

REGULATING COMPANIES AS IF THE WORLD  
MATTERS: REFLECTIONS FROM THE  
ONGOING SUSTAINABLE  
COMPANIES PROJECT

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INTRODUCTION: A MORAL IMPERATIVE FOR ACTION

The company is one of the most ingenious inventions of our time.<sup>1</sup> With limited liability for its investors, enabling capital to be (in theory) put to its most efficient use, the company has become the backbone of our economies. But must this all-important component of our market economies be equated with environmental degradation to the extent that we risk dangerous loss of biodiversity and passing the tipping point of climate change? In my opinion it must not. We need to find out how to make the necessary changes. We have a moral imperative for action.<sup>2</sup>

Climate change is a case in point for the necessity of working toward a sustainable development; toward the achievement of economic development and social justice within the nonnegotiable

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1. The enforceable contract may be the most innovative contribution of Roman law. See Alan Watson, *The Evolution of Law: The Roman System of Contracts*, 2 LAW & HIST. REV. 1, 1 (1984). In a similar manner, company law has contributed to the contemporary economy. See RAGHURAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY 59, 160 (2003).

2. Others have also eloquently argued this proposition. See generally JONATHON PORRITT, CAPITALISM AS IF THE WORLD MATTERS (Earthscan rev. ed. 2007). The title of this Article is inspired by and intended as a tribute to Jonathon Porritt’s book.

ecological limits of our planet.<sup>3</sup> According to even the most conservative estimates of the Intergovernmental Panel on Climate Change (“IPCC”),<sup>4</sup> business as usual will most probably lead to climate change of a magnitude to which we cannot adapt, or to which we can adapt only at extremely high costs.<sup>5</sup> Contrary to popular phraseology, dealing with climate change is not about saving the planet. The planet will take care of itself. The issue is whether we should preserve the very basis of our existence, of our societies as we know them today.<sup>6</sup> Runaway climate change involves a high risk of severe environmental, social, and economic consequences,<sup>7</sup> and the challenge of climate change needs to be dealt

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3. Sustainable development—the balancing of economic development, environmental protection, and social justice—has famously been defined as a development that “meets the needs of the present without compromising the ability of the future generations to meet their own needs.” Rep. of the World Comm’n on Env’t and Dev.: Our Common Future, ¶ 27, U.N. Doc. A/42/427, Annex (Aug. 4, 1987) [hereinafter *Our Common Future*]. For a discussion of the concept and criticism against it, 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 § 10.7 (2009). See also CHRISTINA VOIGT, SUSTAINABLE DEVELOPMENT AS A PRINCIPLE OF INTERNATIONAL LAW: RESOLVING CONFLICTS BETWEEN CLIMATE MEASURES AND WTO LAW (2009).

4. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007 (2007), available at [http://ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml](http://ipcc.ch/publications_and_data/publications_and_data_reports.shtml).

5. “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.” Lenny Bernstein et al., *Synthesis Report*, in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, CONTRIBUTION OF WORKING GROUPS I, II, AND III TO THE FOURTH ASSESSMENT REPORT OF THE IPCC (R.K. Pachauri & A. Reisinger, eds., 2007), [hereinafter *Synthesis Report*] available at [http://ipcc.ch/publications\\_and\\_data/ar4/syr/en/main.html](http://ipcc.ch/publications_and_data/ar4/syr/en/main.html). This is not a new wake-up call and is perhaps better perceived as a final warning. See *Our Common Future*, *supra* note 3, ¶ 126 (“We are unanimous in our conviction that the security, well-being, and very survival of the planet depend on such changes, now.”).

6. As stated in the conservative magazine *The Economist*, about “trying to avert the risk of boiling the planet”: the “costs are not huge. The dangers are.” *Economics of Climate Change: Stern Warning*, *ECONOMIST*, Nov. 2, 2006, at 14. The Stern Review has characterized climate change as “the greatest and widest-ranging market failure ever seen,” pointing out that it poses “a unique challenge for economics” (and, may we add, for law). NICHOLAS STERN, STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE (2006), available at [http://www.hm-treasury.gov.uk/d/Executive\\_Summary.pdf](http://www.hm-treasury.gov.uk/d/Executive_Summary.pdf).

