

# INTERNALIZING EXTERNALITIES IN E.U. LAW: WHY NEITHER CORPORATE GOVERNANCE NOR CORPORATE SOCIAL RESPONSIBILITY PROVIDES THE ANSWERS

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## I. E.U. LAW, SUSTAINABLE DEVELOPMENT, AND THE ROLE OF CORPORATIONS

### A. *Taking the General Objectives of the E.U. Treaties Seriously*

E.U. law<sup>1</sup> purports to take sustainable development,<sup>2</sup> and notably its environmental dimension, seriously.<sup>3</sup> At the Treaty level, the

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1. The term E.U. law is used here in reference to Community law. This Article will use the terms “E.U.” and “Community” interchangeably.

2. Simply put, sustainable development is a development where economic, social, and environmental aspects are integrated and that meets “the needs of the present without compromising the ability of future generations to meet their own needs.” See THE BRUNDTLAND COMMISSION, WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (1987).

3. As early as at the Rhodes Summit of 1988, the European Community (EC) heads of government, with reference to “environmental problems of increasing magnitude,” declared sustainable development to be “one of the overriding objectives of all Community policies.” Presidency Conclusions, Rhodes European Council (Dec. 2-3, 2003). At the same Summit, the government heads declared that the completion of “the single market cannot be regarded as an end in itself; it pursues a much wider objective” and in the “wider international context” the Community and the Member States declared their desire to play a leading role in achieving “a better quality of life for all the peoples of the world.” *Id.* The role of the European Council is to provide “the Union with the necessary impetus for its development” and define “the general political guidelines” that the Community institutions are to implement. Treaty on European Union tit. I, art. D, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter EU Treaty]; see also KAPTEYN & VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 111-12, 183-84 (Laurence Gormley ed., 4th ed. 1998).

European Union has progressed from a situation where it did not even mention environmental protection to one where it included environmental protection as one of the general objectives of E.U. law in Article 2 EC of the European Community Treaty (Treaty)<sup>4</sup> in 1992 and where it codified the sustainable development principle in the environmental integration rule of Article 6 EC<sup>5</sup> in 1997.<sup>6</sup> Interesting issues are raised if the E.U. law's focus on sustainable development, and especially the environmental dimension thereof, is taken seriously. What is the significance of the overarching objective of sustainable development for the various sectors of E.U. law? More specifically, does E.U. law require the integration of the environmental dimension of sustainable development in European corporate law?

The position of this Article is that it does. Part I will go on to show why and on what level it is necessary to integrate sustainable development into corporate law. Part II indicates the direction to go to determine how to integrate. Thereafter, Part III summarizes and further analyzes E.U. law concerning the legal consequences of the general objectives which establish the tasks of the Community.<sup>7</sup> The Article will focus particularly on the general objective of sustainable development and its enhancement through the environmental integration rule contained in Article 6 EC. Part III will also demonstrate the chain of legal reasoning that establishes the legal basis in E.U. law for environmental integration as well as the argument for a legal obligation to carry out such integration.

### B. *Corporate Law as an E.U. Law Matter*

In the European Union, corporate law is not solely a matter for the national legislators.<sup>8</sup> Community regulation of European cor-

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4. Treaty Establishing the European Community art. 2, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

5. EC Treaty art. 6.

6. Before that, we saw the adoption of the first directives concerning protection of the environment in the 1970s, and by 1985, the European Court of Justice (the Court) had declared environmental protection to be "one of the Community's essential objectives." Case 240/83, *Procureur de la République v. Ass'n de Def. des Brûleurs d'Huiles Usagées (ADBHU)*, 1985 E.C.R. 531; see also LUDWIG KRÄMER, *EC ENVIRONMENTAL LAW* 4-5 (6th ed. 2007). This Article focuses solely on the treaty level.

7. The term "general objectives of E.U. law" will be used to denote the objectives of the European Union as they are stated in the relevant provisions of the Treaties, notably EC Treaty Article 2 and EU Treaty Articles 2 and 6. These objectives are regarded as objectives of the law of the European Union, based on the premise that the general point of E.U. law is to facilitate the achievement of the objectives of the European Union.

8. For an overview of the evolution of Community corporate law, see generally VANESSA EDWARDS, *EC COMPANY LAW* (1999). For a more up-to-date version of all second-

porations has existed since the late 1960s.<sup>9</sup> Traditionally, the E.U. legislature has been reluctant to deal with the core issues of corporate law, but that has now changed with the adoption of legislation such as the Takeover Directive.<sup>10</sup> The Takeover Directive attempts to facilitate a “market for corporate control” in Europe through regulating takeover bids.<sup>11</sup> In its controversial rule on how the board of the target corporation should deal with a takeover attempt (that is, do nothing to prevent the bid), the Takeover Directive goes into the very core of corporate law.<sup>12</sup> The “board neutrality” rule goes straight to the heart of one of the biggest and oldest controversies in E.U. corporate law, which concerns diverging views regarding the purpose of the corporation and the role of the board.<sup>13</sup> Accordingly, the question is no longer whether E.U. corporate law should go into the core issues of corporate law. The question is whether it should do so under the influence of the dominant corporate governance debate and its shareholder primacy drive, and on the basis of an uncritical belief in the market for corporate control, or based upon a considered reflection of what the overarching goals and guiding principles of E.U. law are and should be.<sup>14</sup>

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dary legislation, see EUROPEAN COMPANY AND FINANCIAL LAW: TEXTS AND LEADING CASES (Klaus Hopt & Eddy Wymeersch eds., 4th ed. 2007) (1991).

9. See First Companies Directive 68/151/EEC, 1968 O.J. SPEC. ED. (L 065/08–12) 41 (publicity requirements, validity of corporate transactions and nullity of corporations). See also EC Treaty art. 44(2)(g) (previously art. 54(3)(g)).

10. Directive 2004/25/EC, 2004 O.J. (L 142/12–23) (on takeover bids) [hereinafter Takeover Directive].

11. For an overview of the directive, see BEATE SJÄFJELL, TOWARDS A SUSTAINABLE EUROPEAN COMPANY LAW: A NORMATIVE ANALYSIS OF THE OBJECTIVES OF EU LAW, WITH THE TAKEOVER DIRECTIVE AS A TEST CASE 297 (2009) (providing a more general overview of the directive in chs. 9.3.5, 14).

12. This “board neutrality” rule in Takeover Directive Article 9(1)-(4), as well as the even more controversial “breakthrough” rule in Article 11, had to be made optional to enable the adoption of the directive. See Takeover Directive art. 12; Beate Sjäffjell, *Political Path Dependency in Practice: The Takeover Directive*, 27 Y.B. EUR. L. 387 (2008).

13. The “board neutrality” rule is a central part of the analysis and evaluation of the directive. SJÄFJELL, *supra* note 11, at 302.

14. See *id.* ch. 16 (discussing shareholder primacy and the theory of the market for corporate control as a basis for legislative action).

### C. *Getting Corporations to Contribute: The External and the Internal Perspective*

Corporations are the basic actors in our economies.<sup>15</sup> If the European Union wishes to achieve sustainable development, European corporations must contribute to that goal. Corporations need to contribute in a substantive way that goes beyond the mere use of corporate social responsibility as a marketing tool, or “greenwashing.”<sup>16</sup> This Article focuses on the contributions of European corporations to sustainable development, whether the corporations operate within the European Union or outside it. Specifically, this Article concentrates on the environmental dimension of sustainable development.<sup>17</sup>

The responsibility to create the legal framework within which corporations operate lies with the legislatures. Today there is a lot of regulation that exists for the purpose of protecting the environment from an external perspective.<sup>18</sup> Community environmental law has undergone an evolution since the first directives on environmental protection in the 1970s, and today it sets up a number of restrictions with which corporations are meant to comply.<sup>19</sup> There is also regulation specifically aimed at ensuring corporations contribute to sustainable development by gently nudging them into becoming more energy efficient, adopting alternative sources of energy, and so forth, typically through economic incentives. Two examples of such regulation include the hotly debated emissions trading scheme<sup>20</sup> and the directive trying to make corporations take account of product externalities.<sup>21</sup>

15. The corporations on which this Article focuses are public limited liability corporations listed on at least one stock exchange. The prototype is a very large manufacturing corporation. The scope of the paper is delimited against so-called state-owned enterprises.

16. See, e.g., William Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253 (2003). “Greenwashing” means presenting the corporation as more eco-friendly than it is, especially in cases where anti-environmental activity is hidden behind an eco-friendly corporate image. *Id.*

17. This Article attempts to do so without thereby ignoring the social dimension or the interrelation and potential of conflicts between all three dimensions: economic, environmental, and social.

18. See, e.g., PETER DAVIES, *EUROPEAN UNION ENVIRONMENTAL LAW* (2004).

19. See, e.g., KRÄMER, *supra* note 6, at 4-5.

20. See Directive 2003/87/EC, O.J. 2003 (L 275/32-46) (establishing a scheme for greenhouse gas emission allowance trading within the E.U.). See, e.g., Nikki Tait, *EU Urged to Clarify Emissions Trading Reforms*, FIN. TIMES, Feb. 17, 2008, FT.com. For an overview of this directive, see Catherine Banet, *Legal agenda for the review of the EU emissions trading scheme*, SCANDINAVIAN INST. MAR. L. Y.B. 347-381 (2007).

21. See Directive 2002/96/EC, O.J. 2002 (L 27/24-39) (on waste electrical and electronic equipment). For a critical discussion of this directive, see Noah Sachs, *Planning the*

External regulation can only go so far, however. One reason is that E.U. corporations also operate outside of the European Union, where the external regulation of their activities may be much more lenient or even nonexistent. Another is that legislatures cannot keep up with everything corporations do, whether in Europe or elsewhere, nor can they keep up with the potential environmental consequences of those actions. Third, and closely linked to the second point, corporations that are subjected to external regulation only may often try to find loopholes, boilerplate formulas, or other measures to avoid or at least reduce the cost of complying (or appearing to comply) with those regulations.<sup>22</sup>

These shortcomings suggest that the external regulation of corporations must be supplemented with regulation based on an internal corporate perspective to ensure that corporations contribute to the societal goal of sustainable development.

#### D. *Why Neither Corporate Governance nor Corporate Social Responsibility Suffices*

Current debates about corporations can be divided into two main trends that seem to point in different directions. On the one hand, there is the corporate governance debate, which has spawned a number of corporate governance codes and legislative measures, such as the E.U. directive on shareholder rights.<sup>23</sup> This debate focuses on investors—first and foremost shareholders—and their relationship with the board of the corporation and, by extension, its management. On the other hand, there is the corporate social responsibility movement, advocating for corporate responsibility for those affected by a corporation's actions: employees, other (external) workers,<sup>24</sup> the local communities and the environ-

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*Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States*, 30 HARV. ENV'T. L. REV. 51 (2006). The term "product externalities" is explained *infra* Part II.A.

22. For a discussion of the problems related to external regulation, also with an internalization objective, see generally Sachs, *supra* note 21.

23. See Directive 2007/36/EC, O.J. 2007 (L 184/17–24) (on the exercise of certain rights of shareholders in listed companies). For an overview of corporate governance codes, see European Corporate Governance Institute, Index of All Codes, [www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php) (last visited June 25, 2009).

24. Corporations utilize a heterogeneous group of workers, mainly, it seems, through the choice of companies situated in Western Europe, not employed directly by the corporation. See also JANET DINE, COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS 13-20 (2005). Through so-called outsourcing, much of the direct legal responsibility for workers in other countries is removed from our public corporations—and often also from the con-

ment.<sup>25</sup> At what we might tentatively view as the meeting point between the focus on investors' interests and the trend for social responsibility, we find socially responsible investment, "green funds," and a certain level of attention being paid by investors to corporate behavior, beyond what is traditionally seen as the shareholders' only concern, the financial bottom line.<sup>26</sup>

Nonetheless, the main focus of the corporate governance debate is, and seems set to remain for the foreseeable future, on the traditional agency issues of how to get the board and management to act in line with the shareholders' interests, defined not as environmentally sustainable investment, but as achieving the highest possible profits in the form of dividends and a rising share price.<sup>27</sup> In the current corporate governance view, the corporation is more or less the property of the shareholders—a tool for maximizing their profit.<sup>28</sup> The problem with this focus is that it restricts the discussion to one small part of the complex web of relationships that exists both within the corporation and between the corporation and society. Therefore, a good corporate governance system "may be perceived as a necessary, but not a sufficient condition for corporate responsibility."<sup>29</sup>

The corporate social responsibility debate typically stands on the outside of the corporation, however, and is concerned with the corporation's responsibility toward those parties and interests which seem to be implicitly defined as being external to the corporation,

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sciousness of the European general public, especially with regard to workers in developing countries. Also, with respect to workers in Europe, there seems to be a growing tendency toward other kinds of contractual relationships than the traditional one of employment, as illustrated by the green paper on this issue. *Commission Green Paper on Modernising Labour Law*, at 3, COM (2006) 708 final (Nov. 22, 2006) (expressing concern on the development of "a grey area where basic employment or social protection rights may be significantly reduced").

25. For a critical approach, see Bede Nwete, *Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?*, 8 GERMAN L.J. 311, 311-15 (2007).

26. Peter Cornelius & Bruce Kogut, *Creating the Responsible Firm: In Search for a New Corporate Governance Paradigm*, 4 GERMAN L.J. 45, 51 (2003). However,

that doesn't mean that economic and financial performance no longer matters. Opening a 250 million dollar SRI fund to other investors, ABP, the largest Dutch pension fund, made clear that they will not be abandoning fundamental financial analysis. "There is no room for socially initiated investments if such investments do not meet the return requirements."

