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CORPORATE SOCIAL RESPONSIBILITY AS CORPORATE SOFT LAW: MAINSTREAMING ETHICAL AND RESPONSIBLE CONDUCT IN CORPORATE GOVERNANCE

EUGENE K B TAN*

This article explores corporate social responsibility (“CSR”) as a viable mode of regulation and governance in the corporate arena. A starting premise is that good corporate governance must move resolutely beyond a compliance mindset to one which recognises that effective corporate governance must have an ethical backbone in which the dimensions of responsibility, transparency, and accountability are evident, recognised and supported. Regulatory endeavours and corporate governance reforms in the past decade have increasingly intersected with mainstream CSR motivations. CSR is increasingly inducted and mainstreamed into corporate governance thinking, characterised by the dual perspective of risk management and values-driven/principled governance and operations. Ultimately, good governance must embrace and integrate values rather than just rules. As a standard setter, values-driven CSR recognises and urges companies to be mindful of their activities and impact on stakeholders and the wider operating environment. These impulses should be harnessed to complement and sharpen corporate governance.

I. INTRODUCTION

The importance of commercially sound and socially responsible transactions cannot be understated if capitalism is to be universally accepted as the dominant mode of organising the economic realm. The excesses of an economic system anchored in the socially recognised logic of profit maximisation needs to be tempered with the need to instil sound values in corporate conduct in order to ensure that capitalism promotes the common good.

While the concept and practice of corporate social responsibility (“CSR”) is not new, the understanding and importance of CSR in Asia has grown in tandem with developments in Europe and North America.¹ What is often forgotten is that issues relating to corporate accountability, social

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responsibility and ethical conduct were not alien to the forerunners of today's modern corporate entities and multinationals.² For example, the early colonial-era British East India Company itself was caught up in the debate over the use of slaves in the West Indies sugar production.³ Almost two centuries later, at the turn of the twentieth century, the colonial Dutch government's "Ethical Policy" in the Dutch East Indies (now Indonesia) professed humanitarian concern for the welfare of the colonial subjects even as exploitation and subjugation remained widespread.⁴

Fast forward to the twenty-first century: In tandem with developments in the advanced economies of North America and Europe, CSR has acquired renewed vigour in the corporate landscape in Asia in which the notion of corporate accountability and credibility, intimately linked with *how* a company conducts its business and makes profits, is of growing importance and urgency.⁵

More recently, several Asian countries, including China, India, Indonesia and Malaysia, have enacted legislation requiring local and foreign companies to behave responsibly and to engage in CSR.⁶ But this regulatory approach has been controversial because of the aspirational attempt by the regulatory authorities to impose and prescribe corporate conscience. For instance, the Indonesian legislation⁷ has drawn criticism ranging from it being a "stealth tax," an investment barrier, to the lack of legislative clarity over where moral responsibilities should lie.⁸ Notwithstanding the legitimate concerns of companies, it is timely to remember that Asia, collectively, is fast becoming

and for the careful editorial work on the article. All errors remain my own alone.

1 David B. Montgomery, "Asian Management Education: Some Twenty-First Century Issues" (2005) 24:1 *Journal of Public Policy and Marketing* 150; Richard Welford, "Corporate Social Responsibility in Europe and Asia: Critical Elements and Best Practice" (2004) 13 *Journal of Corporate Citizenship* 31.

2 See e.g. Nick Robbins, *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational* (London: Pluto Press, 2003).

3 John Micklethwait & Adrian Woolridge, *The Company: A Short History of a Revolutionary Idea* (New York: The Modern Library, 2003). For the view that regards corporations as government-like in their powers and challenges the liberal, contractual theory of the corporation, see David Ciepley, "Beyond Public and Private: Toward a Political Theory of the Corporation," (2013) 107:1 *American Political Science Review* 139.

4 M.C. Ricklefs, *A History of Modern Indonesia since c. 1200*, 3d ed (Basingstoke: Palgrave, 2001) at 193-205.

5 Patrick L. Smith, "Asians demanding greater corporate responsiveness", *International Herald Tribune* (23 October 2006) online: The New York Times <<http://www.nytimes.com>>; Jedrej George Frynas, 'Corporate Social Responsibility in Emerging Economies,' (2006) 24 *Journal of Corporate Citizenship* 16.

6 Rajesh Chhabara, 'Responsibility initiatives – Indonesia and Malaysia are open for business ethics,' *Ethical Corporation UK* (7 September 2007) 28.

7 Law No. 40 of 2007 of Indonesia's Limited Liability Companies, Article 74(1) states: "Companies doing business in and/or in relation to natural resources must put into practice social and environmental responsibility."

8 "Do Good – or Else", Editorial, *Wall Street Journal Asia* (9 August 2007) online: The Wall Street Journal <<http://asia.wsj.com/home-page>>; Erin Lyon, 'CSR law in Indonesia,' *CSR Asia Weekly* 3:30 (25 July 2007) 1; Nguyen Thang D, 'Jakarta turns off investors big-time,' *Business Times [of Singapore]* (31 August 2007) 23.

the largest factory of the world. With the rise of an increasingly affluent middle class, it is fast becoming the largest market of the world too. The rise of China and India, and the likes of the Asian “tiger economies” of Hong Kong, Japan, South Korea, Singapore, and Taiwan, portends the growing economic as well as political clout of Asia.⁹

Not surprisingly, given Asia’s increasing dependence on export markets as an engine of economic growth and the trend of many transnational corporations shifting their production, research and development as well as outsourcing operations to Asia, CSR has gained a fledgling prominence in many parts of Asia over the last decade. Many supply chains now have start and end points in Asia. Simply put, given the heavier footprint of corporate endeavours, ethical transgressions and irresponsible conduct are more likely to take place in Asia in the decades ahead. The impact of these corporate misbehaviour will then also affect Asia significantly. Coupled with the reality that much of emerging Asia is struggling with rule of law issues and endemic corruption, well-crafted legal contracts and policies may be of limited efficacy in such environments.

We only need to recall the likes of Nike, GAP, and Union Carbide in the 1980s and 1990s which suffered severe reputational and commercial outcomes as a result of how they went about doing business in Asia, marginalising ethical concerns and lacking in CSR. Recent economic doldrums (or what has been popularly dubbed the “Great Recession”) inform us that the economic decoupling of emerging Asian economies from the advanced economies of Europe and North America is probably some way off. Although the centre of economic gravity is shifting eastwards, path dependence in the capitalist system render developments in the advanced industrialised economies to be highly relevant, influential and important to Asia. In this regard, CSR as essential corporate behaviour is gaining traction globally. However, there is no one-size-fits-all approach where CSR is concerned. CSR has to be contextualised.

In this essay, I argue that corporate law ought to treat CSR as a putative mode of regulation and governance. CSR has a key and complementary role to play in regulatory matters and in corporate governance. Indeed, this subtle potential is increasingly recognised to varying degrees by governments, regulators, and businesses. CSR, if properly practised and imbibed as part of the DNA of a corporate or governmental entity, seeks to move resolutely beyond a compliance (“checking boxes”) mindset to one which recognises that effective corporate governance must have an ethical spine in which the dimensions of responsibility, transparency, and accountability are evident, recognised and supported.