7. “The resilience of many ecosystems is likely to be exceeded this century by an unprecedented combination of climate change, associated disturbances (e.g., flooding, drought, wildfire, insects, ocean acidification), and other global change drivers (e.g., land-use change, pollution, over-exploitation of resources).” Neil Adger et al., *Summary for Policymakers*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON

with on all those levels, both in terms of mitigating as much as possible, and adapting to that which cannot be avoided.<sup>8</sup>

Climate change is not the only crisis we face. There is a convergence of crises: the financial crises; the loss of biodiversity threatening the stability of our ecosystems;<sup>9</sup> the peaking of fossil energy sources;<sup>10</sup> and the harsh brutality of tens of thousands of people dying every day for poverty-related reasons.<sup>11</sup> In the aftermath of one financial crisis and the furious effort to try to avoid a new full-blown crisis, the attention of world leaders is on stimulating growth and getting back to business as usual.<sup>12</sup>

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CLIMATE CHANGE (M.L. Parry et al. eds., 2007), available at [http://ipcc.ch/publications\\_and\\_data/ar4/wg2/en/spm.html](http://ipcc.ch/publications_and_data/ar4/wg2/en/spm.html).

8. See *supra* notes 5 and 7 and accompanying text.

9. See MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: BIODIVERSITY SYNTHESIS 2 (José Sarukhán et al. eds., 2005), available at <http://www.maweb.org/documents/document.354.aspx.pdf> [hereinafter BIODIVERSITY SYNTHESIS] (“Human actions are fundamentally, and to a significant extent irreversibly, changing the diversity of life on Earth, and most of these changes represent a loss of biodiversity. Changes in important components of biological diversity were more rapid in the past 50 years than at any time in human history. Projections and scenarios indicate that these rates will continue, or accelerate, in the future.”). See also, e.g., Alison Benjamin, *Fears for Crops as Shock Figures from America Show Scale of Bee Catastrophe*, OBSERVER, May 1, 2010, [www.guardian.co.uk/environment/2010/may/02/food-fear-mystery-beehives-collapse](http://www.guardian.co.uk/environment/2010/may/02/food-fear-mystery-beehives-collapse).

10. See, e.g., Jeremy Leggett, *After the Credit Crisis—Next It Will Be Oil*, FIN. TIMES, June 8, 2010, <http://www.ft.com/intl/cms/s/0/6b195284-733c-11df-ae73-00144feabdc0.html#axzz1dX3qlp00> (“[T]he ITPOES companies fear an irrecoverable fall in global oil supply by 2015 at the latest and that if oil producers then husband resources, a global energy crisis could abruptly morph into energy famine for some oil-consuming nations.”); INDUS. TASKFORCE ON PEAK OIL & ENERGY SEC., *THE OIL CRUNCH: A WAKE-UP CALL FOR THE UK ECONOMY* (Simon Roberts ed., 2010), available at [http://peakoiltaskforce.net/wp-content/uploads/2010/02/final-report-uk-itpoes\\_report\\_the-oil-crunch\\_feb20101.pdf](http://peakoiltaskforce.net/wp-content/uploads/2010/02/final-report-uk-itpoes_report_the-oil-crunch_feb20101.pdf).

11. See Ban Ki-Moon, *Foreword to U.N., Millennium Dev. Goals Rep. 2010* (June 24, 2010) (“[I]t is clear that improvements in the lives of the poor have been unacceptably slow, and some hard-won gains are being eroded by the climate, food and economic crises.”). And more recently, see Mark Tran, *UN Declares Famine in Somalia*, THE GUARDIAN, July 20, 2011, <http://www.guardian.co.uk/global-development/2011/jul/20/un-declares-famine-somalia>. The U.N.’s official declaration that two parts of Somalia are in famine amid the worst drought in east Africa for sixty years poignantly illustrates the devastating situation many people face: “The drought in east Africa has left an estimated 11 million people at risk, but Somalia has been the worst hit country as it is already wracked by decades of conflict.” *Id.* Andrew Mitchell, the UK’s international development secretary, is quoted as saying: “In Somalia, men, women, and children are dying of starvation. The fact that a famine has been declared shows just how grave the situation has become.” *Id.*