*Id.* (quoting *ABP to Open \$250m SRI Fund to Other Investors*, FIN. TIMES - SUPP. ON FUND MGMT., OCT. 28, 2002, at 1).

27. See, e.g., Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21 J. ECON. PERSP. 117, 125-27 (2007).

28. See SJAFFJELL, *supra* note 11, §§ 3.3.3, 4.1.3, 4.3.4.3.

29. Cornelius, *supra* note 26, at 49.

even including the corporation's own employees.<sup>30</sup> Proponents of corporate social responsibility generally seem to direct their arguments toward the management and board of the corporation and the shareholders.<sup>31</sup> This inevitably—albeit unwillingly—supports a definition of the corporation as consisting of only shareholders, board members, and management, which in turn, through the influence of the corporate governance debate, are seen respectively as principals (shareholders) and agents (board members and, by extension, management).<sup>32</sup> This observation is not meant to dismiss the fact that the corporate social responsibility movement has significantly contributed to bringing important issues on the impact of the corporations to the forefront. Nor is it meant to deny the likelihood of some corporations being serious about their corporate social responsibility profile, and not resorting to it only for marketing purposes.<sup>33</sup> Corporate social responsibility, however, is expressly defined to be a voluntary exercise.<sup>34</sup> Its voluntary nature was clearly important to corporate input to the European Commission's corporate social responsibility work.<sup>35</sup> The Commission has, apparently without reservation, accepted the corporate definition of social responsibility as voluntary,<sup>36</sup> and thereby accentuated a picture of the corporation as something that, legally speaking, concerns first and foremost the shareholders.

The general acceptance of the shareholder perspective of the corporation is further underlined by the shareholder versus stake-

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30. See SJAFFELL, *supra* note 11, § 4.1.4.

31. See *id.*

32. See *id.* §§ 4.1.3, 13.2.1.

33. Some advocates of corporate social responsibility and, notably, some stakeholder theorists argue in favor of more fundamental changes. Not all have a from-the-outside-in perspective, but the corporate social responsibility movement taken as a whole has a from-the-outside-in perspective and on-a-voluntary-basis-only approach that makes it rather toothless.

34. See *Commission Communication Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 5, COM (2002) 347 final (July 2, 2002) ("CSR is a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.").

35. See *id.*

36. This is expressly accepted by the Commission. *Commission Communication on Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, at 2, COM (2006) 136 final (Mar. 22, 2006) ("Because CSR is fundamentally about voluntary business behaviour, an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation."). This 2006 Communication is practically a verbatim repetition of the business reaction to the Green Paper referred to in the 2002 Communication. *Commission Communication Concerning Corporate Social Responsibility*, *supra* note 35, at 4.

holder debate, which may be seen as the collision point between the corporate governance trend and the corporate social responsibility movement.<sup>37</sup> To perhaps put it more accurately, we may say that the corporate governance debate has emerged from the shareholder side of the larger shareholder versus stakeholder debate, while the corporate social responsibility movement may be seen as emerging out of the stakeholder side. Entering into the shareholder versus stakeholder debate tends to involve an acceptance—willing or unwilling, tacit or express—that shareholders are the central group, while stakeholders are defined as all the external parties and interests affected by the corporation's actions.<sup>38</sup>

The shareholder focus of the corporate governance debate and the from-the-outside-in perspective of the corporate social responsibility movement, with its implicit acceptance of the central role of shareholders and its dichotomy between shareholders and (other) stakeholders, represent a problematic analytical approach that has an impact on the legislative and policy solutions adopted. Analytically, the shareholder focus of both sides results in a narrow and one-dimensional view of the corporation that does not provide a satisfactory starting point for research into the societal role of corporations.

The impact of environmental and social issues of this analytical fallacy is evident: in the corporate governance context, a discussion of companies' actions and their environmental and social consequences is restricted by the definition, expressly stated or implicitly understood, of the societal goal of corporations being to provide (maximum) profit for shareholders.<sup>39</sup> We find echoes of the same problem in the context of corporate social responsibility, with its focus on the voluntary basis within the perceived framework of profit-maximization for shareholders.<sup>40</sup> Here we may also find the root of the problem with many corporate social responsibility initiatives, which tend to be viewed as little more than "greenwashing" and marketing ploys.<sup>41</sup> Addressing the environmental and social impact of corporations within the confines of the corporate gov-

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37. See SJAFFJELL, *supra* note 11, § 4.1.2.

38. If the term "stakeholders" is to be used in a meaningful way, it must, of course, include shareholders and not be seen as opposed to them.

39. For further discussion, see *infra* Part II.C.1.

40. See *Commission Communication Concerning Corporate Social Responsibility*, *supra* note 35, at 5; see also JANET DINE, COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS 222 (2005).

41. See, e.g., Laufer, *supra* note 16.

ernance debate or the corporate social responsibility movement will therefore not lead to the necessary changes.

### E. *A Different Analytical Starting Point*

If we agree that the environmental and social problems we face on a global basis are not being resolved quickly enough, and that corporations, on a global, aggregated basis could make a substantial contribution to resolving these issues, it is clear that we need to take a different approach. A more viable analytical starting point than that of the current corporate governance debate or corporate social responsibility movement involves viewing the corporation in a way that is more closely related to its position as a real life entity. The typical large listed manufacturing corporation is defined, not first and foremost by its shareholders, but by the production of goods, which is carried out by the corporation's employees under the supervision of management, with a board, on the level above management, responsible for drawing up corporate policy, and so forth.

Shareholders convened in a general meeting form a corporate organ of a periodic nature.<sup>42</sup> As such, it could be argued that the general meeting of the shareholders might be seen as an internal part of the corporation, albeit not on a daily basis. This Article's analytical structure, however, takes the view that the decisions of the general meeting, together with other contractual and legal requirements, form the framework for the corporation.<sup>43</sup> The general meeting has some rights of control, intended as protection for the shareholders' investment in the shares of the corporation.<sup>44</sup> These typically and notably include the right to elect the board (though in some jurisdictions this right is shared with the employees).<sup>45</sup> This does not, however, make the board members the agents of the shareholders as a matter of law. The duty of the board is to the corporation, not to the shareholders.<sup>46</sup> Shareholder primacy may therefore be seen more as a matter of culture

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42. See, e.g., JESPER LAU HANSEN, *NORDIC COMPANY LAW: THE REGULATION OF PUBLIC COMPANIES IN DENMARK, FINLAND, ICELAND, NORWAY AND SWEDEN* 80 (2003).

43. For further discussion of the position of corporate shareholders in company law, see SJAFFJELL, *supra* note 11, § 4.3.4.

44. See, e.g., LAU HANSEN, *supra* note 42; SJAFFJELL, *supra* note 11, § 4.3.4.1.

45. See, e.g., LAU HANSEN, *supra* note 42, at 76 (regarding the Nordic systems).

46. SJAFFJELL, *supra* note 11, § 4.2.2.3.

than of law,<sup>47</sup> albeit in some jurisdictions, one may find support in the law as well.<sup>48</sup>

Shareholders as shareholders are one of several sources of finance for the corporation and are as such not part of the corporation itself.<sup>49</sup> The sources of finance are one of several groups of contractual parties. Other contractual parties are the suppliers, other creditors, customers (or clients or patients, as the case may be), and external workers, as well as, in some cases, the local or national authorities where the corporation's premises are located. If we add to this picture the other affected interests, that is, those affected by the actions of the corporation without having a contractual tie to it, notably the effect on what we may call the global community interest (or the societal goal of sustainable development), we have a tripartite starting point for our analysis:

First, we have the parties within the corporation, consisting of the employees, including the management, and the board. Second, we have the parties with a contractual tie to the corporation, including, but not limited to, the shareholders as one of several sources of finance. Third, we have the global community interest, encompassing those other interests affected by the corporation's actions.<sup>50</sup>

Applying this analytical structure, we see that the primary parties we need to consider when attempting to influence the actions of

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47. Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOVERNANCE 11, 11 (2005) ("Shareholder primacy originates not in company law, but rather in the norms and practices surrounding the rise of the hostile takeover movement in Britain and America in the 1970s and 1980s. It is . . . essentially a cultural rather than a legal point of reference.").

48. The role of the board is discussed in SJAFFELL, *supra* note 11, § 4.2.2.

49. The large listed corporation has little in common with the first organized entity where a few people who knew each other got together and invested their money in a common venture. Early regulation of business entities focused on the members of these common ventures and saw them as the owners—basically, the members were the corporation. Even in comparison to the first limited liability corporations, the large listed corporations of today are quite different. The regulation of the large listed corporations, and the legislative and academic attitude toward them, do not seem fully to have kept up the pace of the development of these large entities. In later developments, the legislative focus has tended to be on protecting the new variant of "members" as they no longer have the same proximity to the corporation in which they are involved. Today, discussion of the corporation should be disconnected from preconceived or historically path-dependent notions of *who* the corporation is, asking rather *what* the corporation is, what its position in society is, and who the involved parties and affected interests are. The position of shareholders is therefore the subject of quite detailed discussion in SJAFFELL, *supra* note 11, not only because their role is of equal interest to that of other involved parties, but also because of a need to reconsider the status shareholders today enjoy.

50. The basis for this new analytical structure is discussed in more detail in SJAFFELL, *supra* note 11, chs. 3-6.

the corporation are first and foremost the internal parties. Persuading shareholders and other contractual parties to focus on sustainable development and other ethical considerations is also important, but the most important thing is to bring about change within the corporation. This change may include altering the cultural perception, and in some jurisdictions, also the legal basis, of the relationship between the board and the shareholders.

Of course, we should welcome the fact that some corporations may already be adopting the societal goal of sustainable development as their guiding principle,<sup>51</sup> but these corporations are the exceptions. This Article argues that if we are to ensure that the corporations' actions do not work against, but rather contribute toward achieving the societal goal of sustainable development, the attitudes of people running corporations must change. This is what this Article means when it advocates "internalizing externalities" as the new approach. The next Part explains what this entails.

## II. INTERNALIZING EXTERNALITIES

### A. *Externalities and the Point of Internalizing*

What are externalities? Economists define externalities as the external costs of an exchange in a market.<sup>52</sup> In the theory of welfare economics, externalities are categorized as one of several types of market failure.<sup>53</sup> The classic example of external costs is pollution from a factory.<sup>54</sup> Simply put, if these costs are not internalized, either voluntarily or by force of law, the factory will continue to pollute because of the difference between the "private marginal cost and social marginal cost."<sup>55</sup> In addition to this example of production externalities, we can also consider an example of product externalities. External costs related to a product exist when the product creates negative environmental consequences, either while in use or when it is disposed of, and neither the manufacturer nor the user is required or feels obligated to take these conse-

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51. See, e.g., Vattenfall AB, <http://www.vattenfall.com> (last visited June 18, 2009); General Electric Co., Citizenship: Human Rights, Philanthropy, Public Policy, <http://www.ge.com/company/citizenship> (last visited June 18, 2009). It is difficult to discern the extent to which this is genuine, or merely a marketing strategy, or even "greenwashing," with today's accounting and disclosure systems. Certainly it cannot be deduced simply by reading information available on corporations' websites.

52. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 44-45 (4th ed. 2004).

53. *Id.*

54. *Id.*

55. *Id.*

quences into account.<sup>56</sup> Such a situation leads to over-production and “consumption,” as well as unrestricted disposal of these products, with grave environmental effects that would not have taken place if these consequences had been internalized somewhere along the chain.<sup>57</sup>

Putting this into the context of our discussion, we see that the point is for the corporation to internalize the costs of the negative environmental effects that currently exist as externalities.<sup>58</sup> Even in the case where the corporation is already responsible under the law, internalization, in the sense of the incorporation of values, may be worthwhile. Otherwise, the corporation may teeter right on the outer edge of what is legal, or it might even commit illegal acts because of the low probability that the corporation will be caught or because of lenient sanctions. We will concentrate here on the internalization of true externalities (but bear in mind that this may have an effect on those which should not be externalities but *de facto* are treated as such).

As a matter of social science, there are, broadly speaking, two different types of internalization. The first, which is in line with the daily usage of the word, is what we here may call true internalization; namely, “to incorporate (as values or patterns of culture) within the self as conscious or subconscious guiding principles through learning or socialization.”<sup>59</sup> The second is a type of superficial internalization, where people are made to act as if the values were internalized, without affecting their inner preferences.<sup>60</sup>

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56. See Noah Sachs, *Planning the Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States*, 30 HARV. ENVTL. L. REV. 51, 56 (2006).

57. See *id.* at 55-56. “Consumption” is in quotation marks because the problem, as pointed out by the author, is precisely that many of these goods are not consumed, but thrown away, creating an environmental problem.

58. See NELE DHONDT, INTEGRATION OF ENVIRONMENTAL PROTECTION INTO OTHER EC POLICIES: LEGAL THEORY AND PRACTICE 480 (2003). Dhondt did not find “true internalisation [sic] of environmental costs” in the sectors she examined.

59. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2008), available at [www.merriam-webster.com/dictionary/internalize](http://www.merriam-webster.com/dictionary/internalize). True internalization would lead to what Jon Elster describes as moral norms—norms which are unconditional—which we will follow even when unobserved and even without knowing what others will do. JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 104-05 (2007). True internalization of a less strong type would probably be covered by what Elster describes as quasi-moral norms (norms that are conditional in that we will follow them if we can observe what others do), or even social norms (norms that we follow when observed, to avoid social sanctions). *Id.*

60. This, as described by Robert Cooter, can be further divided into internalization through rules with or without sanctions for noncompliance. Robert Cooter, *The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint*, 75 FORDHAM L. REV. 1275, 1279-80 (2006).

Generally speaking, true internalization is very difficult to achieve, but it is naturally the more effective of the two when it is achieved.