Secondly, prudent regulation and good governance are primarily about norms and values rather than rules *per se*. This distinction is vital although the corporate environment continues to emphasise the centrality of rules as a way of curbing corporate excesses. As a standard setter,

⁹ There are also putative economic powerhouses in Vietnam and Indonesia. Both countries have large populations and will grow in importance.

values-driven CSR is about going beyond mere compliance – it privileges substance over form. It recognises and urges companies to be mindful not just of shareholders but, more crucially, stakeholders, and the larger operating environment. In many instances, there is scope for a tripartite partnership of business, government, and civil society in dealing with the contemporary challenges such as poverty, workplace discrimination, child labour, corruption, and human rights concerns that present significant challenges throughout Asia.

This is not to say that CSR is the silver bullet to solve corporate ills and societal malaise — if only it were that simple! Akin to the demise of Enron in corporate America some years ago, the blue-chip financial institutions that went bust in the recent financial convulsions had one thing in common. All of them claimed to engage in CSR and subscribed to an ethical way of doing business. But, in truth, and as things have turned out, responsibility was patently lacking in the way they operated. Their actions ultimately spoke louder than the corporate spiel that provided the feel-good cover for various vices, including irresponsibility, fraud, and greed. The issue is not whether companies should engage in CSR, but how to operationalise and practise CSR in a purposeful manner. This requires that CSR functions not as a mere add-on — an after-thought. Instead, CSR is essentially about corporate values and strategy embedding CSR as an integral part of how business is carried out and how profits are made. What is different today from the days of European colonialism in Asia is the growing interest and impact of international and domestic civil society, media (both traditional and new media), anti-globalisation activists, and shareholder activism on matters of CSR. Companies ignore these developments to their reputational peril, which will significantly affect their financial bottom line.

Thirdly, CSR's ability to regulate and govern in the economic/commercial realm hinges on its inherent strength as soft law nudging economic players to focus on how profits are made within the overarching framework of recognising that both stakeholders and shareholders are crucial in making any business a profitable and sustainable proposition. Profits are important but profitability is a *sine qua non* if we are to avoid the Keynesian 'in the long run, we are all dead' scenario. In these challenging economic times, capitalism needs to be right-sized if it is to maintain its relevance, legitimacy, and vitality. CSR can be the humanising force if it is grounded in moral reasoning and leadership. It underscores the economic realm as an eco-system in which inter-dependence and trust are of crucial importance.

The thrust of the arguments in this essay coheres around how CSR can help to incorporate a robust sense of ethics and social responsibility in the business arena. The emphasis should be on how ethical and responsible conduct can be mainstreamed into corporate governance, and how society can encourage businesses to inject trust, responsibility and wholesome values in their activities even as businesses seek to generate economic value. The question is not why we need corporate governance and values but how to ensure that corporate governance and values inculcate

the appropriate corporate conduct while ensuring that profits co-exist within the framework of long-term sustainability. CSR has a vital role in that regard in demonstrating that for a business, value and values are not mutually exclusive but are symbiotically connected.

The essay is organised as follows: Part II discusses the concepts of CSR and the licence to operate to emphasise their growing importance in the corporate world and for corporate governance. Part III posits CSR as soft law and explores how CSR can function as a tool of corporate governance and regulation, primarily through seeking to engender the imbibing and internalising of the norms, values, and principles embedded in CSR. CSR, while seemingly inchoate as a body of law, may well develop into a regulatory framework through the ISO 26000 Guidance Standard. Further, CSR can provide the ballast for trust and regulation in the management of agency problems that are the focus of corporate law and governance. Indeed, I argue that CSR can potentially right-size capitalism. Part IV postulates that CSR as an imperative for change, particularly in light of the growing recognition and importance of the enlightened shareholder value principle. Part V concludes.

II. ATTRIBUTES OF CSR

CSR is a concept, a form of corporate conduct that is a lot easier to discuss, than to define. How important is CSR in today's business world? Is it a fad, a myth, a luxury, or a must-have? How compatible is CSR with the financial bottom-line? Is it appropriate for companies to use CSR to boost their reputation? Would you be more likely to work for a company with a reputation and commitment to social responsibility? These are some of the questions that have continually challenged both critics and advocates of CSR.

CSR is certainly more than corporate philanthropy and corporate volunteerism. CSR — despite its increasing popularity, saliency, and visibility — remains a controversial subject. CSR can be likened to the proverbial elephant being felt at different parts and perceived differently by different people. Despite the relative high profile of CSR, CSR remains a challenging concept and principle, attracting its ardent supporters and its fair share of strident critics. And businesses seem unsure how to approach and manage the CSR agenda, if at all.

Many definitions of CSR exist. To cite just one, the World Business Council for Sustainable Development defines CSR as “the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.”¹⁰ While the concept of CSR

10 World Business Council for Sustainable Development, *Corporate Social Responsibility (CSR)*, online: WBCSD <<http://www.wbcd.org>>.

may be relatively new in Asia, the actual practices and related activities are not new. In essence, CSR posits that non-financial performance can contribute to corporate accountability and impinge on the financial performance of companies. Notwithstanding the many definitions proffered in the literature, CSR has evolved into an all-encompassing concept. This essay will not attempt a definition of CSR but instead will list some of its salient attributes:

1. Responsible/ethical conduct (i.e. the domain of ethics);
2. Balancing competing and even conflicting aims and aspirations of diverse shareholders and stakeholders (i.e. cross-sectoral engagement and partnership of business, society, and government);
3. Positive non-financial outcomes in addition to generating optimal profits (i.e. reconciling the triple bottom-line considerations of environmental, social, and governance in evaluating corporate conduct);
4. Sustainability (e.g. quality of life, environmentally sustainable, inter-generational equity); and
5. Voluntary in nature, over and above what the law requires.¹¹

Thus, CSR is about the integration of stakeholders' social, environmental, and other concerns, into a company's business operations. To reiterate, CSR is fundamentally concerned with how profits are made by a company. The concept of the triple bottom-lines is relevant and instructive in this regard. Beyond the financial bottom-line, the three bottom-lines *viz* environmental, social and governance reflect the multi-faceted impact that a business has on the stakeholders and the larger operating environment. This understanding reinforces the value proposition of CSR as one that is not in conflict with shareholder interests but rather, is protective and facilitative of them in the long-term.¹²

It is important to recognise that CSR includes both the internal (ethical conduct, corporate

11 Compare this with the growing tendency to regard compliance with corporate governance requirements as CSR.

12 This brief discussion on CSR is merely painting the contours of a complex and rich area. For further discussion and analyses, see Andrew Crane et al, *The Oxford Handbook of Corporate Social Responsibility* (New York: Oxford University Press, 2008); Michael Kerr et al, *Corporate Social Responsibility: A Legal Analysis* (Ontario: LexisNexis, 2009); Geoffrey Heal, *When Principles Pay: Corporate Social Responsibility and the Bottom Line* (New York: Columbia University Press, 2008); Wayne Visser, *The Age of Responsibility: CSR 2.0 and the New DNA of Business* (West Sussex: Wiley, 2011); Andreas Georg Scherer & Guido Palazzo, "The New Political Role of Business in a Globalised World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy," (2011) 48:4 *Journal of Management Studies* 899; Stephen Brammer, Gregory Jackson & Dirk Matten, "Corporate Social Responsibility and Institutional Theory: New Perspectives on Private Governance" (2012) 10:1 *Socioecon Rev* 3; John Mackey & Raj Sisodia, *Conscious Capitalism: Liberating the Heroic Spirit of Business* (Boston, Massachusetts: Harvard Business Review Press, 2013).