12. The tensions in the international economy and the efforts to revive it are aptly captured in Chris Giles, Alan Beattie & Hugh Carnegy, *G20 Strains Cast Shadow Over Meeting*, FIN. TIMES, Oct. 13, 2011, <http://www.ft.com/intl/cms/s/0/db4ab070-f5ae-11e0-be8c-00144feab49a.html>.

Although there has been some talk of a “Global Green New Deal,” of turning the financial crisis into an opportunity for necessary transition to a green economy,<sup>13</sup> generally speaking, environmental concerns have a tendency to be placed on the backburner, along with concerns for the underprivileged of this world, when jobs are lost, revenues disappear, stock markets quiver, and the financial basis of developed countries appears to be in danger.<sup>14</sup> Getting back on track with economic growth and business as usual is a postponement of the necessary focus on dealing with climate change and other overriding environmental concerns—a postponement that may turn out to be highly detrimental to our chances of achieving a sustainable global society: financially, socially, and environmentally.<sup>15</sup>

It is the poor people of this world who are already suffering the most, who are hit first by financial crises,<sup>16</sup> and who will continue to

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13. See Press Release, U.N. Env't Programme, “Global Green New Deal”—Environmentally-Focused Investment Historic Opportunity for 21st Century Prosperity and Job Generation, (Oct. 22, 2008), <http://www.unep.org/newscentre/Default.aspx?DocumentID=548&ArticleID=5957>; see also EDWARD B. BARBIER, RETHINKING THE ECONOMIC RECOVERY: A GLOBAL GREEN NEW DEAL (2009), available at <http://www.sustainable-innovations.org/GE/UNEP%20%5B2009%5D%20A%20global%20green%20new%20deal.pdf>; *Green Economy*, UNITED NATIONS ENV'T PROGRAMME, <http://www.unep.org/greeneconomy/> (last visited Mar. 11, 2012).

14. As pointed out by professor of economics Edward B. Barbier: “Fossil fuel subsidies and other market distortions, as well as the lack of effective environmental pricing policies and regulations, will diminish the impacts of G20 green stimulus investments on long-term investment and job creation in green sectors. Without correcting existing market and policy distortions that underprice the use of natural resources, contribute to environmental degradation and worsen carbon dependency, public investments to stimulate clean energy and other green sectors in the economy will be short lived. The failure to implement and coordinate green stimulus measures across all G20 economies also limits their effectiveness in ‘greening’ the global economy. Finally, the G20 has devoted less effort to assisting developing economies that have faced worsening poverty and environmental degradation as a result of the global recession.” Edward B. Barbier, *Green Stimulus is Not Sufficient for a Global Green Recovery*, VOX (June 3, 2010), <http://www.voxeu.org/index.php?q=node/5134>.

15. Whether the current global uprising against the financial system can transmute into a call for sustainability in all three dimensions remains to be seen. See Michael Stothard, Shannon Bond & Matt Kennard, *Wall St Protests Spread to Global Stage*, FIN. TIMES, Oct. 14, 2011, <http://www.ft.com/intl/cms/s/0/611665f0-f65e-11e0-86dc-00144feab49a.html>; see also Shannon Bond, *Obama Extends Support for Protesters*, FIN. TIMES, Oct. 16, 2011, <http://www.ft.com/intl/cms/s/0/052226f8-f80c-11e0-a419-00144feab49a.html> (“Others stressed they were part of a global movement for justice. ‘First came the Arab Spring and Spain’s *indignados*. Then came the Wall Street protests. In London, we are now part of this movement campaigning for a better world.’”).