In our context, we do not necessarily have to choose between the two types of internalization, but we do have to acknowledge the risks associated with superficial internalization, through the setting of rules. Namely, if superficial internalization is not sufficiently effective, the result will be more bureaucracy for corporations to contend with and more loopholes for them to find, without any real change being effected. If, on the other hand, superficial internalization is carried out in a satisfactory manner, it may very well have the effect of leading to true internalization over time. If we distinguish between true internalization as social norms (which are conditional) and as moral norms (which are unconditional and strong variants of true internalization),<sup>61</sup> we may also envisage that a social norm has the potential of turning into a moral norm.<sup>62</sup> Further, it has been put forward that the internalization of externalities through social norms often needs a legal norm, a superficial internalization through rules, to start it off.<sup>63</sup>

In our context, the aim would be to achieve true internalization over time, through the setting of internal corporate rules that require the board members to internalize these externalities in their decision-making process. If successful, this change, which probably would have to start as superficial internalization through legal norms, could develop to become a true internalization (as in social, and ideally, moral norms) for members of the board, and, by extension, corporate employees.

### B. *The Internal Corporate Law Approach*

It follows from the internal corporate view set out as the analytical starting point in Part I.D above, that within the corporation, the board is the organ of the highest level with significance for the daily running of the corporation. Returning for a moment to the view of the corporate governance debate, we may ask: if the focus

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61. See ELSTER, *supra* note 59, at 104-05.

62. See ELSTER, *supra* note 59, at 104-105. An example concerning our (Nordic) attitude to traffic lights may illustrate the transition from legal to social to moral norm: Many people stop at a red traffic light (the legal rules concerning which may be seen as superficial internalization) even when there is no traffic and no risk of being caught. Not waiting for the green light, although it sometimes may be done, goes against the grain somehow. For instance, the traffic rules have been the subject of true internalization. People, who feel reluctant to disobey the red light even when not observed, may be said to have internalized the legal rule not only as a social but also as a moral norm.

63. See ELSTER, *supra* note 59, at 358-59.

of the board (and, by extension, the management) is to be primarily on ensuring profits for shareholders and keeping the share price high to avoid a takeover, and the whole system encourages the shareholders to focus on their own profits, then who is responsible for the corporation's actions beyond its narrow obligation to comply with the law?<sup>64</sup>

Normatively, the answer seems to be that this is the role of the board. The function of the board is to determine the corporation's strategy, supervise and advise management, and in that context, promote the corporation's interests.<sup>65</sup> Although members of the board may have personal interests that they seek to follow, the board as such is not a recognized corporate interest<sup>66</sup> (unlike—depending on one's perspective—the employees; which would include the management, the shareholders, the creditors, the customers, the environment or society).<sup>67</sup> The board therefore has a unique role and position in balancing the involved interests.<sup>68</sup>

Nevertheless, the underlying drive of the current corporate governance debate, the shareholder primacy focus, encourages market participants to demand further restrictions on the board's scope of action and suggests additional incentives to align the board's and management's interests with the shareholders' presumed common interest in maximizing profits. Negative consequences for the environment arising from the corporation's activities are then viewed as externalities.<sup>69</sup> If a true internalization of environmental responsibility is to take place, the first and most crucial step is to redefine the societal role of the corporation and the role and the position of the board. Although shareholder primacy in many jurisdictions is a product of culture rather than law, the focus of the corporate governance debate seems to have so entrenched shareholder primacy that to achieve any change, it would be necessary to resort to the law expressly to redefine the

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64. And even this obligation may be set aside in the search for ways to maximize profit if the goal of profit maximization is sufficiently internalized, so that the social and financial consequences of being caught for not following the law are seen as possible (deductible) costs, and not prohibitions in themselves.

65. See SJAFFJELL, *supra* note 11, § 4.2.2.1.

66. Even so, ensuring stability of the board may clearly be important for the corporation.

67. For a further discussion of the concept of the corporate interest, see *supra* Part II.C.2.

68. See REINIER KRAAKMAN et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach* 34 (2004).

69. That is, they are viewed as something the corporation can ignore, as in not legally bound to consider.

role of the societal role of the corporation and the role of the board.

This focus on the board does not mean that we should ignore the main group within the corporation, namely the employees from the management level down. Quite the contrary, in the daily running of the corporation, it is the attitudes and the actions of all the corporation's employees that *de facto* determine corporate policy. If, however, we assume that it is necessary to have a corporate organ that is responsible for the actions of the corporation beyond the narrow responsibility for legal compliance, the board is the right place to start. And if internalization of externalities is achieved at the board level, this should, through the board's responsibility to set corporate policy and oversee the management of the corporation, influence the employees from the management level down. In fact, it should be clarified that this is part of the responsibility of the board: to ensure that the internalization of externalities is effectively made part of the corporate policy in practice.

### C. *The Board and Internal Corporate Internalization*

#### 1. A Normative View of the Purpose of the Corporation

Redefining the internal corporate law definition of the role of the board to include the internalization of externalities would have to take as its starting point the purpose of the corporation and the guidelines for running the corporation on the basis of that purpose. This Section therefore starts by outlining a normative view of the purpose of the corporation and thereafter the guidelines according to which a corporation should be run. We will go on from there to indicate how these guidelines can be internalized within the board and the associated risks and costs of effecting such a change.

The purpose of the corporation, from a normative perspective, may be summarized as the fulfillment of its function as an all-important component of our economies in a way that, as far as possible, contributes to the general goals of society. This summary can be elaborated by saying that the purpose of the corporation is to act as a legal entity through which business can be run in a manner that deals fairly and properly with the involved parties. European societies today neither deem it possible nor desirable for the state to provide all goods and services. Rather, the trend has been that of so-called privatization, whereby the provision of services is increasingly delegated to corporations, including those services

that were earlier the obvious domain of the state.<sup>70</sup> An essential part of the purpose of corporations should therefore be to provide goods and services of the quality and quantity that society requires.<sup>71</sup> To achieve this, the legal entity should be such that it inspires trust among, *inter alia*, the sources of finance, other contractual partners, and its employees, who are the notable providers of firm-specific contributions.<sup>72</sup>

Further, the purpose of the corporation should go beyond mere legal compliance and contribute to the achievement of society's goal of sustainable development by balancing economic, social, and environmental interests. Corporations are such a significant source of power in our society that if they do not contribute toward the achievement of society's goals, society will simply not be able to achieve these goals, or at least not to the same extent.<sup>73</sup>

What does such a societal purpose for corporations entail? It should mean that there is a party within the entity—which should be the board—that is responsible for ensuring that certain societal goals form (part of) the guidelines by which the individual corporation is run. This in turn means adopting an approach whereby the corporation is not viewed solely as a vehicle to allow a particular party—the shareholders—to get the highest possible profits, but involves an approach that recognizes the actual power and influence that corporations have.

From a normative perspective, it seems we need a change of focus. Instead of being content with encouraging corporations to adopt voluntary corporate social responsibility goals—goals that seem to be understood as promoting corporate social responsibility within the framework of “business as usual”—we need to clarify the responsibility of all corporations to treat their employees, external workers, the environment, their creditors, sources of finance, suppliers, and so forth in a responsible manner. The goal of profit, for the benefit of the enterprise and thereby also of the shareholders, must then take its place within the framework of a responsible busi-

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70. See Colin Mayer, *Corporate Governance, Competition, and Performance*, 24 J.L. & Soc'y 152, 170 (1997) (regarding some of the challenges posed by the privatization).

71. This is also linked to our moral obligations concerning the global environment—using resources in a quality-conscious manner. A related question, which we can but indicate here, is whether our societies *need* many of the goods and services produced.

72. See Margaret M. Blair, *Shareholder Value, Corporate Governance, and Corporate Performance*, in *CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY* 53, 70-71 (Peter K. Cornelius & Bruce Kogut eds., 2003); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999).

73. Making a contribution means both abstaining from actions with detrimental effects and contributing actively and positively.

ness instead of *vice versa*, as represented by the concept of shareholder profit maximization, a trend that appears to dominate thinking in the United States and the United Kingdom and that is on the rise in Continental Europe as well.<sup>74</sup>

An argument against stipulating the general purpose of corporations in this way is that it confuses roles. In labor law, environmental law, planning law, and so forth, it is the responsibility of the legislator to establish the ground rules with which all parties, including corporations, must comply. A corporation cannot be expected to take the same kind of overview as a legislator. It is not necessary, however, for individual corporations to attempt to envisage the aggregated effect of all corporations' actions. Corporations should fulfill their societal purpose by each focusing on its own role and the consequences of its own actions, based on available knowledge and expertise. Another consideration is that legislation has a tendency to follow events, rather than to anticipate and thereby prevent them.<sup>75</sup> If we want to avoid a proliferation of *ad hoc* legislation, we really have only two alternatives: either all possible actions by a corporation, both thinkable and unthinkable, will have to be regulated, or, if we do not want such overregulation, the purpose of the corporation must be defined in a way that recognizes its societal impact. The next two Subsections seek to develop this topic by discussing guidelines relating first to the corporate interest and second to sustainable development.

This call for a change of focus may be seen as taking one step further to the triple bottom line recommended by various bodies, such as the European Union, in its sustainable development policy.<sup>76</sup> It is quite possible to maintain the focus that was criticized

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74. This trend is on the rise so much so that at one point the end of history was declared. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* 1 (Yale Law Sch. Law & Econ., Working Paper No. 235, 2000), available at <http://ssrn.com/abstract=204528>. But see John Armour, Simon Deakin & Suzanne J. Konzelmann, *Shareholder Primacy and the Trajectory of UK Corporate Governance*, 41 BRIT. J. INDUS. REL. 531, 532 (2003); Lynn A. Stout, *New Thinking On "Shareholder Primacy"* 6 (Jan. 10, 2005) (unpublished manuscript), available at <http://www.law.ucla.edu/docs/bus.sloan-stout.pdf>.

75. See, e.g., GEORGE GOYDER, *THE JUST ENTERPRISE* 36 (1987) (giving the example of the countryside of Northamptonshire being dug up in search of iron ore: "[i]t was some years before the government passed legislation imposing on companies the legal duty of reinstating fields and woods devastated by open-cast mining, and by then it was too late to recover much of the amenity value lost").

76. See, e.g., *Commission's Proposal to the Gothenburg European Council: A Sustainable Europe for a Better World*, at 8, COM (2001) 264 final (May 15, 2001). It is important to keep in mind that triple-bottom-line accounting means expanding the traditional reporting framework to take into account ecological and social performance in addition to financial performance.

above while applying a triple bottom line, that is, by putting shareholder profits first, and then incorporating social and environmental concerns as far as possible after the first bottom line has been put in place. A more integrated, comprehensive approach is required where economic gain is realized within the framework of the broader societal interest.

## 2. The Corporate Interest as the First Guideline

This Article develops as a guideline the concept of the corporation interest itself, encompassing the involved parties and with the economic interest of the enterprise at its core.<sup>77</sup> The economic component of the corporate interest tends, from the perspective of shareholder value, to be identified as shareholder-value maximization.<sup>78</sup> Shareholder value, however, which is a rather typical consequence of a well-run corporation, cannot fruitfully be used as a guideline for running the corporation. For such a guideline to be realistic, normatively tenable, and meaningful, other involved parties and affected interests would also have to be taken into consideration, as in the “enlightened” shareholder value taken by, *inter alia*, the U.K. Companies Act.<sup>79</sup> Since the shareholders of a large listed corporation are an ever-changing group, employing their interest as a guideline, even in an enlightened version, can only be done theoretically.<sup>80</sup> Canvassing the actual shareholders for their opinion on a regular basis would hardly be a realistic, let alone an appropriate, course of action.<sup>81</sup> Since enlightened-shareholder value is intended to be a long-term concept, a concept involving a hypothetical shareholder would somehow have to amalgamate current and future, as yet unidentified, shareholders.<sup>82</sup> The resolve of the active shareholders’ will have manifested itself through the res-

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77. For a further discussion of the parties involved, see SJAFFJELL, *supra* note 11, chs. 2-7.

78. Michael C. Jensen, *Value Maximization, Stakeholder Theory and the Corporate Objective Function*, in UNFOLDING STAKEHOLDER THINKING: THEORY, RESPONSIBILITY AND ENGAGEMENT 65-84 (Jörg Andriof et al. eds., 2002).

79. The directors are acting in good faith and exercising independent judgment to promote the “success of the company” for the benefit of the shareholders as a whole, and “in doing so have regard (amongst other matters) to” long-term consequences, the interests of the employees and “the need to foster the company’s business relationships with suppliers, customers and others” and “the impact of the company’s operations on the community and the environment.” Companies Act, 2006, c. 46, § 172 (Eng.). As we see here, the shareholders’ interest is still the ultimate guideline.

80. Gregory Crespi, *Maximizing the Wealth of Fictional Shareholders: Which Fiction Should Directors Embrace?*, 32 J. CORP. L. 381, 383 (2006-2007).

81. *Id.* at 421.

82. *See id.*

olutions of the general meeting. This constitutes part of the framework for the running of the corporation, as do, for example, the corporation's legislative and contractual obligations—but what we are discussing here are the guidelines by which the board and management should make strategic decisions and determine the day-to-day running of the corporation, within that framework.