governance, and transparency) and external dimensions (supply chain activities, impact on community and the environment) of a company's activities. Too often, the internal dimension gets side-lined or forgotten, resulting in CSR having a very strong external manifestation in which enhancing the corporate reputation is deemed more important than doing good. In many respects, it is artificial to separate the internal and external dimensions since they are intertwined and impact upon each other. Not surprisingly, critics have labelled CSR as "green wash" or a public relations exercise in which the objective is to enhance a company's reputation and visibility as a responsible corporate citizen. Regardless of the various understandings of CSR, it offers a viable platform through which a company can maintain its legal and social licence to operate. The inexorable trend is that of a "value shift" whereby companies will attain their financial targets if they can satisfy both the financial and social expectations of their stakeholders. This entails the melding of high ethical standards and outstanding financial results against the backdrop of society expecting higher standards of corporate conduct.¹³

A. *A Broader Conception of Licence to Operate*

Another way of looking at and justifying businesses practising CSR revolves around the concept of a company's "licence to operate". Two meanings follow: the first is the legal licence to operate which is essentially a formal grant of the licence to operate by the authorities in a jurisdiction; the second relates to the society's social approval or cognisance of a company's corporate conduct and impact that is deemed to be acceptable. A broader understanding of the licence to operate has two components: first, a contractual dimension in which a corporation is treated under the law as a separate legal personality, and, secondly, the subsistence of a *quid pro quo* arrangement expressed as an unwritten social contract in which a company maintains trust and confidence with stakeholders through operating in a manner that does not harm society.

To maintain the broader licence to operate, the corporation's compliance with laws and regulations while necessary is not sufficient to sustain the social licence to operate. Increasingly, CSR is seen as a vehicle by which companies can maintain the formal and social licences to operate. This approach underlines the importance of trust, the lack of which will result in negative commercial implications, including a tarnished reputation and increased government regulation. In a worst-case scenario, the licence (formal and social) to operate may be revoked. As such, the financial bottom-line is grossly inadequate as an indicator of corporate success even if the business of business is to make money and generate profits. But complementary to that is for a business to do good even as it strives, naturally, to do well.

13 Lynn Sharp Paine, *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance* (New York: McGraw-Hill, 2003).

What is evident is that CSR is conceived as a sound business approach that helps companies make money while doing good. Through the social contract idea, CSR embodies the symbiotic relationship between businesses and their wider operating environment. Interestingly, this is very much in line with the communitarian ethos espoused in many Asian societies. For instance, Article 5 of the People's Republic of China's Company Law captures this perspective well. Article 5 stipulates:

In its business activities, a company must comply with laws and regulations, observe social morals and commercial ethics, act in an honest and trustworthy manner, subject itself to the supervision of the government and the public and assume social responsibility.¹⁴

In February 2013, India's Lok Sabha passed the Companies Bill 2012 to update its 56-year-old omnibus Companies Act.¹⁵ Under the new law, a company with a specified net worth, turnover, or net profit in a financial year must spend at least 2 percent of its average net profits, made during the immediately preceding three financial years, towards CSR activities.

However, in much of Asia, the encouragement of CSR by governments, consumer groups, and citizens has been dominated by the "business case"¹⁶ for CSR, even as socio-political and cultural norms are relied upon to buttress the relevance of CSR in various facets of life. Further, there does not seem to be much critical discussion or concern with the fundamental need and imperative for companies to integrate CSR into their operations and way of doing business. CSR is still seen as an add-on, a luxury that is hard to justify in economic bad times. Such a hard-nosed approach to CSR is certainly not sustainable. The business case for CSR approach dwells obsessively on short-term costs and its impact on profits, without giving sufficient credence to the long-term benefits for companies engaging in CSR. In this regard, the appropriation of CSR by companies and the promotion of CSR by many governments and regulatory agencies appear to be unbalanced.¹⁷ There is the need to widen the generally narrow conception of CSR in Asia which tends to focus

14 *PRC Company Law* (Amended), promulgated on 27 October 2005 and effective as of 1 January 2006.

15 *The Companies Act*, 2013, especially section 135, online: The Gazette of India < http://egazette.nic.in/WriteReadData/2013/E_27_2013_425.pdf>.

16 "Business case" is understood as the engagement of businesses in corporate social responsibility as being similar to an investment in any other product attributes such as quality, service, or reputation that contribute to the profit making of the firm.

17 Alwyn Lim & Kiyoteru Tsutsui, "Globalization and Commitment in Corporate Social Responsibility: Cross-National Analyses of Institutional and Political-Economy Effects," (2012) 77:1 *American Sociological Review* 69. On Singapore's approach to CSR, see Eugene KB Tan, "Moulding the Nascent Corporate Social Responsibility Agenda in Singapore: Of Pragmatism, Soft Regulation, and the Economic Imperative" (2013) 2 *Asian Journal of Business Ethics* 185. See also Eugene KB Tan, *The State of Play of CSR in Singapore* (Singapore: Lien Centre for Social Innovation, 2011).

on corporate philanthropy and one-off community projects, together with the mandatory photo opportunity with the political elites!

Given the growing global footprint of many Asian business and economic activities, this need to widen the conception of CSR arises on two fronts. First, the promotion of CSR understanding and action has to incorporate “global corporate social responsibility” in which companies are responsible for their actions beyond their boundaries to include the supply chains.¹⁸ Secondly, CSR has to engage the very issues that arise from doing business such as discrimination, labour, social, sustainability, corruption that are endemic in much of Asia.

III. CSR AS A GOVERNANCE AND REGULATORY TOOL

A. *CSR as Soft Law*

If properly internalised, CSR urges a resolute departure from the compliance mindset to one which recognizes that effective corporate governance must have an ethical backbone in which the dimensions of responsibility, transparency, and accountability are evident, recognised and supported. What is not appreciated sufficiently is that corporate governance failures often reflect a situation where the ethical backbone does not extend into the leadership and sinews of the company. In some respects, CSR is fully alive to the limitation of laws, rules and regulations. The reality is that there are infinite possibilities with regards to how laws and regulations can be circumvented or complied with in a perfunctory way. The crux of the matter in corporate governance is whether compliance is merely to the letter of the law, or does it extend to the spirit of the law as well. In short, there are severe limits to what regulation and enforcement can do and this must be recognised in corporate governance. Too much regulation would jam the wheels of commerce, adding to the costs of doing business. All too often, however well intended, the inculcation of a rule-based, compliance mindset may do more harm than good. Regulators tend to look at laws and regulations as safety nets but too often such a rules-based approach, with bright-line tests and detailed guidance, only invite expedient interpretation by corporate executives and boards of directors.

There is a patent need for the development of what Lawrence Kohlberg calls the “post-conventional stage of moral development”¹⁹ wherein the economic players adopt an ethical

18 Gerald F. Davis, Marina V.N. Whitman, & Mayer N. Zald, “The Responsibility Paradox!” (2008) 6:1 *Stanford Social Innovation Review* 30.

19 Lawrence Kohlberg, “Moral Stages and Moralization: The Cognitive-Developmental Approach” in T. Lockona, ed, *Moral Development and Behavior: Theory, Research, and Social Issues* (New York: Holt, Rinehart, & Winston, 1976).

perspective and reasoning that factors the interests of those affected based on impartial and reasonable principles (as opposed to the pre-conventional stance of obedience driven by self-centred motivation and fear of punishment). CSR, when embodied in codes of conduct and business guidelines, can operate as “soft law” and engender a regulatory approach that seeks to go beyond the form of a regulation to address the substance of the regulatory requirement.