16. Although the U.N. cites some positive results in terms of the Millennium Development Goals, the 2010 Millennium Development Goals Report also indicates that progress against hunger has been impacted more

be affected the most, in the short term, as a consequence of climate change and the global energy situation.<sup>17</sup> But ultimately these crises affect us all: there are many indications that business as usual is the right choice only if we desire a very uncertain future for our children and grandchildren.<sup>18</sup> Unfortunately, by the time enough decision-makers realize that business as usual is not a viable alternative, it may very well be too late.<sup>19</sup> That gives rise to the question: What do we do?

### I. THE ROLE OF COMPANIES

What then is the role of companies in this bigger picture? Surely it is not companies, but policymakers and lawmakers, our parliaments and governments, who should do what is necessary to lead us into sustainable development. The responsibility of the state is incontestable.<sup>20</sup> However, a part of that responsibility is considering the role of companies.<sup>21</sup> The great significance of the function of companies within the global economy and the vast impact that the operations of companies today have, on an aggregated level, on society in general and on the biosphere and the atmosphere, means that a critical analysis of the purpose of companies and the regulatory framework within which they operate is crucial to a deeper understanding of the correlation between society and sustainable development.<sup>22</sup> We cannot hope to achieve overarching societal goals without companies contributing to them.

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severely by economic troubles: “The ability of the poor to feed their families was hit consecutively by skyrocketing food prices in 2008 and falling incomes in 2009, and the number of malnourished, already growing since the beginning of the decade, may have grown at a faster pace after 2008.” U.N., Millennium Development Goals Report 2010 (June 24, 2010) [hereinafter MDG Report], available at [http://www.un-ngls.org/spip.php?page=amd10&id\\_article=2681](http://www.un-ngls.org/spip.php?page=amd10&id_article=2681).

17. See JOACHIM VON BRAUN, THE WORLD FOOD SITUATION: NEW DRIVING FORCES AND REQUIRED ACTIONS 12 (2007), available at [www.ifpri.org/pubs/fpr/pr18.pdf](http://www.ifpri.org/pubs/fpr/pr18.pdf) (“When taking into account the effects of [unmitigated] climate change, the number of undernourished people in Sub-Saharan Africa may triple between 1990 and 2080 . . .”); see also *Synthesis Report*, *supra* note 5.

18. See, e.g., MDG Report, *supra* note 16.

19. See, e.g., CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE, CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (B. Metz et al. eds., 2007) [hereinafter MITIGATION], available at [http://ipcc.ch/publications\\_and\\_data/ar4/wg3/en/contents.html](http://ipcc.ch/publications_and_data/ar4/wg3/en/contents.html) (calling for emissions to peak before 2015).

20. See generally Beate Sjøfjell, *If Not Now, Then When?: European Company Law in a Sustainable Development Perspective*, 7 EUR. COMPANY L. 187 (2010).

21. Tending to be ignored or left to the realm of voluntary corporate social responsibility initiatives, a case may be made for including the regulation of companies in the toolbox of regulators pursuing sustainable development. See generally Sjøfjell, *supra* note 3.

22. *Id.*

Companies are all-important components of our economies, with an enormous unrealized potential for mitigating climate change. As put forward by the IPCC, there is potential to reduce greenhouse gas emissions with existing technology, but a number of barriers prevent this potential from being realized.<sup>23</sup>

The conceived primacy of shareholders and of profit maximization for shareholders is arguably one such barrier, and indeed prime among them.<sup>24</sup> Business acceptance of the nonprimacy of shareholder interests seems to be a necessary prerequisite for business to become sustainable, also in the environmental sense. As long as profit (maximization) for shareholders is the overarching goal, any attempt at prioritizing environmental concerns and prioritizing climate change mitigation will quickly hit a ceiling.<sup>25</sup> Certainly, profit in itself is good and necessary for the survival of our businesses providing workplaces, revenue, and in short, welfare. The search for profit is legitimate and necessary. The problem arises when profit becomes the overarching objective to the detriment of other legitimate interests and societal goals. We need to find out how to change the framework within which profit is pursued, so that profit is pursued within the goal of sustainable development instead of the pursuit of profit being the main goal, with some good being done (or appearing to be done) in the name of corporate social responsibility.