The broader view of the corporate interest then seems to offer a more meaningful alternative, both in that it encompasses all the relevant parties, and also in that it has the interest of the enterprise itself as a distinguishing element, that is, as something other than the sum of the interests of all the involved parties.<sup>83</sup> If, for example, there is a conflict between the interests of the shareholders and the interests of the employees, the interest of the enterprise itself may be helpful and even decisive. Consider the following simple example. Decision *A* is opposed by the employees but will satisfy the shareholders because the share price rises as rumors grow that the corporation is considering relocation or downsizing. Decision *B* will satisfy the employees but not the shareholders, because downsizing is avoided but the share price goes down with the denouncement of downsizing plans. Decision *C* will satisfy the shareholders but not the employees, because the share price will rise on the announcement of a merger that will probably also entail downsizing. Decision *C* will also ensure the economic viability of the enterprise, as opposed to Decisions *A* and *B*, which, in the considered opinion of the board, would both pose threats to the economic health of the enterprise. Decision *C* would then be easier to opt for as being the decision in the corporation's overall interest, rather than for the decision to be reached only through setting the interests of the employees against those of the shareholders.

In fact, it seems that if the board and management of the corporation are to adopt a long-term, rational economic perspective, the economic health of the enterprise itself would have to be a part, and often a decisive part, of decisions where the purported guideline is long-term “enlightened” shareholder value.<sup>84</sup> The concept

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83. The interest of the enterprise is explained, for example, by the Finnish author L.E. Taxell as ensuring economic stability and development opportunities (“ekonomisk stabilitet och utvecklingsmöjligheter”) for the enterprise. L.E. TAXELL, *AKTIEBOLAGETS ORGANISATION* [The Organization of the Company] 13 (1983).

84. See, e.g., Companies Act, 2006, c. 46, § 172 (Eng.) (requiring that the directors act, in good faith and exercising independent judgement, 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 long-term consequences, the interests of the employees and “the need

of the corporate interest in this broad sense, with the interest of the enterprise itself as the decisive element, offers a more realistic approach to corporate decision making.<sup>85</sup> It also allows the concept of the corporate interest to be applied in relation to a group of companies, an issue that time and space do not allow us to develop further here.

Using the corporate interest as a guideline therefore means that the decision makers, when making strategic and concrete decisions, must attempt to balance the various interests as best as possible, with the interest of the enterprise normally as the decisive factor where there is conflict between other interests. This probably would not add anything new to strategic and decision-making practices in many corporations, nor is it meant to. Rather, these observations are meant to reflect the complexity of running a responsible business.

### 3. Sustainable Development as the Second Guideline

The interest of the global community is essentially different from those of the involved parties. With respect to the involved parties, both within and outside the corporation, there will be a clear contractual connection, and although there may not be a contractual link with the local (or the national communities), the corporation will typically have a relationship with, and understanding of, its local community or communities.<sup>86</sup> The corporation will not usually have a problem recognizing that it affects, and is affected by, these parties and interests.<sup>87</sup> The interest of the global community, with its intertwined global environmental, human, and economic considerations, is generally a much more abstract concept for the

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to foster the company's business relationships with suppliers, customers and others" and "the impact of the company's operations on the community and the environment," is seen as a codification of "enlightened" shareholder value). *See also id.* ¶ 325 (explanatory notes to § 172).

85. *See also* Eddy Wymeersch, *A Status Report on Corporate Governance Rules and Practices in Some Continental European States*, in *COMPARATIVE CORPORATE GOVERNANCE: STATE OF THE ART AND EMERGING RESEARCH 1080* (Klaus Hopt et al. eds., 1998) (distinguishing between the interest of the corporation as such, which could imply that the board would "act for the continuity of the [corporation] as a separate economic entity" and the interests of the enterprise, where mergers and restructurings are not perceived as a threat *per se.*) *See also* TAXELL, *supra* note 83, at 13 (on the interest of the enterprise as the often decisive element in the balancing of the different interests). As Taxell also points out, this balancing still has to be carried out, ultimately and in principle, by the shareholders through their decisions at the general meeting, but in practice by the board and management. *Id.*

86. *See* SJAFFJELL, *supra* note 11, § 4.4.1.

87. *See id.*

individual corporation to grasp.<sup>88</sup> Nor, traditionally, has it been thought that there was any need for the corporation to grasp this concept.<sup>89</sup>

The global challenges we face, which in part are perceived as new (climate change<sup>90</sup> and the looming energy crisis<sup>91</sup>) and which in part arise from a growing recognition of our responsibility for long-standing issues (poverty and human-rights violations)<sup>92</sup> and of the interrelation between them,<sup>93</sup> are in the process of changing

88. *See id.* §§ 4.4.1, 4.4.2.

89. *See id.* § 4.4.2.

90. CLIMATE CHANGE 2007: SYNTHESIS REPORT 65 (Rajendra Pachauri & Andy Reisinger eds., 2007) (“Unmitigated climate change would, in the long term, be *likely* to exceed the capacity of natural, managed and human systems to adapt. Reliance on adaptation alone could eventually lead to a magnitude of climate change to which effective adaptation is not possible, or will only be available at very high social, environmental and economic costs.”).

91. *See* Mamdouh Salameh, *Peak Oil: A Reality or Hype?*, (U.S. Ass’n for Energy Econ. (USAEE), Working Paper No. 08-005, 2008), available at <http://ssrn.com/paper=1084991>. Salameh notes:

[T]here is plenty of oil and gas left but not enough to feed growing global energy demand for much longer. Second, the peak in conventional oil production has already been reached in 2006 and when the market realizes this, severe economic traumas will ensue . . . [D]oing nothing is not an option. It will only lead to conflicts and devastating wars in the future. This begs the question as to whether the world could eventually be weaned off oil. The answer to that is that it can only be done if we endeavour to change our way of life, eas[ier] said than done. But the dire alternative will eventually force us to change the way we live and seek alternative energy sources.

*Id.*

92. JOACHIM VON BRAUN, FOOD POLICY REPORT: THE WORLD FOOD SITUATION: NEW DRIVING FORCES AND REQUIRED ACTIONS 11 (2007). Von Braun reports:

Many of those who are the poorest and hungriest today will still be poor and hungry in 2015, the target year of the Millennium Development Goals . . . The fact that large numbers of people continue to live in intransigent poverty and hunger in an increasingly wealthy global economy is the major ethical, economic, and public health challenge of our time. The number of undernourished in the developing world actually increased from 823 million in 1990 to 830 million in 2004 . . . [I]n the developing world, one of every four children under the age of five is still underweight.

*Id.*

93. It is the poor people of this world who are already suffering the most, who will suffer first as a consequence of climate change and of the global energy situation. CLIMATE CHANGE 2007, *supra* note 90, at 65. *See also* VON BRAUN, *supra* note 92, at 12 (discussing the current rising energy prices which lead to rising food prices and the detrimental effect on the underprivileged). “When taking into account the effects of climate change, the number of undernourished people in Sub-Saharan Africa may triple between 1990 and 2080.” *Id.* *See also* Javier Blas, *WFP plea for \$500m to avoid food aid cut*, FIN. TIMES, Mar. 23, 2008, (providing the latest news at the time of writing). “The World Food Programme has launched an ‘extraordinary emergency appeal’ to governments to donate at least \$500m in the next four weeks to avoid rationing food aid in response to the spiralling cost of food.” *Id.* And the gap is rising daily: “The WFP’s funding gap is now about \$600m-\$700m, officials said, after a 20 per cent jump in food costs in the past three weeks, the rise in the oil price to about \$100 a barrel, and a surge in shipping costs” and “[f]ood prices are rising on

this picture. We can no longer base our corporations' competitiveness, or the possibilities for economic development that our corporations offer, on a perception that natural resources are inexhaustible or that our ecosystem is invulnerable. The looming energy crisis underlines the fact that continuing along a path based on high fossil-fuel consumption is no longer a viable option—a fact that has to be accepted even by those who do not believe in the worst-case climate-change scenarios.<sup>94</sup> Once the global peak-oil point is passed, we will need to have found ways to move away from our dependence on oil. Otherwise, our economies will be left in ruins.<sup>95</sup> Nor is it normatively defensible to accept human-rights violations or other exploitations of workers (either in developing countries or on our doorstep). Thus it has become necessary to formulate a guideline that encompasses the interests of the global community—a sustainable development guideline.

The sustainable-development guideline is, as a starting point, wider than the corporate-interest guideline, but in certain cases, it will impose restrictions on the scope of the corporation's actions. This is an expression of the need for all actors in the global community to take on their responsibility for contributing to sustainable development, both in terms of legal compliance and beyond.

Application of the guideline has three main results. First, if a corporation is in a position to pursue one of two equally attractive paths, and both are in line with the corporate interest, but one will make a greater contribution to sustainable development, the latter should be adopted. This demonstrates how the sustainable-development guideline may affect the balancing of interests under the corporate-interest guideline. Second, the sustainable-development guideline may require a corporation to change its methods of pro-

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a mix of strong demand from developing countries; a rising global population; more frequent floods and droughts caused by climate change; and the biofuel industry's appetite for grains, analysts say. The WFP provides food to about 73m people in nearly 80 countries." *Id.*

94. See Javier Blas, *Peak oil: How will we cope when the oil has run out?*, FIN. TIMES, Nov. 9, 2007.

95. See, e.g., *id.*, stating the following:

In an unusually stark prediction for the head of one of the world's biggest oil companies, Christophe de Margerie, CEO of Total, the French group, says it will be difficult to reach 100m barrels a day of crude oil production. That is well below the official forecast of how much oil the world will need in the next 25 years.

See also *The Oil Price: Peak Nationalism*, ECONOMIST, Jan. 3, 2008 (stating that whether the situation amounts to a true geological peak oil, or rather a peak oil in political and investment terms, the same measures need to be applied: "encourage energy efficiency and support research into alternative fuels").

duction, even if such changes would, for the foreseeable future, lead to fewer bonuses for its employees and lower profits for its shareholders. In such a case, the corporation would be following strategies that would be excluded by mere application of the corporate-interest guideline.

Finally, and most dramatically, the sustainable-development guideline may require a corporation to close down its business if it is not possible to adopt alternative ways of doing business that do not cause irreparable damage to the interests of the global community. For example, if a corporation's business is based on an activity that contributes to the destruction of the rainforest, then it must either change its mode of operation or close down. A corporation that is dependent on the exploitation of workers in developing countries cannot be content with exploiting them slightly less; it must offer decent working conditions<sup>96</sup>—and if the business then becomes unprofitable, the corporation should cease to exist.

This may sound dramatic, but from a normative perspective, it seems clear that the global challenges we face may necessitate larger changes than those we have experienced or even considered so far.<sup>97</sup> We have to be prepared to face the fact that it is impossible to achieve all the necessary changes merely through adjustments to existing rules and practices. In certain contexts, drastic changes may have to be made. This is putting into operation the concept that we introduced above in our discussion of the purpose of the corporation, namely the idea that corporations' profits must be sought within the framework of the interests of the global community, instead of vice versa.<sup>98</sup>

Just like the corporate interest guideline, the sustainable-development guideline offers no simple solutions or general answers of a concrete nature. Again, this reflects the complex reality in which corporations operate.

#### 4. The Difficult Issue of How: the Risks and the Costs

The issue then remains of how to internalize within the board this dual guideline, arising from the combination of the corporate-interest and sustainable-development guidelines. Such internaliza-

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96. The fact that transnational corporations in many cases offer good working conditions in developing countries (compared to what is otherwise available locally), does not alter the need to stop the abuse that also does happen.

97. The abolition of slavery may have been perceived as a similarly dramatic turn of events.

98. *See supra* Part II.C.1.

tion is both a matter of law and of social norms, and of the interrelation between them. As a starting point, the role and position of the board should be redefined in corporate law, in line with the dual guideline. This first requires an elucidation of the purpose of the corporation and the concurrent responsibility of the board. The definition of the purpose of the corporation and the role of the board would have to be wide enough to encompass corporations in all industries while being specific on the integration of the environmental (and the social) dimension of the goal of sustainable development. Second, the legal position of the board will probably have to be strengthened in those jurisdictions where the drive toward shareholder primacy has led to decision making being taken out of the hands of the board and handed over to the shareholders.<sup>99</sup>

For such a sea change to take effect, the role of the board will have to be defined in such a way that its members feel bound to work actively toward fulfilling that role, rather than just using boiler-plate formulas to give the appearance of doing so. This is probably the most difficult aspect of the whole issue, especially if profit maximization for shareholders, or less extremely, profit maximization for the corporation, has been internalized as the overriding goal. But on the other hand, if a broader perspective concerning the purpose of the corporation and the role of the board is already within the realm of the preferences and self-understanding of many board members, then a redefinition of their role and position could suffice. Indeed, board members may not in general be all that comfortable being regarded as merely the agents of the shareholders.

It would be necessary to consider to what extent a redefinition of the board's role and position should be backed up by the use of incentives or sanctions. The interrelationship between legal and financial incentives, as well as the so-called low-powered incentives of duty, pride, conscience, and so forth, needs to be taken into

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99. See SJAFFELL, *supra* note 11, § 17.3 (analyzing the effect of the Takeover Directive's board neutrality rule on the board's possibility to take care of and balance the various interests affected by the corporation). It may be mentioned that it has been put forward that the reason why most public corporations in the United States have staggered boards (a system ensuring that the whole board cannot be replaced at once) may be precisely to protect their independence against abrupt changes in control amongst shareholders. See Blair, *Shareholder Value, Corporate Governance, and Corporate Performance*, *supra* note 72, at 64. Blair also mentions as (other) benefits: "continuity and stability of the board, as well as a greater independence from management." *Id.*

account.<sup>100</sup> Economic incentives meant to align the interests of board members (and management) with the profit-maximization interest of shareholders—for example, schemes where a rising share price will be profitable for board members—should probably be discontinued.<sup>101</sup> Increased possibilities for initiating litigation on the part of various parties, including shareholders, environmental groups and local authorities, should perhaps also become part of this picture, but the dangers of counterproductive effects, such as making the board more risk averse, must also be taken into account. Not least with a view to the pressure to make profits that invariably still will, and to a certain extent should, be on the corporation and therefore the board, but also as to provide real help to the board in making the right decisions for the move toward a sustainable business, internalizing the true societal costs of the corporation's actions through changes to accounting law may also be necessary.<sup>102</sup> Generally speaking, disclosure rules need to be considered. A review article of research into environmental disclosure shows that although many firms have increased the extent to which they voluntarily disclose environmental information, this informa-

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100. These values are denoted “low-powered” incentives in law and economics. KRAAKMAN, *supra* note 68, at 27. *But see id.* at 27 n. 19, stating the following:

By referring to moral norms as ‘low-powered’ incentives we do not mean to imply that they are generally less important in governing human behavior than are monetary incentives. Surely, for most individuals in most circumstances, the opposite is true, and civilization would not have gotten very far if this were not the case.