In the area of governance and regulation particularly in the realm of public international law, the use of hard law and, increasingly, soft law are the two main modes by which legalization has taken place. As CSR requires sustained stakeholder engagement, this collective approach means that corporate governance cannot just be about a fixed set of rules to be applied and enforced. Rather, with CSR as a driver, corporate governance can also operate as a framework for collective problem solving wherein multiple stakeholders are involved and multiple levels of governance have to be coordinated. Further, corporate governance laws can have better effects and outcomes if they can communicate, facilitate, and entrench effective and efficient governance without coercing.²⁰

Hard law is generally understood as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”²¹ Domestic legislation and international treaties, for example, are the tangible expressions of hard law. Most corporate law legislations stipulate — in varying degrees of clarity and precision — the proscribed acts of commission and omission (obligations and compliance), the imposition of legally binding duties and obligations (accountability), and the punishment for transgression (sanctions).

On the other hand, soft law is less definitive and does not create enforceable rights and duties. It includes a variety of processes that attempt to set rules, guidelines, or codes of conduct that share the common trait of having non-legally binding normative content that may have regulative, practical effects similar to hard law. As soft law cannot be enforced by legal means, it does not have the same deterrent effect as hard law. As such, it cannot be relied upon as a basis for enforcement action and punitive sanctions. However, soft law is flexible and has discursive power through its facilitative effort to set normative standards and enable social learning. This is particularly useful in situations of flux where persuasion and reflexive adjustment, rather than rigid adherence or enforcement, are needed. Soft law also has the benefit of being facilitative of efforts to internalise the norms embedded in hard law.²² For instance, the ideational standards or expectations first

20 See further M Patrick Cottrell & David M Trubek, “Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space” (2012) 21 *Transnat’l L & Contemp Probs* 359.

21 Kenneth W Abbott & Duncan Snidal, “Hard and Soft Law in International Governance,” in Judith L. Goldstein et al, *Legalization and World Politics* (Cambridge, Massachusetts: MIT Press, 2001) at 37.

22 David M Trubek, Patrick Cottrell & Mark Nance, “‘Soft Law’, ‘Hard Law’ and EU Integration” in G de Búrca & J Scott, eds, *Law and New Governance in the EU and the US* (Oxford: Hart, 2006).

enunciated, practised, and accepted in soft law mechanisms can subsequently form the basis on which the practical application of the hard law can acquire effectiveness, efficacy, and legitimacy.

Soft law can also be understood as hard law in its embryonic stage of formation. As the precursor of emerging hard law, soft law can be viewed as principles and norms that might eventually consolidate and acquire a shared meaning and understanding. This can contribute to the legal interpretation of hard law or those principles and norms can become legally binding rules themselves. In this regard, soft law can help knowledge, norms and values to be framed strategically and dovetail with existing normative frameworks. Soft law's strategic potential thus lies in its "soft power". Rather than resorting to threats (in essence, the use of hard law) or payments (incentives or bribes), soft power is the ability of an entity or an idea to obtain what it wants by virtue of being an attractive model and acquire traction and acceptance respectively.²³ It is this attribute of soft law: facilitating the socialisation, formation of consensual knowledge and a shared understanding of CSR. This can encourage and engender a CSR mindset which hard law may find challenging to do so. Hence, soft law can also possess the regulative and constraining effect of hard law.

The utility of soft law instruments is its transformative capacity in socialising stakeholders through a consensual and confidence-building process. More directly, soft law speaks to reason, understanding, strives to develop consensus, and encourage the internalization of desired values and interests. Lawrence Kohlberg's three levels of moral development help demonstrate how soft law's iterative, quasi-prescriptive nature can engage cognitive and informed responses in developing a nuanced regulative response to a societal challenge (see Figure 1).²⁴

23 Joseph Nye Jr., *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004).

24 *Supra* note 19.

Level 1: Pre-conventional Stages

(1) Punishment and obedience orientation

(2) Instrumental and relative orientation

- Obedience driven by self-centered motivation and fear of punishment; little awareness of others



Level 2: Conventional Stages

(3) Interpersonal concordance orientation

(4) Law and order orientation

- Expectations maintenance vis-à-vis peers, family, and other communities characterised by loyalty to group and its needs and norms; greater awareness of the individual vis-à-vis the group



Level 3: Post-conventional Stages

(5) Social contract orientation

(6) Universal ethical orientation

- Ability to adopt a perspective that factors the interests of those affected based on impartial and reasonable principles

Figure 1: Lawrence Kohlberg's Stages of Moral Development

Hard law approaches tend to elicit reasoning and responses that are primarily egocentric, denominated in self-centred terms of avoiding punishment, compliance with an authority, and group norms (levels one or two of Kohlberg's moral development). On the other hand, soft law approaches encourage the movement towards a level three moral development in which a person is able to adopt a perspective that factors the interests of affected parties based on impartial and reasonable principles. When successfully imbibed, soft law approaches result in society being able to attain the post-conventional stage of moral reasoning in which critical and reflective reasoning are dominant. Although we should not view hard and soft law in binary or antithetical terms, they can complement each other to enlarge CSR's capacity for "lite" regulation as well as socialise the citizenry to demand the corporate norms and conduct necessary to maintain a vibrant yet responsible corporate sector that is essential in any thriving economy.

The foregoing discussion underscores the centrality of regulation and governance and getting the balance right in the corporate arena. Ultimately, prudent regulation and good governance

are primarily about norms and values rather than just rules alone. As a standard setter, values-driven CSR is about going beyond mere compliance. Perhaps the most significant development on the CSR front is the ongoing efforts by the International Organisation for Standardisation (“ISO”), in collaboration with a variety of international partners, to provide a guiding standard for social responsibility.

B. *ISO 26000 – CSR Norms, Codes & Guidelines as Putative Law?*

ISO 26000, which is a guiding standard on social responsibility, defines social responsibility as the “responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that:

- Contributes to sustainable development, including health and the welfare of society;
- Takes into account the expectations of stakeholders;
- Is in compliance with applicable law and consistent with international norms of behaviour; and
- Is integrated throughout the organisation and practised in its relationships.

ISO’s use of “social responsibility”, rather than CSR, is deliberate. Social responsibility applies universally - not just to companies but includes governments, non-profit entities, and professional industries as well. The guidance standard, unveiled in 2010 as ISO 26000, is for voluntary usage. Unlike other ISO technical standards, ISO 26000 is not a certification standard but may eventually evolve into one.²⁵

What is noteworthy is that the ISO 26000 guidance standard seeks to help businesses, NGOs, governments, the labour movement, and other stakeholders internalise the desired norms and values of social responsibility. By virtue of its inherent flexibility and potential discursive power, ISO 26000 can facilitate the setting of normative standards and enable social learning about social responsibility. This is particularly useful in the sphere of CSR where persuasion and reflexive adjustment, rather than rigid adherence or enforcement, are needed. The ideational standards or expectations enunciated in such guidelines and industry-wide codes of conduct can form the basis on which the practical and universal application of CSR can subsequently acquire effectiveness, efficacy, and legitimacy. Thus, ISO 26000 can be treated as a soft law instrument. As discussed earlier, soft law’s utility is in socialising stakeholders through a consensual and confidence-building process. More directly, soft law speaks to reason, understanding, strives to develop

25 For more information, see online: International Organization for Standardization < <http://www.iso.org/iso/home/standards/iso26000.htm>>.

consensus among stakeholders, and encourage the internalisation of desired values and interests.