## II. THE ROLE OF LAW

### A. *Beyond CSR and Mainstream Corporate Governance: Integration of Environmental Concerns*

There are two dominant debates concerning companies: the Corporate Social Responsibility (“CSR”) debate and the Corporate Governance debate.<sup>26</sup> CSR in a sustainable-development perspective could be seen as dealing with and bringing together two interrelated issues:<sup>27</sup> firstly, legal compliance and secondly, the company’s responsibility for going beyond such compliance, with the legal rules forming the floor and the voluntary part of CSR being a

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23. Lenny Bernstein et al., *Industry, in* MITIGATION, *supra* note 20.

24. *See* SJAFJELL, *supra* note 3, § 4.3.5.

25. *See generally* Beate Sjøfjell, *Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation*, 8 EUR. COMPANY L. 56 (2011).

26. Beate Sjøfjell, *Internalizing Externalities in E.U. Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers*, 40 GEO. WASH. INT’L L. REV. 977, 981 (2009).

27. For example, including the three dimensions of sustainable development: environmental protection, social justice, and economic development, in CSR debates also known simply as “Planet, People and Profit.” *See* T. LAMBOUY, CORPORATE SOCIAL RESPONSIBILITY: LEGAL AND SEMI-LEGAL FRAMEWORKS SUPPORTING CSR 10 (Deventer: Kluwer, 2010).

striving beyond that—a race to the top.<sup>28</sup> In that sense, CSR would encompass and form a bridge between hard law, soft law, and ethical obligations. But CSR does not do this. Business lobbyists have captured the CSR concept and ensured that the definition legislators subscribe to is that of CSR as a voluntary activity.<sup>29</sup> The business message may be said to be: “Do not legislate us, and we are willing to talk about how we behave.”<sup>30</sup> This is not meant to ignore that good is done in the name of CSR. And certainly the CSR movement has led to or been a part of a process where no self-respecting business leader will claim that her company disregards CSR.<sup>31</sup> However, as I have argued elsewhere, defining CSR through delimitation against legal obligations is deceptive and detrimental to the development of a sustainably and socially responsible business and has contributed to giving CSR a bad name.<sup>32</sup>

Much of what companies claim as credit on their CSR accounts is involvement with issues unrelated to their businesses, for example the Norwegian Airport Express Train organizing computer classes for former drug addicts<sup>33</sup> or Norsk Hydro funding the Oslo Philharmonic Orchestra.<sup>34</sup> Funding the Orchestra gives no indication at all of how Norsk Hydro is run as a business—how it contributes to or works against the mitigation of climate change, how its employees are treated, or whether it cares about the workers hired by its subcontractors.<sup>35</sup> Organizing computer classes for the

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28. Sjøfjell, *supra* note 25, at 56–64.

29. See, e.g., *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 5, COM (2002) 347 final (July 2, 2002), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:en:PDF> (“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.”). For an example on a national level, see Beate Sjøfjell, *Report from Norway: Another CSR Victory for the Business Lobbyists*, 5 EUR. COMPANY LAW 235 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1413388](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413388). We may, however, be seeing the first indications of the EU definition of CSR attempting to get out of the straight-jacket of voluntarism, see the Commission’s newest Green Paper on CSR. See *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 25, 2011), available at [http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act\\_en.pdf](http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf).

30. Sjøfjell, *supra* note 25.

31. *Id.*

32. *Id.*

33. This was heralded by the Norwegian business newspaper *Dagens Næringsliv* in December of 2010 as an example of CSR.

34. See *Sponsor*, FILHARMONIEN OSLO, <http://www.oslofilharmonien.no/lang/en/filharmonien/sponsor/> (last visited Mar. 11, 2012).