101. In general, options seem to have gone from being the assumed answer to the perceived problem. Now, several Member States are outlawing, or considering a prohibition against, options. *See* Ralph Atkins & Patrick Jenkins, *DaimlerChrysler drops plan for performance pay*, FIN. TIMES, Mar. 24, 2004 (regarding a German court ruling “outlawing stock options for supervisory board members”); Guillaume Delacroix, *France to unveil new rules on share options*, FIN. TIMES, Sept. 20, 2006 (regarding a proposed text for a law according to which “directors of French companies will be banned from exercising share options ‘whilst they remain in office’”) (citations omitted). “The new requirement is a response to public and media outrage over the exercise of options by executives of pan-European aerospace group EADS and French construction and toll-roads conglomerate Vinci.” *Id.* A well-publicized Norwegian case also illustrates the controversy associated with this attempted alignment of interests. *See* Rebecca Bream, *Norsk Hydro chairman forced to quit*, FIN. TIMES, Aug. 5, 2007 (“The chairman of Norsk Hydro was forced to resign on Sunday over the closure of the group’s stock option scheme, which involved a Nkr210m (\$36.5m) payout to top executives.”).

102. Corneliu, *supra* note 26, at 52 (“If firms and governments are serious about sustainable development, their most pressing job is to make progress in designing similar structures for the reporting of data relevant to sustainability. Comprehensive compilations of potential externalities like those advocated by the Global Reporting Initiative are part of this agenda, but a necessary complement is the development of pricing systems for the externalities, positive and negative, that are most likely to have significant effects on the outcomes of the tests for sustainability.”).

tion tends to be neither representative nor reliable.<sup>103</sup> There are even studies that indicate “a negative relation, i.e., the more a firm discloses, the worse its environmental performance.”<sup>104</sup> In other words, the uglier the corporation, the more makeup or corporate social responsibility as “greenwashing.” There are some mandatory disclosure requirements, typically concerning financial costs of environmental legal compliance.<sup>105</sup> Not even mandatory disclosure requirements are properly complied with, however, and concerns have therefore been raised about the reliability in this area as well.<sup>106</sup> Similar problems are reported concerning the disclosure of social issues.<sup>107</sup> This underlines the need for the internalization of these externalities so that they become decisive values within the corporation and its board.<sup>108</sup>

Any proposal to make such changes will, of course, be met with arguments that the board and by extension the management will act in a self-serving way if they are not obliged to focus on the interests of the shareholders.<sup>109</sup> But it is an over simplification to view the board as requiring a single, easy-to-measure guideline to work toward, in order to prevent its members from focusing on enriching themselves. Such an idea is too strongly based on an assumption of profit maximization as the decisive factor. Other incentives and mechanisms are also at work. Further, we have not discussed changing the rules governing election to the board—the fundamental control right of shareholders. The shareholders, as one source of finance, should have control rights to protect their investments in the shares. Although the independence of the board, in relation to the shareholders should probably be protected against the shareholders between general meetings (both ordinary and extraordinary), the board would still have to face the general meeting at some point, and would need to be able to justify its actions in

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103. Sylvie Berthelot, Denis Cormier & Michel Magnan, *Environmental Disclosure Research: Review and Synthesis*, 22 J. ACCT. LITERATURE 1, 5, 8-9, 15, 20 (2003).

104. *Id.* at 20.

105. *Compare* Commission Recommendation 2001/453, 2001 O.J. (L 156/33–42) (EC) on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies. This is a rather toothless measure as far as environmental protection is concerned.

106. Berthelot, Cormier & Magnan, *supra* note 103, at 26, 29, 32, 34.

107. Laufer, *supra* note 16.

108. This gives rise to difficult issues for research. *See also* Berthelot, Cormier & Magnan, *supra* note 103, at 36-38 (“[T]he measurement of environmental performance generally used by researchers does not reflect a complete and accurate environmental balance sheet.”). Berthelot, Cormier and Magnan explain the need for future research covering issues such as measurement, standardization, relevance, and reliability. *Id.*

109. *See generally* Jensen, *supra* note 78.

the preceding period within the new framework of the law, in order to be reelected. It is naïve to believe that today's general meetings have a simple job in assessing what the board has done because of profit maximization for shareholders as the ultimate guideline. The difficult balancing between involved parties and affected interests, between long-term and short-term, is a part of everyday business life today as well. What we are suggesting is an elucidation of this balancing process, adding and emphasizing considerations that sooner or later will force their way into all boardrooms and general meetings as a part of the reality we all must face anyway. But if we wait for this to happen voluntarily, it may be too late.

Combining a clearer role for the board with the old rules for electing it may lead to a satisfactory system of checks and balances in respect to power within a corporation, and although the risk of self-serving behavior by the board should not be ignored, neither should it prevent reconsideration of the current system. The current system's attempt to align the interests of shareholders and the board/management has, after all, backfired quite spectacularly,<sup>110</sup> illustrating the limitations of a monetized system of incentives.<sup>111</sup>

Naturally, there are costs involved in effecting such a change internally within the corporations. First, there are potential costs in the event of inadequate internalization, as indicated above.<sup>112</sup> These may possibly be minimized by the identification of the appropriate measures—and the challenge for future research lies in finding tentative answers to what these might be. Second, there may, at least and especially in the short term, be real costs attached generally to not maximizing profits wherever possible. More specifically, having to comply with requirements that corporations

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110. As Enron and other corporate scandals perhaps may illustrate, see Jennifer Hill, *Corporate Scandals Across the Globe: Regulating the Role of the Director*, in REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 266 (Guido Ferrarini et al. eds., 2004).

111. See Blair, *supra* note 72, at 70-71. See also Peter K. Cornelius & Bruce Kogut, *Introduction to CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY*, *supra* note 72, at 21 (discussing the similar issue that concerns employees):

The job of good governance . . . is to create conditions that improve capabilities inside a firm and among all parties contracting with the firm. The financial approach of effort and incentives is very often counterproductive to this end. It suffers from a fundamental problem called the "functional fallacy": if you pay people to do something they will do it, because people do things in order to be rewarded. This is not only bad social science; it also carries the seeds of eventual catastrophe. For once every relationship is monetized into a "nexus of contracts," people indeed do optimize and game the system. The solution has created a worse problem. We doubt if there is any governance mechanism that can prevent the consequences that ensue from fully monetizing the employment relationship.

112. See *supra* Part II.A.

from other jurisdictions are not bound by may result in a competitive disadvantage.

If we accept that these changes toward sustainable businesses ultimately have to be made, however, industries that are forced to prioritize sustainable-development and alternative energy sources now may become the market leaders in the future. The current lack of rules requiring businesses to follow a sustainable-development guideline may very well be providing an unfair competitive advantage to irresponsible corporations. Conversely, requiring all European corporations to work toward a sustainable development would give corporations that already implement such a guideline a competitive advantage over those that do not.

When considering further the argument that requiring European corporations to follow a sustainable-development guideline could render them less competitive, there are several considerations that should be taken into account.

First, the proposed requirement is envisaged to be formulated in a very general manner. The alternative, over time, would be a further increase in specific, external regulation which would, as a consequence of the nature of concrete regulatory requirements applicable to a broad group, run the risk of being both over invasive and missing the mark. Documenting compliance with such specific external regulation could well be even more bureaucratic and costly, and as such, even more detrimental to European competitiveness. A general requirement concerning awareness of environmental issues could, at the discretion of a well-informed and trustworthy board, be better internalized within the specific decision-making and production processes of the individual corporation.

Second, the intention of the current European environmental regulation of corporations is not to win a global "race to the bottom" by imposing no environmental requirements. The question is therefore not *whether* we should have rules protecting the environment, but *what* rules we should have. The argument may be made that requiring the corporation and its board to internalize a duty to protect the environment and contribute to sustainable development may, if successfully implemented, both lead to a more comprehensive and active contribution by the corporations and give the corporations more freedom in how to plan and implement their businesses and their contribution to sustainable development. Only corporations that wish to commence or continue business of an unsustainable nature should be concerned by such a

requirement. And are those the kind of corporations we want to foster in Europe: those providing jobs and economic development for now, but working against the achievement of a necessary sustainable development?

Third, different requirements for European corporations and corporations from other jurisdictions, such as China, Russia, or for that matter, the United States, are a part of the reality that European corporations already face. Depending on their competitors' jurisdictions, European corporations may have to comply with stricter regulations aimed at protecting the environment. But has this led to European corporations moving out of the European Union? Generally speaking, this does not seem to be the case. We may, however, find that stricter environmental (and social) regulations will have some impact, as corporations may, rather than moving out of the European Union, relocate their production to, for example, certain developing countries. If a general requirement were to be stipulated that covered corporations' production abroad, that might of course lead some corporations to relocate altogether. On the other hand, corporations within the European Union have the advantage of being part of the common market: an advantage that might outweigh possible disadvantages. Also, to the extent that European corporations manufacture goods abroad, not to avoid stricter regulation in Europe, but to take advantage of lower labor costs, this would not as such, except in cases of exploitation, be stopped by a general sustainable-development requirement.

Fourth, European corporations that could show they were governed by a corporate-law regime that encompasses a sustainable-development guideline, might find this to be a marketing advantage with regard to both private and public customers and the growing group of "green" investors and other sources of finance, as well as in relation to other businesses that are interested in cooperating with environmentally responsible corporations.

These considerations come in addition to the fact that in a number of cases, the sustainable-development guideline and the corporate-interest guideline—at least from a reasonable long-term perspective—will coincide.<sup>113</sup> Increasing numbers of consultants

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113. This does not, however, entail that the corporate interest guideline by itself will lead to sustainable development. As we remember from Part II.C.3 above, the sustainable development guideline may entail a corporation making a specific, environmentally-responsible, choice between two financially attractive alternatives. Further, the sustainable development guideline may lead to the corporation going into new avenues compatible

claim that this is so and advertise their services to help businesses become sustainable.<sup>114</sup> Whether these consultants really contribute toward a truly sustainable development, or whether they help businesses act in a socially responsible manner within the framework of, and subordinate to the goal of, profit maximization for shareholders, is an area that requires further research.

But it should not be denied that requiring European corporations to become truly sustainable does entail a real risk that some industries or some corporations may lose out, at least in the short-term, either because they are unable *per se* to make a profit while being environmentally responsible, or because of competition from corporations in other jurisdictions. If the European Union uses its global position to promote sustainable development as a corporate-law guideline, this effect may to a certain degree be mitigated.<sup>115</sup> Nevertheless, requiring corporations to be sustainable may conflict with the aim of the Lisbon agenda of creating more jobs and furthering economic development.<sup>116</sup> The Lisbon agenda has been expanded to encompass the concept of sustainable development and its environmental dimension,<sup>117</sup> but we may well ask whether this has had any significant impact on the way its aims are sought to be achieved.<sup>118</sup>

It may be politically difficult to explain that job creation and economic development have to be subordinated to the overarching aim of sustainable development. Considering the growing aware-

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with the corporate interest guideline, but which in traditional corporate interest thinking could have been overlooked.

114. See, e.g., PriceWaterhouseCoopers, Consulting: Sustainability, [www.pwc.com/gx/sustainability/index.jhtml](http://www.pwc.com/gx/sustainability/index.jhtml) (last visited Aug. 18, 2009) (describing creating a sustainable business). But whether these corporations are truly following a sustainable development guideline or just behaving less irresponsibly than their peers is perhaps unclear because "financial analysis continues to be based on traditional accounting practices that do not reflect social or environmental issues." Cornelius, *supra* note 26, at 51.

115. To what extent the European Union can require that, for example, products exported to the European Union from third country corporations follow a sustainable development guideline, is notably a matter of World Trade Organization law, which we will not pursue here.

116. Presidency Conclusions, Lisbon European Council (Mar. 23-24, 2000). With time, this has become known as the "Lisbon agenda." The new challenge was that of a "quantum shift resulting from globalisation and the challenges of a new knowledge-driven economy," to which the European Union must react in a manner "consistent with its values and concepts of society." *Id.*

117. Presidency Conclusions, Gothenburg European Council (June 15-16, 2001).

118. See e.g., Marc Pallemmaerts, *The EU and Sustainable Development: An Ambiguous Relationship*, in *THE EUROPEAN UNION AND SUSTAINABLE DEVELOPMENT: INTERNAL AND EXTERNAL DIMENSIONS* (Marc Pallemmaerts & Albenaz Azmanova eds., 2006). See also DHONDT, *supra* note 58, at 480.

ness of the necessity of environmental protection, however, resistance may not be as great as politicians seem to expect. And it is not as if jobs can be secured through political means today: we accept “creative destruction” as a natural part of a free-market economy, where some corporations make it, and some do not.<sup>119</sup> It would be strange indeed if we did not then accept the demise of unsustainable corporations as an inevitable result of imposing a sustainable-development requirement as part of the equal terms of competition for all European corporations.