The structural power of hard law manifested in rules and regulations is often not only reactionary but also grossly inadequate as a means of pre-emptive, adaptive socialization and social learning prior to, during, and after corporate crisis. In the corporate arena, corporate governance failures like Enron and WorldCom in the early 2000s tend to elicit a robust regulatory response but often also generating regulatory hubris and governance over-reach. In some ways, this is not surprising. In the halcyon days of economic exuberance, capitalism is seen as having the inordinate ability to promote the common good.²⁶ But when the market crashes due to systemic corporate malfeasance, the regulatory agencies have to step in and muscularly “right-size” the regulatory framework — all ostensibly to promote the common good. Regulation ‘overkill’ often results instead when the urgent need is to artificially rejuvenate and instill trust among stakeholders in the corporate system. Agency problems are often at the core of corporate governance weaknesses and failures. Regulatory robustness can help to ameliorate the excesses of principal-agent problems and risks but it would be a gross mistake to manage the decline of trust and accountability in such scenarios through the law only.

C. *CSR as Trust & The Management of Agency Problems*

Corporate law in most jurisdictions attempt to address three basic agency problems: (1) Opportunism of managers vis-à-vis shareholders; (2) Opportunism of controlling shareholders vis-à-vis minority shareholders; and (3) Opportunism of shareholders as a class vis-à-vis other corporate constituencies including non-shareholder stakeholders. In all three areas, besides regulations, CSR has a necessary (but insufficient) role to play. Thus far, corporate law has been the main stay in dealing with the transaction costs that these agency problems present. CSR, not just embodied in codes of conduct, but embracing the principles of fair play, transparency, accountability, and responsibility can reduce the opportunities and the opportunism for value-reducing corporate behaviour.²⁷

Value, increasingly, in the corporate world cannot be just about pecuniary outcomes. It will increasingly be about both pecuniary and non-pecuniary indicators since they both impact upon each other and inform us how sustainable a business entity is. To nurture and sustain corporate value, the role of values and norms are surprisingly under-estimated. CSR is ultimately about

²⁶ See, for example, Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London: Allen Lane, 2012).

²⁷ The limits of markets in constraining socially sub-optimal corporate conduct, and how culture and ethics are needed as complementary mechanisms is examined in Dan Awrey, William Blair & David Kershaw, “Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation” (2013) 38:1 Del J Corp L 191.

trust. Capitalism needs trust to thrive. Together with regulatory rules, CSR can provide the holistic approach in dealing with these instances of opportunism. They will not remove entirely agency problems but they can help minimise them.

An alternative way of conceptualising CSR is that offered by Michael Porter and Mark Kramer in their influential *Harvard Business Review* article.²⁸ They argue that current CSR efforts are counterproductive. First, such efforts spring from the premise that CSR, ultimately, pits business against society. As we can all see, but perhaps fail to appreciate it enough, the reality is that businesses and society are interdependent. There is competition, but cooperation and trust are also embedded within meaningful competition. Secondly, according to Porter and Kramer, current CSR efforts only go so far as to encourage companies to think of corporate social responsibility in generic ways instead of in the way most appropriate to their individual strategies. For Porter and Kramer, the prevailing approaches to CSR are so disconnected from strategy as to obscure many great opportunities for companies to benefit society.

Hence, the paucity of ideas is evident when companies' CSR reports are examined. It is often more of the same: corporate philanthropy, corporate volunteerism, and token environmental mitigation efforts. These tend to result in uninspiring and generic efforts that come across as public relations endeavours. Such so-called CSR efforts may generate short-lived feel-good effects but little in terms of substantive changes in corporate leadership, conduct and approaches towards doing business. To cynics and anti-capitalists, these efforts are like "corporate penance" to assuage the corporate guilt and to generate corporate goodwill among the stakeholders. So while CSR is becoming more common, the scepticism towards it is also palpable.²⁹ This cannot be good for business or society. CSR is inherently valuable to both business and society. However, how CSR has hitherto been practised has given it a questionable reputation of being nothing more than "corporate green wash". A more enlightened approach and practice of CSR is needed if CSR is to live up to its promise.

Porter and Kramer argue that if corporations use the same frameworks that guide their core business choices, CSR presents a potential wellspring of ideas and motivation as well as a potent source of innovation and competitive advantage. They cite the examples of Toyota (hybrid automobile engines), Whole Foods (sustainable consumerism), and Nestle (supply chain quality assurance) in which a close melding of CSR with strategy in the last decade or so have helped these corporations transform CSR from what is construed as a necessary business cost, into a

28 Michael E Porter & Mark R Kramer, "Strategy & Society: The Link between Competitive Advantage and Corporate Social Responsibility" (2006) 84:12 *Harvard Business Review* 78. See also Marc Pfitzer, Valerie Bockstette & Mike Stamp, "Innovating for Shared Value" (2013) 91:9 *Harvard Business Review* 100.

29 See e.g. David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institution Press, 2005). See also Robert B Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (New York: Alfred A. Knopf, 2007).

vibrant generator of innovation and competitive advantage. In turn, this translates into competitive success that is sustainable and not at odds with society's long-term interests and needs.

What Porter and Kramer suggest or synthesise is not radically new. Rather, they crystallise a counter-intuitive way of looking at the relationship between business and society in a fundamentally different way. The thrust of their arguments is that corporations and society should not treat corporate growth and social welfare as a zero-sum game. They introduce a strategic framework that seeks to integrate business and society to create "shared value" — outcomes that benefit both business and society. It is an exhortation to treat CSR as not just a dispensable 'add on' but as an integral part of strategy formulation. Of course, strategising alone is not enough. Companies have to be persuaded and believe that CSR is a force for good – for their financial bottom line and more.

According to Porter and Kramer, "strategic CSR" is about leveraging on opportunities to create shared value and adding a social dimension to a corporation's value proposition in which social impact is integral to, and complements the overall business strategy. In that sense, social impact is a vital competitive advantage because it creatively meets the needs of both business and society. More importantly, by building on the intricate interdependence of business and society, long-term success of the business is secured and sustainability is also assured. Porter and Kramer put it eloquently: "Efforts to find shared value in operating practices and in the social dimensions of competitive context have the potential not only to foster economic and social development but to change the way companies and society think about each other."

This "shared value" approach to CSR has the potential to transform social practices and the relationship between business and society. More importantly, it signals the need for an attitudinal shift in which existing norms and assumptions are critically examined, challenged, and recalibrated. In the process, beliefs are changed, behaviour modified, and value systems at the individual, corporate and societal levels, are recalibrated.³⁰ While it is by no means certain that "strategic CSR" will be the norm, it coheres with Jeremy Moon's proposition that "CSR needs to be understood as part and parcel of a wider system of national societal governance incorporating government institutions, business organisations and non-governmental organisations."³¹

Implicit in Porter and Kramer's arguments (and the companies they cite) is that CSR can be

30 This is similar to Peter Senge's 'mental models' in which the acquired patterns of thinking at the organisational level can be a barrier to fresh thinking (on the approach to CSR). See Peter M Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (New York: Doubleday/Currency, 1990).