35. See *Our Values*, NORSK HYDRO, <http://www.hydro.com/en/Subsites/NorthAmerica/About-Hydro/Our-values/> (last visited Mar. 11, 2012).

underprivileged or funding cultural activities is not CSR in the true sense—it is corporate charity work.<sup>36</sup>

The mainstream corporate governance debate concentrates on a small segment of the reality in which companies operate.<sup>37</sup> This debate focuses on investors, first and foremost shareholders, and their relationship with the board of the company and, by extension, its management. The corporate governance debate has spawned a number of corporate governance codes and legislative measures, such as the EU Directive on shareholder rights.<sup>38</sup> Heavily influenced by the dominant legal-economic theory of agency,<sup>39</sup> the focus is on how to find the right incentives to make the board act as agents for the shareholders as principals with profit maximization as the overarching goal.<sup>40</sup>

Together with the capture of CSR as a voluntary affair for business, the narrow focus typical of the mainstream corporate governance debate promotes the shareholder primacy drive and the misconception that the company is and should be a vehicle for profit maximization for shareholders only—and that it is sufficient for companies to contribute to overarching societal goals.<sup>41</sup> A true

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36. It could be argued, of course, that corporate charity work (“CCW”) is a part of an extended concept of CSR, but we should distinguish between CSR in the wide sense, including CCW, and the core of true CSR; for further explanation, see Sjäffjell, *supra* note 25. For different definitions of CSR, see generally Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT’L J. MGMT. REVS. 85 (2010).

37. SJÄFJELL, *supra* note 3, § 4.1 (explaining the current debates including the mainstream corporate governance, and introducing a new structure for analysis of issues concerning companies, involved parties and affected interests).

38. See Council 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 *Index of Codes*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE, [www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php) (last visited Mar. 11, 2012). For a critical perspective, see generally Steen Thomsen, *The Hidden Meaning of Codes: Corporate Governance and Investor Rent Seeking*, 7 EUR. BUS. ORG. L. REV. 845 (2006).

39. Beate Sjäffjell, *More Than Meets the Eye: Law and Economics in Modern Company Law*, in LAW AND ECONOMICS. ESSAYS IN HONOUR OF ERLING EIDE, 217 (Erik Røsæg et al. eds., 2010), available at <http://papers.ssrn.com/abstract=1601980>.

40. *Id.* See also SJÄFJELL, *supra* note 3, § 4.3.5. See also Kent Greenfield, *From Rights to Regulation in Corporate Law*, in PERSPECTIVES ON COMPANY LAW: 2, 1 (Fiona Patfield ed., 1997). However, indications on EU level may now be found that these alleged truths are questioned and that the problems with a too short-term perspective that the shareholder primacy drive entails are acknowledged. See, e.g., *The EU Corporate Governance Framework*, COM (2011) 264 final (Apr. 5, 2011), available at [http://ec.europa.eu/internal\\_market/company/docs/modern/com2011-164\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf).

41. A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 149 HARV. L. REV. 1049, 1049 (1931).

integration of environmental concerns is required. The law, therefore, is necessary to ensure the contribution of companies, to level the playing field for companies that wish to actively contribute to the mitigation of climate change and of threats to biodiversity, and to ensure that their contributions are not limited by the competitive advantage that today's system tends to give irresponsible and short-sighted companies.

*B. The Limited Effectiveness of Environmental Law*

Having established that the law is necessary, this poses the question: What area of law? Environmental law and other forms of external regulation<sup>42</sup> are important, but the limits of external regulation are well documented and consist of a number of interlinked issues, briefly sketched here.

First, the extraterritoriality issue or the issue of home state and host state. For example, while European companies may be under relatively strict environmental regulation in their home state, the jurisdictional scope of home state regulation does not typically cover the companies' business in other countries.<sup>43</sup> The host state may have lax regulation or lacking enforcement. Developing countries, needing jobs and revenue, may be fearful of making demands on companies from developed countries.<sup>44</sup> Second, the regulatory lacuna at an international level—the stalled proposal for UN norms governing transnational companies is an example of this gap.<sup>45</sup> Third, the legislatures cannot keep up with everything companies do or plan to do and the environmental consequences of their actions.<sup>46</sup> Fourth, there is the danger of loopholes, boilerplate formulas or other measures through which companies comply or seem to comply

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42. As opposed to the internal regulation of the competence, duties, and decision making in companies through company law.

43. Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 409 (2002).

44. See generally JANET DINE, COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS (2005) (discussing the complex relationships between corporations, nation states, and international organizations).

45. See United Nations, Econ. & Soc. Council, Comm. on Human Rights, Sub-Comm. on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. INT'L & COMP. L. 493 (2003); Carolin F. Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 4 GERMAN L.J. 1065 (2003).

46. D.G. GOYDER, *THE JUST ENTERPRISE* 36 (1987) (giving the example of the countryside of Northamptonshire being dug up in search of iron ore: "It 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.").

with the law at as low a cost as possible. This is the problem with reporting.<sup>47</sup>

Finally, and perhaps most importantly, sustainable development is about going further than the antipollution approach that often characterizes environmental law and other external regulation. Sustainable development is a way of thinking. To get decision makers in companies to think in a certain manner an internal company perspective is required. In my opinion, this involves a company law perspective—not as an exclusive perspective, but as a necessary contribution.

### C. *The Role of Core Company Law*

This Article makes the argument that company law is a necessary tool for achieving sustainable companies, both to make the external regulation of companies more effective and to realize the potential within each company to make its own independent, creative, and active contribution to the mitigation of climate change. Take the mainstream corporate governance debate as a starting point: If the focus of the board, and by extension, the management, is to be primarily on ensuring profit for shareholders and keeping the share price high, and the whole system encourages shareholders to focus on their profits, who then is to be responsible for the company's action beyond its narrow obligation to comply with the law? In my opinion, this should be the responsibility of the board. But the board is under pressure from the shareholder primacy drive to focus on the short term rather than the long term and to disregard externalities that the company is not obligated by law to internalize (or which it can get away with ignoring).

In many jurisdictions, company law is seen as regulating the purpose of the company through its regulation of the relationship between the shareholders, the board, and management. Company law is thereby seen as supporting the shareholder primacy drive, although that view arguably is more a social norm than a legal one.<sup>48</sup> Combating the negative effects of the shareholder primacy drive therefore, in my opinion, entails redefining the purpose of the company and the role and the purpose of the board.<sup>49</sup> I believe redefining should be done in a principle-based manner, but it should be done in law, through the use of legal standards, instead of attempting to do this (only) through more or less voluntary codes and so on. The law needs to create a floor beneath which no company can go, thereby promoting a race to the top through each company contributing in its own individual, creative way.

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47. Sjøfjell, *supra* note 25.

48. *See infra* Part III.C.

49. *See infra* Part III.D.

## III. THE RESEARCH PROJECT “SUSTAINABLE COMPANIES”

A. *Internalizing Environmental Externalities*

The international team of the Oslo-based research project “Sustainable Companies”<sup>50</sup> is dedicated to finding out how to move from the idea of internalizing externalities<sup>51</sup> to a research-based proposal. Our vision is to contribute to the tools that make companies become a part of the solution. The hypothesis underlying the project is that environmental sustainability in the operation of companies cannot be effectively achieved unless the objective is properly integrated into company law and thereby into the internal workings of the company.<sup>52</sup> To test this hypothesis and to prepare the ground for well-founded proposals for reform at the end of the project period, an important first stage in the “Sustainable Companies” project has been to map the barriers to and possibilities for the promotion of sustainable business in the hitherto often ignored area of company law.<sup>53</sup> Team members in our project, from a wide range of jurisdictions including countries in Europe, the Americas, Africa, and Asia,<sup>54</sup> have written country reports concerning the same set of questions with the main focus on core company law issues but also covering accounting/reporting and auditing/assurance, as well as the in practice very important but in company law not adequately addressed area of groups. These country reports have formed the basis for the ongoing work with three cross-jurisdictional papers identifying the barriers to and possibilities for sustainable companies in the same three important areas: first, core company law; second, accounting/auditing rules; and third, the regulation of company groups.<sup>55</sup> In this Article, a first

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50. For more information about this project, which is financed by the Research Council of Norway and has a dedicated team of thirty-five scholars from many regions of the world, see *Sustainable Companies*, UNIV. OF OSLO, <http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/> (last visited Mar. 11, 2012) [hereinafter *Sustainable Companies*].