From an ethical point of view, no corporation’s competitiveness should be based on the exploitation of people and the environment or on the taking of unacceptable risks with our ecological and societal basis, whether this takes place within the current framework of the law or not.

We shall now return to the issue of E.U. law and its position on integrating sustainable development in corporate law. Can E.U. corporate law move toward the inclusion of environmental (and social) considerations at the very core of corporate law? And should it do so? Or is E.U. corporate law, with its focus on shareholder rights and the promotion of a “market for corporate control,” immune to such considerations? This gives rise to the further question of what role E.U. corporate law has, and should have, in the larger context of E.U. law. As we shall see, the discussion concludes that E.U. law provides a legal basis for integrating environmental and social considerations into corporate law. This leads us to the discussion of whether E.U. law mandates such integration, or whether the direction to be taken by E.U. corporate law can be left to the political horse trading between dominant political and economic forces.

### III. E.U. CORPORATE LAW AND SUSTAINABLE DEVELOPMENT

#### A. *The Core and Contributory Role of E.U. Corporate law*

The core role of E.U. corporate law is to promote economic development by acting as a vehicle for market integration, facilitating and enabling cross-border business, promoting investment in the European financial market(s), and protecting the interests of the involved parties—the latter both to facilitate integration and to

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119. RAGHURAM RAJAN & LUIGI ZINGALES, *SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY 1* (2003) (using the term generally about the process that “vibrant, innovative” financial markets keep alive).

serve as an objective in its own right. This is the conclusion of an analysis of relevant Treaty provisions, of the preambles of the secondary legislation within the sector, and of the case law of the European Court of Justice.<sup>120</sup> This analysis further shows that each sector also has a contributory role that goes beyond and affects the scope of its core role. The basis for stipulating such a contributory role is the position of the general objectives of E.U. law, particularly as set out in Article 2 EC.<sup>121</sup> The general objectives form a framework for all E.U. law; and activities within each sector are meant to contribute to, and at least not work against, the general objectives.<sup>122</sup> The contributory role of E.U. corporate law is accordingly to promote sustainable development through facilitating and furthering the coherence between on the one hand, environmental and social/labor law and on the other, the core economic role of corporate law of promoting economic development.<sup>123</sup>

This Article will consider the scope of the obligations for Community institutions that follow particularly from Article 2 EC and Article 6 EC, and what this means for our discussion regarding the internalization of externalities in corporate law.

### B. *Article 2 EC and Article 6 EC*

Our analysis of the general objectives of E.U. law focuses on Article 2 EC as the main provision that encompasses the general objectives.<sup>124</sup> Article 2 EC states the following:

The Community shall have as its task . . . to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.<sup>125</sup>

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120. See generally SJAFJELL, *supra* note 11, chs. 8-11 (going into both corporate and securities law, as the analysis has as its starting point the regulation of large listed corporations).

121. See *id.*

122. See *id.*

123. See *id.* § 10.9.

124. See *id.* chs. 8-11.

125. By using the term "task" (and not "objectives," as does EU Treaty art. 2), the EC Treaty actually only indirectly tells us what the general objectives of the Community are, in that the characteristics that the Community has as its task "to promote" also shows us that the ultimate goal is the achievement of a good society—that is, a society which has the

The general objectives may be said to consist of five main elements: economic development; social development; environmental protection; respect for human rights; and contributing to global development.<sup>126</sup> These elements form the framework for all of E.U. law.<sup>127</sup>

Article 6 EC is the rule that encompasses the environmental integration principle with the aim of sustainable development (which may therefore also be called the sustainable-development principle), and provides that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.” This sustainable development principle raises the status of sustainable development as a general objective, and establishes a duty to integrate environmental protection into all sectors and thereby work toward sustainable development.<sup>128</sup>

It should be recognized that both the main provision encompassing the general objectives and the principle of integration have legal implications; neither are mere policy statements.<sup>129</sup>

### C. *Legal Consequences for Community Institutions*

#### 1. Obligations on Different Levels

For the purposes of this analysis, discussion of the legal consequences for Community institutions of the general goals of E.U. law, and particularly of the position of Article 2 EC, may be split up into four different questions. The first question is whether Community activities must be grounded within the wide boundaries set by the general objectives. The second is whether an obligation to balance or to attempt to balance the general objectives may be stipulated. This also involves issues of prioritization. The third question is whether a duty to act to promote the general objectives may be deduced from the position of the general objectives. Finally, the fourth is whether the Community institutions may be said to

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characteristics that Article 2 lists. *See also* EBERHARD GRABITZ & MEINHARD HILF, *DAS RECHT DER EUROPÄISCHEN UNION* 2 (2008) (denoting the characteristics listed in Article 2 as “allgemeine [Vertrags] Ziele”).

126. The basis for and status of these general objectives are set out in SJAFFJELL, *supra* note 11, at 193.

127. *Id.*

128. *See* KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT 644 (Hans von der Groeben & Jürgen Schwarze eds., 6th ed. 2003).

129. *See* SJAFFJELL, *supra* note 11, §§ 10.1.3, 10.7.3, 10.10, 11.4.

have a duty to undertake specific activities in specific sectors. The analysis below will also discuss the significance of the sustainable development principle in Article 6 EC.

The concept of duties or obligations in this context may be split up into three different types. The first and presumably strongest is the legal duty that is enforceable in a court of law. It appears untenable, however, to draw the conclusion that a legal obligation can only be found to exist where, and to the extent that, it is enforceable in a court of law. If we conclude that a certain obligation rests on the Community institutions, the Court of Justice will be under the same obligation (or a similar one, as its precise nature will of course vary according to the institutions' tasks) as the other Community institutions. If the Court does not fulfill its duty, this may mean that it becomes *de facto* impossible to take enforcement action in respect of nonfulfillment by other Community institutions. Similarly, even if the Court conscientiously fulfills its duty, there may be general rules or case-specific issues regarding procedure or competence that may prevent the Court from enforcing the duties of other Community institutions. Neither of these situations should in themselves, however, change the nature of the legal obligation's character. The second type is therefore the legal duty that, for various reasons, may not be enforceable in a court of law.

The third type is the normative duty that comes within the framework of the law, covering both the situation where normative arguments may act as support for an uncertain or fragile legal basis for stipulating an obligation, and the situation where normative arguments provide a basis for deciding between legally acceptable alternatives.

## 2. The Obligation to Stay within the Boundaries of the General Objectives

In the context of this Article, it is not the possible obligations imposed on the E.U. Member States, but those imposed on the Community institutions, that we are interested in.<sup>130</sup> The imposition of a legal obligation that states that the Community's activities must be grounded in the general objectives of the Community seems to follow quite naturally from the wording of Article 2 EC,

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130. And, as stated by Grabitz, Article 2 does not have a direct effect ("nicht unmittelbar anwendbar") on the Member States and the citizens. Article 2 is directed at Community institutions. GRABITZ, *supra* note 125, at 3 ("Art. 2 [wendet] sich unmittelbar nur an die Unionsorgane.").

which establishes the framework for Community law, stating the Community's tasks, objectives, and main instruments.<sup>131</sup>

The position of Article 2 EC in Part One of the Principles of the Treaty, second only to the provision declaring the establishment of the Community, further supports this understanding, as does the wording of Articles 3, 4, and 5 EC,<sup>132</sup> as well as Article 5 EU.<sup>133</sup> The latter two articles embody the recognized principle that all legislative initiatives must have their legal basis in the Treaty.

The case law of the Court of Justice supports this understanding of Article 2 EC as setting out a legal duty. Whether regarding secondary legislation or a particular Treaty provision, the Court has repeatedly related the aims of the provision in question to the general objectives in Article 2 EC. On topics ranging from sports and religious communities to drugs and prostitution, the Court has interpreted the objectives in Article 2 EC in order to determine whether or not a case comes within the scope of Community law.<sup>134</sup> Where activities or national legislation fall outside the scope of the general objectives, they are not governed by Community law.<sup>135</sup>

Article 2 EC therefore establishes the framework of the Community's competence and, as such, it may be said that the Community's activities must have their basis in its general objectives. Obviously, the duty to stay within the boundaries of the general objectives applies not only to the Community institutions responsi-

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131. The list of objectives in Article 2 is quoted above, in Part III.B. See also GRABITZ, *supra* note 125, at 3.

132. See EC Treaty arts. 3-5. Articles 3 and 4 open with: "For the purposes set out in Article 2," and Article 5 stipulates that the Community "shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." *Id.* See also KAPTEYN, *supra* note 3, at 110 ("Articles 2 [and 3] set out in global terms the objectives of the Treaty and the means by which they are to be achieved.").

133. EU Treaty art. 5 (stating that the Community institutions are to "exercise their powers under the conditions and for the purposes provided for" by both the EC and the EU Treaties).

134. See Case 34/74, B.N.O. Walrave v. Ass'n Union cycliste internationale, 1974 E.C.R. 1405, ¶ 4 (stating that "[h]aving regard to the objectives of the Community, the practice of sport is subject to Community law only as far as it constitutes an economic activity within the meaning of Article 2"); Case 240/81, Einberger v. Freiburg, 1982 E.C.R. 3699, ¶ 13 (the common customs tariff "falls within the scope of the objectives assigned to the Community in Article 2," while the import of drugs falls "wholly outside those objectives"); Case 66/85, Lawrie-Blum v. Baden-Württemberg, 1986 E.C.R. 2121, ¶ 13 (regarding the term "worker"); Case 196/87, Steymann v. Justitie, 1988 E.C.R. 6159, ¶ 2, 8-14 (on religious communities); Case C-309/96, Annibaldi v. Sindaco del Comune di Guidonia, 1997 E.C.R. I-07493, ¶ 14-15, 20-24 (on cultural heritage protection); Case C-268/99, Janý v. Justitie, 2001 E.C.R. I-8615, ¶ 33, 48-50 (regarding prostitution).

135. See B.N.O. Walrave, 1974 E.C.R. 1405; Einberger, 1982 E.C.R. 3699; Lawrie-Blum, 1986 E.C.R. 2121; Steymann, 1988 E.C.R. 6159; Annibaldi, 1997 E.C.R. I-07493; Janý, 2001 E.C.R. I-8615.

ble for legislating and carrying out policy-related activities, but also to the judiciary, as “the systematic teleological method of interpretation binds the judges to the system and aims of Community law.”<sup>136</sup> Clearly we will not find a great variety of practical examples where a Community institution has gone beyond the competence derived from the objectives of the Treaty, as the scope of the objectives is very wide.<sup>137</sup> This does not, however, alter the consequence of the general objectives, which is to establish the boundaries of Community law.

### 3. The Duty to Work toward a Balance between the General Objectives

The second issue, whether Article 2 EC imposes a legal obligation on the Community to achieve an overall balance between the general objectives, might seem more open to debate. The wording of Article 2 EC itself, however, indicates the existence of an obligation to achieve balance—the European Union is to promote a “harmonious, balanced and sustainable development.”<sup>138</sup> Logically, for the development to be “harmonious, balanced and sustainable,”<sup>139</sup> a balance must be sought between the various objectives. Furthermore, Article 2 EC does not stipulate that achievement should be attempted of only one or some of the list of major and minor objectives, but rather promotes all of the objectives—which once again, means that a balance has to be sought.<sup>140</sup>

It may be argued that an obligation to balance the various objectives is an intrinsic part of E.U. law, and at least it should be common ground that such balancing is intrinsic to E.U. law. E.U. law is constantly evolving. The focus on market integration and economic objectives in the original European Economic Community

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136. KAPTEYN, *supra* note 3, at 291 (quoting Geelhoed, who states that this method of interpretation “thus limits [judges’] freedom of policy choice”).

137. We can find an example of the opposite situation, namely, of a general objective expanding the competence (as hitherto perceived) of the Community institutions. *See, e.g.*, Case C-176/03, *Comm’n of the European Cmty. v. Council of the European Union*, 2005 E.C.R. I-7879, ¶ 47-51.

138. EC Treaty art. 2.

139. *Id.*

140. *See also* MIGUEL P. MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* 150-51 (1998) (“Whichever institution is entrusted the regulation of the common market *will have to* balance a variety of goals.”) (emphasis added); GRABITZ, *supra* note 125, at 8 (saying that the goal of a high level of environmental protection does not mean the highest level that is technically achievable, but rather that the objective must be considered in relation to the other objectives and that a balance must be achieved between them (“und mit ihnen zum Ausgleich gebracht werden muß”).

may have led us to overlook the fact that Community institutions have continuously sought to balance the objectives and involved interests.<sup>141</sup>

The Court has, notably, through the development of the position of fundamental rights in Community law, as well as the promotion of environmental protection as an essential objective, demonstrated a desire to achieve a balance between the societal goals of the Community. Likewise, the Court has, throughout the entire history of its case law on the issue of whether Member States' restrictions are justifiable, where it has not confined itself to the bases for derogation in the Treaty, but developed the doctrine of imperative requirements, and through its related discussions on proportionality, attempted to establish a balance.<sup>142</sup>

The development of the objectives at the Treaty level leads to two factors from which we may infer support for the existence of an obligation, linked to Article 2 EC, to balance different objectives. First, the range of societal objectives specified in the Treaty has increased, indicating a pursuit of balance in the European project.<sup>143</sup> Second, the inclusion of these objectives is significant. Its significance is demonstrated both by the fact that the Member States have changed the Treaty to include objectives such as economic and social cohesion and environmental protection "which the Member States already regarded as important for Community policy and for which Community action already has an express legal basis in the Treaty,"<sup>144</sup> and in the Court's use of the objectives.<sup>145</sup>

*Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*<sup>146</sup> is an example of a case where the Court sought to achieve a balance between objectives in Article 2 EC, namely

141. That we may wish, at times, to criticize or disagree with the way this balancing is carried out simply underlines the subjective element of the value choices that are always involved therein.