31 Jeremy Moon, *Government as a Driver of Corporate Social Responsibility* (International Centre for Corporate Social Responsibility Research Paper Series No. 20-2004, Nottingham University Business School, 2004) [unpublished]. See also Jeremy Moon, "The Social Responsibility of Business and New Governance" (2002) 37:3 *Government and Opposition* 385. On the emerging trend of transnational business governance associated with CSR due to the failure of states to regulate nationally or internationally issues of public concern, see David Vogel, "The Private Regulation of Global Corporate Conduct" in W Mattli & N Woods, eds, *The Politics of Global Regulation* (Princeton, New Jersey: Princeton University Press, 2009).

the driver by which business and society are symbiotically and synergistically, as they should be, linked. A strategic approach to CSR also yields another advantage: that of catalysing innovation. As strategic CSR is driven by the motivation and the imperative to generate shared value for both business and society, business operations informed by a genuine commitment to CSR can catalyse innovation that is both economic and social value-giving. In turn, this will open new frontiers for business possibilities. Indeed, social innovation, as a manifestation of CSR and entrepreneurship, is gaining traction. Social innovation entails, at its core, the intrinsic and extrinsic need for social value creation. This also speaks to sustainability, an area of increasing importance in CSR initiatives and efforts.³²

To further encourage this development of CSR as a shared value, a crucible of innovation, business and society have to engage in continual dialogue with their stakeholders in order that business can help meet human needs while society appreciates the user-driven innovation that business are so adept in providing. In this regard, innovation is not just a business necessity but also encompasses a social dimension in which business and society are interlinked and interdependent. This potential and imperative for cross-sectoral collaboration is essential to the urgent quest of bringing back the much-sidelined human values as the core of business. Together, they can help redirect capitalism towards the common good, and help ensure a sustainable future.

D. *Right-sizing Capitalism*

While anchored in economic rationality, capitalism is, at its core, both a human system and a human enterprise. Apart from profit making, capitalism enables society to achieve a variety of human goals. These goals range from meeting basic needs to fulfilling exuberant wants and desires. They include wealth generation, provision of employment opportunities, and the stoking of human ingenuity. The emphasis here is on the 'human' dimension. Ultimately, capitalism must reflect a human-centred and a values-oriented society. We often talk about a business licence to operate but that requires, and it is often forgotten, a moral obligation on the part of businesses to conduct their activities in ways that promote the common good, instead of privatising interests at the expense of the larger good.³³

Undoubtedly, business is about competition that does not harm the larger society but rather, brings out the best in it. It is also about inter-generational equity in which current resources used by

32 As Thomas Malone reminds us, sustainability has its downsides if the concept is not appreciated for its inherent limitations: 'It's often the case that good things are sustainable, but sometimes things are sustainable but not good. And sometimes things are good but not sustainable'. See interview of Professor Thomas Malone (23 April 2009) online: MIT Sloan Management Review <<http://sloanreview.mit.edu>>.

33 For a discussion of the severe functional and moral challenges facing the shareholder model of capitalism, see generally Heiko Spitzbeck et al, eds, *Humanism in Business* (Cambridge: Cambridge University Press, 2008).

the present generation will not compromise the usage of similar resources for future generations. Competition is also about cooperation, which in turn, is about trust.

In order for capitalism to function optimally, trust is a necessity. The sub-prime mortgage crisis in the United States—which shocked global markets in 2008 and the convulsions are still being felt—was a manifestation of the abuse of trust, in which key stakeholders of the financial industry developed or allowed the sale of inherently flawed financial instruments. It was not a competition of trustworthy products but rather, one that was destructive and self-annihilating. Lord Adair Turner, then Chairman of UK’s Financial Services Authority, sums it well:

And in the years running up to 2007, too much of the developed world’s intellectual talent was devoted to ever more complex financial innovations, whose maximum possible benefit in terms of allocative efficiency was at best marginal, and which in their complexity and opacity created large financial stability risks.³⁴

Moral hazard was creatively packaged as financial ingenuity and profitability. Lord Turner describes it in the following terms:

For there must be a suspicion that some and perhaps much of the structuring and trading activity involved in the complex version of securitised credit, was not required to deliver credit intermediation efficiently, but achieved an economic rent extraction made possible by the opacity of margins and the asymmetry of information and knowledge between end users of financial services and producers.

This abuse of trust was so severe in its ramifications that the sectoral excesses transmogrified into a systemic failure of trust which affected the financial sector of the major markets in the world before engulfing the entire global economic system. In turn, economic rents, allocative inefficiency and risks became overwhelmingly disproportionate to the benefits that were generated by the financial instruments. The failure of trust, in this case, was essentially about competition bereft of cooperation.³⁵

Let us return to the foundational premise that business is a humanistic enterprise. If so, giving full

34 Adair Turner, “The Financial Crisis and the Future of Financial Regulation” (Speech delivered at The Economist’s Inaugural City Lecture, 21 January 2009), online: Financial Services Authority <<http://www.fsa.gov.uk>>.

35 The marketplace adage, ‘Trust me, I’m a banker,’ now seems like a bad joke given the excesses in the financial and banking sector. The collapse of well-known brands and institutions like Lehman Brothers and AIG has shattered the veneer of dependability, trustworthiness, and stability in the financial world. Banks are now wary of even lending to other banks, crippling the access to funds for economic players and individuals.

expression to positive human values cannot simply be about maximising profits (value); instead, it has to be about ensuring that the legal enterprise is able to further and enhance those fundamental human values. It is perhaps a cliché to say that we live in a world that is now characterised by interdependence. The dominance of the business world, renewed forces of globalisation, global supply chains and the urgent importance of dealing with climate change mean that CSR takes on greater importance to ensure that businesses continue to be of benefit to society. The cynicism that many people have towards CSR is perhaps not surprising. The blandness and generic quality of CSR as it is currently practised by companies only illustrates a tendency to game stakeholders' expectations and "spin doctor" how society ought to feel about business.

Going forward, CSR has to expand the core purpose of corporations to be more than just concerned with the oft-misunderstood maxim that "the business of business is business". That maxim is not inaccurate if the term "business" is construed narrowly as pure profit making. Given the global challenges that face us today and the central feature of business in our lives and economy, the role of business in society cannot be so narrowly circumscribed. Thus, if we reconceptualise business as maximising and giving full expression to the positive human values, then business cannot be just about making profits. Instead, it has to be about ensuring that the economic enterprise is able to further and enhance those human values instead of detracting from it. Responsibility is one value that got marginalised in the mindless search for profits. American President Barack Obama emphasised responsibility in his inauguration address in January 2009: "Our economy is badly weakened — a consequence of greed and irresponsibility on the part of some but also our collective failure to make hard choices and prepare the nation for a new age." His prescription for the ill: "What is required of us now is a new era of responsibility..."³⁶ It was an overdue reminder and spoke of the need for a values-based leadership in the business world.

In this regard, CSR, as ethics in action, can function as a mode of moral reasoning and leadership in the economic ecosystem. As capitalism is not a zero-sum game, serving markets and society equates to serving business shareholders. In this respect, adding value to stakeholders and society will equally benefit shareholders too. Although profits are a legitimate objective, businesses also have a larger purpose of ensuring long-term profitability. This can only come about through capitalism which is inherently responsible, remaining mindful that it has the capacity to do good or wreck havoc at systemic, organisational and individual levels.

Take Timberland, a well-known apparel company, for example.³⁷ The company, a long-time

36 President Barack Hussein Obama, Inaugural Address (Address delivered at the White House, 20 January 2009), online: The White House <<http://www.whitehouse.gov>>. See also Daniel Yankelovich, *Profit with Honor: The New Stage of Market Capitalism* (New Haven and London: Yale University Press, 2006).

