). Rule of Law for Nature. New Dimensions and Ideas in Environmental Law (2013). The principle of sustainable development. Integration and ecological integrity (chapter 8 – author).

Voigt. Christina. Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law (2009).