142. See SJAFJELL, *supra* note 11, at 183. See also JOANNE SCOTT, EC ENVIRONMENTAL LAW 69 (1998) ("Proportionality proper . . . demands a balancing."). That the results may be criticized does not negate the Court's search for balance. Rather, the fact that the Court has not kept to a straight path, but instead adjusted its case law, emphasizes its search for balance.

143. See SJAFJELL, *supra* note 11, ch. 10 (providing an overview of the development of the general objectives).

144. KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 81 (Robert Bray ed., 2d ed. 2005) (on the inclusion of these and other objectives through treaty amendments).

145. See SJAFJELL, *supra* note 11, § 10.1.2.

146. Case C-67/96, *Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, 1999 E.C.R. I-5751.

between the objective of promoting competition—as a fundamental element of the common market and part of the goal of economic development—and the objectives regarding employment and social protection.<sup>147</sup> After referring to Articles 2 and 3 EC (regarding both objectives), and additional social provisions in the Treaty regarding the development of dialogue between management and labor, the Court found, through an interpretation based on a coherent Treaty system where objectives are balanced, that:

It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the *social policy objectives* pursued by such agreements would be *seriously undermined* if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment. . . . It therefore follows from *an interpretation of the provisions of the Treaty as a whole which is both effective and consistent* that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.<sup>148</sup>

Further examples are the case regarding the Austrian prohibition on road transport in a certain area to protect the environment, where the Court balanced the objectives of environmental protection and the free movement of goods,<sup>149</sup> and the case concerning the compulsory return of empty drinks containers in Denmark, where the objective of economic development, through the facilitation of the internal market by free movement, was balanced

147. *Id.* ¶¶ 53-60.

148. *Id.* ¶¶ 59-60 (emphasis added). The same wording is used in Joined cases C-115/97 to C-117/97, *Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, 1999 E.C.R. I-6025, ¶¶ 56-57 and Case C-219/97, *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, 1999 E.C.R. I-6121, ¶¶ 46-47, decided the same day.

149. *See* Case C-320/03, *Comm'n of the European Cmtys. v. Republic of Austria*, 2005 E.C.R. I-9871, ¶¶ 64, 72 (outlining the objectives). The balancing of the two objectives in this case ended with the Austrian ban being struck out because the environmental effects of alternative measures had not been considered properly and because the aim of the ban—moving goods from road to rail—could only be achieved if sufficient rail capacity was made available. *See id.* ¶¶ 87-89. This finding against an environmental measure is a “relatively unusual phenomenon” in environmental cases, according to Francis Jacobs, *The Role of the European Court of Justice in the Protection of the Environment*, 18 J. ENVTL. L. 185, 199 (2006), who emphasizes the Court’s environmentally-friendly attitude, as opposed to the somewhat inaccurate and negative description of the case in KRÄMER, *supra* note 6, at 4-5, 114.

against that of environmental protection.<sup>150</sup>

In *Europemballage Corp. v. Commission of the European Communities*, the Court discussed the “need to harmonize the various objectives of the Treaty.”<sup>151</sup> In *Schmidberger v. Republik Österreich*, the Court balanced the human rights of freedom of expression and assembly with the economic interests encompassed by the free movement of goods.<sup>152</sup> The Court expressed this balance as the need to “reconcile” the conflicting interests and ensure that a “fair balance was struck” between them.<sup>153</sup>

In the specific context of secondary legislation, the Court has illustrated in a number of cases the requirement intrinsic in E.U. law to achieve a balance between the different objectives. Examples include cases concerning the conservation of wild birds,<sup>154</sup> fundamental rights,<sup>155</sup> trademarks,<sup>156</sup> and Community protective

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150. See Case 302/86, *Comm'n of the European Cmty. v. Kingdom of Denmark*, 1988 E.C.R. 4607, ¶¶ 20-22. Based on the enhancement of the position of environmental protection in Case 240/83, *Procureur de la République v. ADBHU*, 1985 E.C.R. 00531, ¶ 13, the 1988 Court made the important announcement that the protection of the environment “is a mandatory requirement,” which meant that it could be used to justify restrictions on free movement. *European Cmty.*, 1988 E.C.R. 4607, ¶¶ 8-9. See also JOANNE SCOTT, *EC ENVIRONMENTAL LAW 67-68* (1998); JAN H. JANS, *EUROPEAN ENVIRONMENTAL LAW 246-48, 258-62* (2d ed. 2000); KRÄMER, *supra* note 6, at 105-06. Krämer has, for other reasons, denoted this case as (unduly) “influenced by policy considerations” and as one of few exceptions to his otherwise favorable impression of the rulings of the Court of Justice concerning the protection of the environment. KRÄMER, *supra* note 6, at 50, 113.

151. Case 6-72, *Europemballage Corp. v. Comm'n of the European Cmty.*, 1973 E.C.R. 215, ¶ 24.

152. Case C-112/00, *Schmidberger v. Republik Österreich*, 2003 E.C.R. I-05659, ¶¶ 77, 81. There is also a requirement for striking a “fair balance” in European human rights law as an intrinsic part of the European Convention of Human Rights. FRANCIS G. JACOBS, ET AL., *The European Convention on Human Rights 4-5* (4th ed. 2006). See, e.g., Case Application No. 44302/02, *J.A. Pye Ltd. v. United Kingdom*, 2007 E.C.H.R. [not yet published], ¶ 53.

153. *Id.*

154. See, e.g., Case 262/85, *Comm'n of the European Cmty. v. Italian Republic*, 1987 E.C.R. 3073, ¶ 8 (stating “that the protection of birds must be balanced against other requirements”), based on Council Directive 79/409/EEC, art. 2, 1979 O.J. (L 103) I (stating that “economic and recreational requirements” are to be taken into account).

155. See, e.g., Case C-101/01, *Criminal proceedings against Bodil Lindqvist*, 2003 E.C.R. I-12971, ¶¶ 85-86 (“Thus, it is, rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved” and in that context, “fundamental rights have a particular importance.”) (emphasis added).

156. See, e.g., Case C-337/95, *Parfums Christian Dior SA v. Evora BV*, 1997 E.C.R. I-6013, ¶ 44 (“[A] balance must be struck between the legitimate interest of the trade mark owner in being protected against resellers using his trade mark for advertising in a manner which could damage the reputation of the trade mark and the reseller’s legitimate interest in being able to resell the goods in question by using advertising methods which are customary in his sector of trade.”) (emphasis added).

measures against Chilean apples.<sup>157</sup>

Perhaps one of the clearest statements by the Court regarding Community institutions' obligation to balance the various objectives has been made with reference to sector-specific objectives, as follows:

In pursuing those objectives, [the various objectives of the common agricultural policy] the Community institutions *must secure the permanent harmonization made necessary by any conflicts between those objectives* taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made.<sup>158</sup>

The scope of the objectives concerned is not dissimilar to the wide range of objectives in Article 2 EC, encompassing the increase of agricultural productivity, a fair standard of living for farmers, stable markets, the availability of supplies, as well as reasonable prices for consumers.<sup>159</sup>

We see that the case law of the Court supports the existence of a general obligation to balance Community objectives, although the Court has not expressly stated that such an obligation exists. An annulment claim before the Court of Justice based on an allegation that one of the objectives was not properly considered, or that the objectives were not properly balanced, may very well be dismissed with reference to the discretion enjoyed by the Community (and Member States) as to how the objectives are followed up in practice. This may be illustrated by a case concerning the validity

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157. See, e.g., Case C-152/88 R, Sofrimport Sàrl v. Comm'n of the European Cmty., 1988 E.C.R. 2931, ¶ 30 (regarding the necessity of balancing the detrimental consequences for the trader against the alleged "serious and irreparable damage" for the Community—incidentally, the Court's conclusion was in favour of the trader). Regarding the suspension of the operation of a Commission decision relating to proceedings under (then) Article 85 of the EEC Treaty, see, e.g., Case C-56/89 R, Order of the President of the Court in case Publishers Ass'n v. Comm'n of the European Cmty., 1989 E.C.R. 1693, ¶ 35 ("*A balance must be struck*, in particular, between that risk and the Commission's interest in bringing to an end forthwith the infringement of the competition rules contained in the Treaty which it claims to have ascertained.") (emphasis added).

158. Case 29-77, SA Roquette Frères v. French State – Administration des Douanes, 1977 E.C.R. 1835, ¶¶ 29–31 (emphasis added). This has been confirmed in a number of judgments. See, e.g., Case 203/86, Kingdom of Spain v. Council of the European Cmty., 1988 E.C.R. 4563, ¶ 10 ("[T]he Court has consistently held that in pursuing the objectives of the common agricultural policy the Community institutions must secure the permanent harmonization.") (referring to the first judgment). See also Case C-405/92, Établissements Armand Mondiet SA v. Armement Islais SARL, 1993 E.C.R. I-6133 (regarding the common fisheries policy); Case C-44/94, The Queen v. Minister of Agric., Fisheries & Food, 1995 E.C.R. I-3115.

159. EC Treaty art. 33(1).

of Community legislation within the transport sector.<sup>160</sup> Here the Court said the following:

As the case-law has firmly established, in giving the Council the task of adopting this policy[,] a common transport policy, the Treaty has conferred wide legislative powers upon it as regards the adoption of appropriate common rules . . . . In reviewing the exercise of such powers, the Court cannot substitute its own assessment for that of the Community legislature, but must confine itself to examining whether that latter assessment contains a manifest error or constitutes a misuse of powers, or whether the authority in question did not clearly exceed the bounds of its discretion . . . .<sup>161</sup>

Accordingly, the case law on Article 2 EC may not give explicit support for the existence of a binding obligation—binding in the sense that the Court would strike down a single Community initiative that did not sufficiently balance the objectives—that requires Community institutions to balance the different objectives in the strictest sense. It may be open to question what the Court would do if faced with a piece of legislation that called for a balancing of objectives and where no such balancing seemed to have been attempted. Nonetheless, if the Community should proceed in a completely different direction from that implied by the Court's interpretation of the objectives as a whole, or should it clearly abandon any attempt to achieve one of the general objectives, that might very well constitute grounds for a successful claim for annulment. It should be noted that in the case referred to immediately above<sup>162</sup> where the discretion of the legislature was referenced, the Court did assess whether Community legislation was “in conformity with the aims of the Treaty as set out in Article 2 thereof.”<sup>163</sup>

Further, on the basis of the case law we have discussed so far, it is clearly a correct understanding of E.U. law to view the general objectives as a framework within which a balance between the objectives has to be sought—and the Court of Justice will typically go into this issue if it is brought to the Court's attention. It is probable, however, that the issue often does not come to a head

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160. See Joined cases C-248/95 and C-249/95, *SAM Schiffahrt GmbH v. Federal Republic of Germany*, 1997 E.C.R. I-4475, ¶¶ 40-49.

161. *Id.* ¶¶ 23-24; see also Case 29-77, *Frères*, 1977 E.C.R. 1835, ¶¶ 19-20.

162. See generally Joined cases C-248/95 and C-249/95, *SAM Schiffahrt GmbH v. Federal Republic of Germany*, 1997 E.C.R. I-4475; Case 29-77, *Frères*, 1977 E.C.R. 1835, ¶¶ 19-20.

163. Joined cases, *SAM*, 1997 E.C.R. I-4475, ¶ 37. See also Case C-341/95, *Bettati v. Safety Hi-Tech Srl.*, 1998 E.C.R. I-4355, ¶ 35 (regarding the environmental objectives in then Article 130, where the Court considered whether the Council had “committed a manifest error of appraisal”).

because of the Court's dynamic, teleological method of interpretation, whereby the Court seeks to achieve an interpretation of the secondary legislation that conforms with the Treaty, and because of individual Treaty provisions in line with the Principles in Part One of the Treaty.<sup>164</sup>

If we move beyond the issue of what the Court will consider to be within its competence (and prudent) to strike down, we may conclude that, although the scope of the Community institutions' discretion will make enforcement before the Court difficult (except in rather extreme cases), the Treaty objectives form the basis for a legal obligation on the Community institutions.<sup>165</sup>

Article 6 EC imposes a legal obligation to integrate environmental protection requirements into all sectors of E.U. law,<sup>166</sup> and the addition of the aim of sustainable development to the principle of integration is legally significant. First, Article 6 EC strengthens the position of sustainable development as a general objective, and second, Article 6 EC establishes the direction to be followed when integrating environmental-protection requirements into all sectors.<sup>167</sup> When we add this to the very definition of sustainable development, which in itself necessitates the balancing of various objectives, logic dictates that Article 6 EC is the final piece of the jigsaw puzzle: first, it completes the argument in favor of the existence of a principle of E.U. law that requires a balancing of the general objectives,<sup>168</sup> and second, it establishes that this balancing must have sustainable development as its ultimate goal, with emphasis given to the environmental-protection dimension of sustainable development.<sup>169</sup> Although the Court of Justice has not expressly stated that such an obligation flows from Article 6 EC, its use of, and repeated reference to Article 6 EC as "a provision

164. See, e.g., ANTONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 620-621(2d ed. 2006) (on the Court's teleological, contextual and dynamic method of interpretation).

165. JANS, *supra* note 150, at 21-22, makes the same distinction (between what can be relied upon before the Court, and what the legal obligation is for the E.U. legislature) in a related discussion regarding EC Treaty art. 6.

166. That is, those included in EC Treaty art. 6, which encompass EC Treaty art. 3's instruments: the entire internal market, the facilitation of the free movement of goods, services, capital and labor, free market competition, and the so-called flanking policies.