37 Information on Timberland's initiatives mentioned in this section were taken from John Russell, "Consumer trust that's good for the sole" *Ethical Corporation* (May 2009) 14 and online: Timberland <<http://www.timberland.com>>.

supporter and practitioner of CSR, viewed the economic malaise of the last decade as an opportunity for companies to engage more meaningfully with their stakeholders — especially consumers — to overcome the massive loss of confidence. Its then CEO, Jeff Swartz, was confident that companies who engage consumers on social and environmental concerns (in short, the triple ‘Environmental-Social-Governance’ bottom-line) would win back trust and develop social capital. Swartz argues that “consumers are starting to value brands as social institutions.” Consumers are a key locus of power in getting companies to address social and environmental issues. Increasingly, these issues – comprising corporate governance, climate change, sustainability, human rights and supply chain management – resonate with consumers and other stakeholders. Timberland engages its stakeholders on various fronts, addressing ethical issues arising from its global supply chain as well as issues of its own environmental footprint. It is also a passionate advocate for a low carbon economy. Although a public policy advocacy role is rare for a company, Timberland embarked on public advocacy as it felt that its own actions were inadequate in dealing with the challenge of climate change.³⁸

In 2007, the company unified its CSR team from four different business units into one, with the concomitant outcome of a “unified strategy with clearly articulated social and environmental goals” and demonstrating “transformative value” to their stakeholders. In 2008, Timberland started reporting on key CSR performance indicators on a quarterly basis as it believed that this would represent “an evolution in its CSR reporting process from static data presentation to dynamic information exchange; corporate statement to stakeholder engagement as well as from delayed annual reports to quarterly updates.” Timberland believed that the high level of disclosure and reporting, as a real expression of stakeholder awareness and collaboration, would provide invaluable feedback loops to help it achieve the bold goals set forth in its long-term CSR strategy. Such significant reporting meant that the company was ready to stand by its performance in the social and environmental spheres and demonstrated its readiness to manage risks that were non-conventional in nature.

Other loci of power in challenging companies to address social and environmental concerns include employees, investors, government and suppliers. Not surprisingly, these stakeholders often have competing interests at stake. Hence, it will always be a significant challenge for them to rally companies to be socially responsible whilst producing good business performance. Essentially, a lodestone of action and commitment found within a company is that of leadership. A leadership that genuinely believes in values, shared purpose as well as responsibility to stakeholders and

38 Going beyond the debate of defining a common set of values, business ethics education is now emphasising the need to enact and implement shared values to discipline shared purpose in a corporate setting. See, for example, Mary C Gentile, *Giving Voice to Values: How to Speak Your Mind When You Know What's Right* (New Haven and London: Yale University Press, 2010); Kenneth E Goodpaster, *Conscience and Corporate Culture* (Malden, Massachusetts: Blackwell Publishing, 2007).

the community at large can provide the much-needed impetus to drive the company forward and contribute optimally to society, while also producing a reasonable financial performance.³⁹

IV. CSR – IMPERATIVE FOR CHANGE

Issues relating to corporate accountability, social responsibility and ethical conduct were not alien to the forerunners of today's modern corporate entities and multinationals. Activists and scholars have elaborated at length on how businesses pay lip service to CSR. What is urgently needed is a new paradigm of responsible business that incorporates social and environmental concerns into the corporate agenda. The leadership role in engendering meaningful CSR, while often underestimated, is much needed to drive a framework that would help make CSR a *sine qua non* of business, while also cementing the trust between business and society.

Traditionalists might view this expanded mandate as an unnecessary encroachment that would undermine the first priority of business — which is to contribute to economic wealth. To be sure, that is still of primary importance but as the corporate scandals over the last two decades have shown, a singular determination to make profits at all costs will only damage the larger economic eco-system and make capitalism untenable. The late Milton Friedman, a Nobel laureate in economics and guru of free market capitalism, had called CSR a “fundamentally subversive doctrine” in a free society. But, often forgotten, Friedman also reminded us that while a company's responsibility is to make profits for its shareholders, that goal must not violate the fundamental rules of ethics and social responsibility:

... [t]here is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits; so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.⁴⁰

Friedman reiterated that business is about making “as much money as possible” but “conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”⁴¹ This important caveat is often ignored. In short, CSR can be the driver through

39 For an exploration of whether business leaders must shed personal values or compromise integrity in order to succeed in business, see Bowen H “Buzz” McCoy, *Living Into Leadership: A Journey in Ethics* (Stanford, California: Stanford Business Books, 2007).

40 See Milton Friedman, *Capitalism and Freedom* (Chicago, Illinois: University of Chicago Press, 1962) at 133.

41 Milton Friedman, “The Social Responsibility of Business is to Increase its Profits”, *The New York Times Magazine* (September 13 1970). Emphasis is mine.

which business and society are symbiotically and synergistically linked. It need not be a zero-sum game. As the *New York Times* columnist Thomas Friedman observes of green technology, “You can’t make a product greener ... without making it smarter — smarter materials, smarter software or smarter design.”⁴²

Capitalism is arguably facing a deep crisis of legitimacy. This chasm between business and society is not a recent development but a state of affairs that has persisted and heightened since the 1970s. In these extraordinary times, CSR epitomises equilibrium and demonstrates how businesses and society can co-exist and thrive. Put simply, business is a *humanistic* enterprise and a *moral* economy that we ignore to our peril.⁴³

The developments in CSR in the commercial sphere increasingly have a legal dimension. For example, in the United Kingdom, this development has been given impetus by section 172 of the UK Companies Act which codifies the fiduciary duty of a company director to promote the “success” of the company. This recent codification of a director’s duty to act in good faith in the company’s best interest necessarily means that the interests of stakeholders, who may not necessarily be shareholders, must be factored in decision-making. In turn, this requires a director to act in good faith with due regard to the probable long-term consequences, the interests of employees, suppliers and customers, as well as the implications for the environment and concerns of the community at large. This would obviously include maintaining high standards of probity, propriety and reputation in business conduct. This legislative provision underlines the importance of making decisions for the long-term and factoring how they affect shareholders and stakeholders alike.⁴⁴

While activities and programmes that demonstrate commitment to CSR are important, all too often, businesses and (even law firms and lawyers) fail to realise that genuine CSR is fundamentally about values, norms and attitudes towards a variety of stakeholders. These values, norms and attitudes speak to how business is done, and how it can effectuate self-regulation. In many discussions on CSR, ethics is often mentioned only in passing. This is problematic since CSR programmes and initiatives that lack an ethical backbone will not be sustainable and impactful. To be sure, profits are important. Businesses are, after all, not charities. Profits are

42 Thomas Friedman, “The Green Road Less Travelled”, *New York Times* (15 July 2007) online: *New York Times* <<http://www.nytimes.com>>. Likewise, see the ideas and arguments in Peter Senge et al, *The Necessary Revolution: How Individuals and Organizations Are Working Together to Create a Sustainable World* (New York: Doubleday, 2008).

43 Paul J Zak, ed, *Moral Markets: The Critical Role of Values in the Economy* (Princeton, New Jersey: Princeton University Press, 2008).

44 The literature on the enlightened shareholder value (“ESV”) principle is burgeoning. The evolving development of ESV and whether it sharpens corporate governance are dealt with in Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (London and New York: Routledge, 2013).

needed to make the practice sustainable and to deploy new talents, technology and resources in the service of stakeholders. But it cannot be the be-all-and-end-all. Instead, profits should go towards ensuring that the business of a business is able to further and enhance positive human values instead of undermining them. In short, how earnings and profits are reaped is of great importance and deserves greater consideration.

In tandem with the strong market and managerial logic in today's corporate sphere, professionalism has tended to emphasise technical competency and rigour. This is legitimate but the danger in prioritising professional knowledge above professional values and ideals is the undermining of the ethos of professionalism. All too often, business professionals know that they must provide lawful (what is legal) advice in the course of their work. But, often neglected, is the moral duty to provide ethical (what is right) advice as well. Consequently, this results in "ethical fading" where one no longer sees the ethical dimensions of a decision. Bounded ethicality, when individuals make decisions that harm others and when that harm is inconsistent with these decision-makers' conscious beliefs and preferences, is also manifested. Together, ethical fading and bounded ethicality demonstrate how ethics can affect decision-making.⁴⁵ Corporate governance can benefit by recognising how corporate governance blind spots are triggered by an over-reliance on compliance with rules and regulations, which ultimately undermine the effectiveness and efficacy of the regulatory framework.

It should be emphasised that this is not about imposing one's moral scruples and rectitude but rather about appreciating how their decisions will affect others and what those effects will be. Put simply, a business executive's ethical and professional responsibility is to use his professional skills, knowledge and values such that they respond fully to the needs and interests of the clients in a responsible manner. In particular, the strategic approach to CSR, one that leverages on opportunities to create "shared value" by integrating a social dimension to the value proposition of a business, insists that meaningful social impact is integral to a business. In that sense, social impact provides a vital competitive advantage because it creatively meets the economic and non-economic needs of the business and society. More importantly, by building on the intricate interdependence of business and society, long-term success of the business is secured and sustainability is also assured.

In turn, this will open new frontiers for business possibilities while building trust and confidence between business and society.

45 See further Max H Bazerman & Ann E Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to do About It* (Princeton, New Jersey: Princeton University Press, 2011). The field of behavioural ethics in aiding our understanding of corporate malfeasance bears close watching. See also David De Cremer & Ann E Tenbrunsel, eds, *Behavioral Business Ethics: Shaping an Emerging Field* (New York and London: Routledge, 2012).

V. CONCLUSION

*If one's actions are motivated only by profit,
one will have many enemies.
– Confucius*

What then is the future of CSR? CSR must go beyond being a mere public relations exercise that generates short-term publicity and a feel-good effect, but leaves no sustainable and meaningful outcome. In some respects, CSR can help rightsize the way a business views society and its social responsibilities. For starters, the corporate world needs to embrace society of which it is a member. The business eco-system is not a zero-sum game. Goodwill, reputation, moral fibre, and profits are attained inter-dependently over the long term, and CSR will be better appreciated if we truly recognise this interdependence.

This essay has argued that CSR has a critical role to play in today's business world. In particular, CSR can be a mode of regulation and governance. CSR cannot operate from the tired and unimaginative paradigm of mere corporate communications, corporate volunteerism and traditional philanthropy. In a world where the vices of companies can now be easily reported through the mass media and citizen journalism, adopting a purposeful, values-centric approach to align business operations with societal values is fast becoming an indispensable principle of corporate management and an invaluable business strategy towards sustainability and value creation for a business. CSR is no longer a luxury but a critical component of the ethical responsibilities of a business.

Regulatory endeavours and corporate governance reforms in the past decade have increasingly intersected with mainstream CSR motivations. The current economic uncertainty provides an opportune time for companies (be it multinational corporations, government-linked, or small and medium enterprises) to reflect on the role of business vis-à-vis society. It is this malaise and the lack of trust between businesses and between business and society which form the backdrop to the current economic climate. CSR is one of the platforms that can be used to assist in corporate governance efforts. This quest for better regulation and corporate governance has enabled CSR to be increasingly inducted and mainstreamed into corporate governance thinking. CSR has been characterised by the dual perspective of risk management and value-driven/principled governance and operations. Good corporate governance is primarily about the integration of values and rules to deliver economic and non-economic value to shareholders and stakeholders alike. Indeed, corporate governance is moving beyond the core governance methodology to embrace the values dimension. Corporate governance needs to go beyond laws and regulations, and mere compliance therewith.⁴⁶ This point is worth reiterating. Companies have to be mindful of their activities, and

46 On the role Confucianism can play in corporate governance, see Lilian Miles & S H Goo, "Corporate

their impact on the wider operating environment. In this connection, an area worth keeping an eye on is how companies manage the negative externalities that arise from their operations as part of CSR.

CSR can complement legislation by engendering the development of desirable values and norms. Although the law is often the lowest common denominator and tends to lag behind developments in the social and business arenas, regulatory bodies across the globe are sensitive to the severe limits of a command-and-control type regulatory framework in a subjective, and oftentimes, contentious area. Thus, CSR can significantly impact the basis of accountability and responsibility within a business while also ensuring that corporate governance is purposeful.

Even if regulation, broadly conceived, is seen as desirable, it is likely that the regulatory framework would be characterised by regulatory norms (rather than enshrined in mandatory laws) that have been arrived at in consultation with the other stakeholders. Ultimately, the policy intent is the same: To put the parties concerned on notice as to expected corporate behavioural standards that are legitimately agreed upon and complied with voluntarily, thereby requiring minimal governmental oversight.

The intrinsic attraction of such an approach coheres around a norms-based mode of self-regulation, which appeals to the business sense of making profits in a sustainable, reputable and equitable manner. This “carrot approach” also means that the government can wield the “stick” of legislation and regulation if earlier efforts to induce the desired conduct are unsuccessful. Ultimately, what is needed is to incorporate a robust sense of ethics and social responsibility in the business arena. The emphasis should be on how corporate law can mainstream ethical and responsible conduct, and how society can encourage businesses to inject responsibility and values in their activities.⁴⁷ The question, therefore, is not about why enlightened corporate governance should be pursued but rather, how corporate governance can be leveraged on to inculcate the appropriate corporate conduct while ensuring that short-term profits co-exist within the framework of long-term sustainability.

In this regard, CSR has a crucial role to play as a manifestation of ethical and responsible conduct. CSR has tremendous potential to help businesses do well, and do good. CSR is at a critical crossroad. All the corporate ethical failures that have been implicated in the past decade and earlier can boast of CSR activities and contributions. So CSR, as it is currently practised, is not good enough. Notwithstanding that the interactions of business, government and society is

Governance in Asian Countries: Has Confucianism Anything to Offer?” (2013) 118:1 Business and Society Review 23.

47 Macey argues that corporate governance is about promises because “the idea of promise captures the primordial fact that *trust* rather than reliance on the prospect of enforcement is the focal point of a successful system of corporate governance”: see Jonathan R Macey, *Corporate Governance: Promises Kept, Promises Broken* (Princeton, New Jersey: Princeton University Press, 2008).

different in Asia, and it would be pretentious to state that there is one universal way of performing CSR. Nonetheless, for CSR to remain relevant, purposeful and effective, the value system and the practices of CSR will have to adapt to the needs of business and society in any part of the world. The key is not to adopt a dogmatic view of what constitutes CSR. Rather, the challenge is to emplace a contextualised CSR that is nuanced and sensitive to the peculiar challenges and expectations of the company while at the same time reaffirming the ethos of responsibility and ethical conduct in the way business is done.

In the final analysis, corporate governance must generate and instill a culture of corporate accountability before, rather than after, corporate malfeasance occurs. With its emphasis on ethical conduct and stakeholder engagement, CSR can catalyse this necessary transformative process and endow corporate governance with purpose and effect. The days of corporate governance as narrow legalism are numbered.