167. See SJAFFJELL, *supra* note 11, §§ 10.5.3, 10.7.2. See also Case C-379/98, *PreussenElektra AG v. Schleswag AG*, 2001 E.C.R. I-2099; Case C-176/03, *Comm'n of the European Cmty. v. Council of the European Union*, 2005 E.C.R. I-7879, ¶ 42; Case C-440/05, *Comm'n of the European Cmty. v. Council of the European Union*, 2007 E.C.R. I-9097, ¶ 60.

168. See, e.g., JANS, *supra* note 150 (providing some support).

169. See DHONDT, *supra* note 58, at 484.

which emphasises the *fundamental nature of [the environmental protection] objective* and its *extension across the range of those policies and activities*<sup>170</sup> underlines the significance of the provision and supports the argument made here.<sup>171</sup>

#### 4. The Duty to Act

This Article argues that Article 2 EC not only establishes the limits within which the Community potentially may act, but also imposes a general obligation on the Community institutions to act—they must implement the task bestowed upon them. This obligation may be said to follow directly from the wording of the formulation in Article 2 EC of the Community's task, and likewise the wording in Article 2 EU<sup>172</sup> concerning the objectives that the European Union "shall set itself," and that "shall be achieved as provided in this Treaty."<sup>173</sup> This understanding is confirmed by the wording in Article 5 EC,<sup>174</sup> albeit this focuses on the limits within which the Community shall act, but which also thereby indicates that the Community shall act in order to achieve the objectives of the Treaty. Article 5 EU is even clearer.<sup>175</sup> Although this provision also indicates the limits within which the Community may act, the provision states that the Community institutions "shall exercise their powers . . . for the purposes" of the Treaties.<sup>176</sup>

Support for the claim that there is an actual obligation on the Community institutions to work toward achieving the general

170. See, Case C-176/03, Comm'n of the European Cmty. v. Council of the European Union, 2005 E.C.R. I-7879, ¶ 42 (emphasis added).

171. The opinions of the Advocates General have often been much clearer. See, e.g., Case C-379/98, Opinion of Advocate General Jacobs in *PreussenElektra*, 2001 E.C.R. I-2099; Case C-371/98, Opinion of Advocate General Léger in *The Queen v. Sec'y of State for the Env't, Transp. & the Regions*, 2000 E.C.R. I-9235. These cases illustrate that sometimes the opinions are "jurisprudential racehorses, galloping directly to the finishing line decked out in vivid colours," with the judgments following at a more sedate pace. ARNULL, *supra* note 164, at 16. Even in a rather reticent opinion by Advocate General Geelhoed, the legal significance of, and the obligations derived from, Article 6 are acknowledged. Geelhoed did not argue against the requirement to find a balance, but emphasized rather that an assessment of whether that requirement had been complied with would have to take the form of a wide evaluation of the Community measures in that area, "given the broad horizontal character of Article 6 EC." Case C-161/04, Opinion of Advocate General Geelhoed in *Austria v. Parliament & Council*, 2006 E.C.R. I-7183, ¶¶ 54-60. The Court of Justice did not have occasion to enter into the debate in this case, as the case was withdrawn by Austria and removed from the register.

172. EU Treaty art. 2.

173. *Id.* art. 2.

174. See EC Treaty art. 5.

175. EU Treaty art. 5.

176. *Id.*

objectives of E.U. law may be found in early academic works on Community law<sup>177</sup> as well as in the updated commentaries on the Treaties: Grabitz and Hilf describe the Community as a goal-oriented system of action (“ein zielorientiertes Handlungssystem”) that is characterized by a particular focus and commitment to the achievement of its goals (“zeichnet sich durch besondere Zielbezogenheit und Zielverpflichtetheit aus”).<sup>178</sup> Groeben and Schwarze also state that Article 2 EC imposes a duty (“Pflicht”) on Community institutions to work toward, to the greatest extent possible, the balanced achievement of the various objectives contained in Article 2 (“die verschiedenen Ziele . . . abzustimmen, im *weitesten* Umfang zu *verwirklichen* und miteinander in Einklang zu bringen”).<sup>179</sup>

We need to distinguish here between two questions: first, do the Community institutions have an obligation to work toward the achievement of the general objectives; and second, do the general objectives impose direct and specific obligations on the Community in relation to how the objectives should be achieved; the latter being the issue discussed in the next Subsection. E.U. Member States have several times argued that the second interpretation is right, but their claims have been rejected.<sup>180</sup> This is not decisive, however, for determining whether Article 2 EC imposes a general obligation to work toward achieving the objectives contained within it. Nor does that rule out, *per se*, the possibility that the Community institutions could be obligated to undertake specific action. The claims set forth by the E.U. Member States concerning the action that the Community institutions should be required to undertake—or refrain from undertaking—have not only been very specific, but also of an extreme nature.<sup>181</sup> Accordingly, the Court

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177. See H.P. IPSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* 558 (1972), who is clear on the direct legal effect of the objectives provision on the Community institutions: “[Die] Zielbestimmungen haben für die Gemeinschaftsorganen trotz ihrer tabestandlichen Unbestimmtheit unmittelbar bindende Wirkung. Sie sind aktuelles Recht.” This is followed up in *KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT*, *supra* note 128, at 600 (with further references: “Die Vertragsziele besitzen also ‘rechtsverbindlich steuernde Wirkung’”).

178. GRABITZ, *supra* note 125, at 2-3.

179. *KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT*, *supra* note 128, at 601-02 (emphasis added). Albeit this duty is not necessarily enforceable in the Court, see also *infra* note 181 and accompanying text.

180. See Case C-149/96, *Portuguese Republic v. Council of the European Union*, 1999 E.C.R. I-8395, ¶¶ 85-87; Case 126/86, *Giménez Zaera v. Institut Nacional de la Seguridad Social*, 1987 E.C.R. 3697, ¶¶ 3708-09.

181. In Case C-149/96, *Portugal v. Council*, 1999 E.C.R. I-8395, ¶¶ 85-87, we see that Portugal seems to have claimed that the objective of economic and social cohesion in Arti-

does not seem to have had occasion to go into the issue of whether the Community has a general obligation to work toward achievement of the Treaty's objectives.

What then does Article 6 EC add to this picture? Perhaps it may be said that the wording of Article 6 EC does not impose a general duty to act in order to achieve sustainable development, that is, to instigate new measures, independent of other policies and activities that come within the scope of Article 3 EC.<sup>182</sup> It certainly imposes a duty, however, to include environmental protection and the aim of sustainable development into the definition of all new plans and when implementing already existing activities and policies. As such, Article 6 EC requires the Community institutions to undertake their activities in a certain way and with a particular goal. In other words, Article 6 EC requires action. This duty to act is at least in principle, enforceable before the Court of Justice.<sup>183</sup>

The action required by Article 6 applies to all stages of a policy or activity, as is apparent from the words "definition and implementation":<sup>184</sup> the sustainable development principle must be considered during the shaping of the policies and activities and must also be integral to their implementation. As already noted, Article 6 EC enhances the position of environmental protection as a general objective and thereby also that of sustainable development.<sup>185</sup>

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cle 2 is a fundamental principle that is absolutely binding on the institutions "to the extent that any measure capable of having a negative impact on certain less-favoured areas of the Community is automatically void." In that context, the Court rejected the Portuguese claim. In Case C-107/99, Opinion of Advocate General Mischo in *Italian Republic v. Comm'n of the European Cmty.*, 2002 E.C.R. I-1091, ¶¶ 157-158 (annulled by the Court for other reasons), we see that Italy attacked a Commission decision regarding structural funds. The Advocate General was of the following opinion:

[T]he aim of strengthening economic and social cohesion, as provided in Article 2(j) of the Treaty, is not specific enough for it to be inferred that a precise obligation is imposed on the Commission, such as a particular method according to which the Commission should have divided between the Member States the reduction made in the indicative allocations for the benefit of the Peace programme.

In the same category is Case 126/86, *Giménez Zaera*, 1987 E.C.R. 3697, where any reduction in a person's retirement pension was claimed to be contrary to the goal of improving standards of living.

182. EC Treaty art. 6 stipulates that: "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development."

183. See SJAFFJELL, *supra* note 11, §§ 10.5.2, 19.3. See also KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT, *supra* note 128, at 644.

184. EC Treaty art. 6.

185. See *supra* Part III.C.3.

“Accordingly, as regards the objective of sustainable development, and particularly the environmental protection dimension, Article 6 EC serves to strengthen the obligation imposed by Article 2 EC to work towards the achievement of the general objectives.”<sup>186</sup> The normative necessity of working toward sustainable development further strengthens the case in favor of a legal duty to act to achieve this overarching goal.

Of course, the general obligation that this Article has argued for under Article 2 EC, with support under Article 6 EC as concerns sustainable development and notably the environmental-protection aspect, would have to be understood within certain practical limits concerning, for example, the economic resources available in each and any period. On a general level this obligation can only be stated in rather wide-ranging and abstract terms. This probably also partly explains the absence of case law on such a general duty to act. To bring the issue down from an abstract level to a more concrete level, it is necessary to determine, as already indicated, a specific setting, and go into the discussion of an obligation to act on those concrete terms. That is what we will do in the next Subsection, with a focus on the goal of sustainable development.

##### 5. The Duty to Undertake Specific Activities in Specific Sectors

We have seen that E.U. law provides a legal basis for working toward sustainable development in all sectors.<sup>187</sup> The problem is that the narrow, one-dimensional shareholder-primacy approach that tends to dominate the European-corporate-law debate also influences the E.U. legislative debate and the legislation that is the result.<sup>188</sup> The question examined in this Subsection, and the final question in our analysis, is whether the Community institutions are under a legal obligation to change this approach. Clearly, the political climate cannot be a relevant restriction of a legal obligation.<sup>189</sup> So if we agree that we have a long way to go before a sustainable development is achieved, and if we further agree that it is necessary to have the cooperation of corporations in order to achieve sustainable development (and that the current voluntary contributions are insufficient), Treaty law, notably Articles 2 and 6

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186. SJAFFJELL, *supra* note 11, at 226.

187. *See id.* § 10.7.3.

188. *See* SJAFFJELL, *supra* note 11, chs. 14-19 (analyzing the Takeover Directive).

189. It is not clear whether the rather pessimistic view taken by Professor Krämer, for example in KRÄMER, *supra* note 6, at 402-410, entails a disagreement concerning the scope of the legal obligation, or whether Krämer is merely disillusioned about the willingness of Community institutions to follow up on their legal obligations.

EC, taken seriously, obliges the Community to first evaluate the necessary steps and then to take them.

This Article argues that real influence on the decision makers in corporations can only be achieved by taking the view from within. To influence European corporations, we need to make the perspective of sustainable development integral to all areas of the law involving corporations—especially corporate law—truly to internalize that which today is perceived as externalities. If we agree that internalizing externalities by way of changes in corporate law is necessary to ensure that corporations contribute toward sustainable development, then Treaty law mandates such a step.

Unfortunately, the objective of sustainable development has not yet been integrated properly into all sectors of E.U. law.<sup>190</sup> This does not, however, detract from the legitimacy and veracity of the legal argument advanced here. Rather, it emphasizes the need to spell it out and repeat it until the message gets through.

The counterargument that would typically be advanced against the changes proposed in this Article would be that such steps cannot be taken because they would scare away investors and make E.U. corporations less competitive. As discussed above, there may be competitive advantages in requiring the corporation to contribute to sustainable development.<sup>191</sup> Costs may arise, however, especially in the short-term, as a result of the transition from unsustainable to sustainable businesses and as a consequence of European corporations being required to integrate environmental protection to a larger degree than their foreign competitors. Nevertheless, it is the position of this Article that we have both a legal basis for and a normative imperative requiring the prioritization of sustainable development, especially its environmental protection dimension. The European Union cannot normatively, or as a matter of E.U. law, prioritize European corporations' (short-term) competitiveness over securing the very fundament for all societies: the sustainability of our ecosystem—"without which there is neither mankind nor society nor law."<sup>192</sup>

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190. KRÄMER, *supra* note 6; DHONDT, *supra* note 58, at 480; SJAFJELL, *supra* note 11.

191. See *supra* Part II.C.4.

192. An "acceptable environment is not the product of social development, but a prerequisite for it to exist, and is a right bound up with human life, without which there is neither mankind nor society nor law." Case C-176/03, Opinion of Advocate General Ruiz-Jarabo Colomer in case Commission v Council, 2005 E.C.R. I-07879, n. 51 (quoting Loperena Rota, *Los derechos al medio ambiente adecuado y a su protección*, in 3 DERECHO AMBIENTAL 87 (1999)). For further development of the argument concerning prioritization of our ecosystem, see SJAFJELL, *supra* note 11, § 10.9.3.

#### IV. CONCLUSION

To achieve real change for the better, three steps need to be taken. First, we must acknowledge that there is a problem, that is, that there are global environmental (and social) challenges that are not being dealt with adequately.

Second, we must establish what needs to be done to properly deal with this problem. This Article has argued that the contribution currently made by corporations is not sufficient, and that it is essential to ensure a true internalization of externalities. The way forward seems to lie with changes to corporate law, and the greatest research challenges lie in exactly how we are to achieve a true internalization in the face of opposition from powerful economic forces.

Third, once the way forward has been identified (and this will inevitably involve conclusions that are both tentative and temporary) the pertinent changes must actually be executed.

While the second step constitutes the greatest challenges for legal research, the first and especially the third steps are the greatest political stumbling blocks in a climate where shareholder primacy is still perceived by many as offering the most efficient solution, and where efficiency and economic development are seen as greater goods than a sustainable, viable development.