51. Sjøfjell, *supra* note 26, at 1003–04.

52. See *Sustainable Companies*, *supra* note 50.

53. See generally Benjamin J. Richardson, *Sustainability and Company Law: An Improbable Union?*, 8 EUR. COMPANY L. 54 (2011).

54. See *Sustainable Companies*, *supra* note 50 (listing the team members). The tentative analysis below is based on draft mapping papers, many of which are still works in progress. Direct reference to the draft mapping papers are generally not made in this Article. The final versions will be made available in 2012 on the website’s publications page. The jurisdiction-specific papers published in the Sustainable Companies project referred to below are initial discussions of some of the issues that are analysed over a broader scale in the mapping papers.

55. All three draft papers were presented at the international conference “Towards Sustainable Companies: Identifying New Avenues” in Oslo on August 29 and 30, 2011. For more information about the conference, see *Towards Sustainable Companies: Identifying New Avenues*, UNIV. OF OSLO,

tentative suggestion of the results of this mapping and what it entails for possible reforms is given.<sup>56</sup> For reasons that will be made clear below, the focus is on core company law.

*B. Tentative Results: Possibilities and Critique*

On the face of it, we see tentative glimmers of hope and possibilities for the promotion of companies in the increasing focus on CSR and the ethical obligations of a company to consider the environmental and societal impacts of its business.<sup>57</sup> An analysis of the results of the mapping indicates that the two debates of CSR and mainstream corporate governance are reflected.<sup>58</sup> On the one hand, there is more shareholder focus, also in continental European and Nordic countries originally having a wider perspective.<sup>59</sup> On the other hand, there is more focus on the wider corporate responsibility also in shareholder primacy strongholds such as the United Kingdom, with its enlightened shareholder value.<sup>60</sup> Exceptionally, the consideration of the environment is directly included in legal requirements of the duties of the board, as in the U.K. Companies Act of 2006,<sup>61</sup> while in jurisdictions like Germany we even see an increased emphasis in company law on a pluralistic view of the interests of the company.<sup>62</sup> In countries that have had to rebuild their societies after communism, or as in South Africa after apartheid, we see tendencies to new approaches based on a broader understanding of the societal significance of companies.<sup>63</sup> Certainly company law in many jurisdictions allows the inclusion of environmental concerns and also the prioritization of environmental

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<http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/event/s/conferences/sustainable-companies-conference-2011.html> (last visited Mar. 11, 2012).

56. Again, the tentative summary of the results and what they entail for possible future reform is my own personal view, not necessarily representative of the view of the whole project team, nor of my co-authors for the cross-jurisdictional paper in core company law.

57. This is apparent in the emphasis placed on these issues by those who sell sustainability services to companies. See, e.g., *Global Sustainability*, PwC <http://www.pwc.com/gx/en/sustainability/index.jhtml> (last visited Mar. 11, 2012).

58. The two debates are introduced *infra* Part II.A.

59. For an illustrative example of Norway, see generally Sjøfjell, *Towards a Sustainable Development: Internalising Externalities in Norwegian Company Law*, 8 INT'L & COMP. CORP. L.J. 103 (2011).

60. See generally Charlotte Villiers, *Directors' Duties and the Company's Internal Structures Under the UK Companies Act 2006: Obstacles for Sustainable Development*, 8 INT'L & COMP. CORP. L.J. 47 (2011).

61. *Id.*

62. Gudula Deipenbrock, *Sustainable Development, the Interest(s) of the Company and the Role of the Board from the Perspective of a German Aktiengesellschaft*, 8 INT'L & COMP. CORP. L.J. 15 (2011).

63. See generally Richard Croucher & Lilian Miles, *Corporate Governance and Employees in South Africa* 10 J. CORP. L. STUD. 367 (2010).

protection over short-term profit, and we find legal sources that substantiate that from a legislative perspective. Companies are expected to contribute toward societal goals wider than that of shareholder profit maximization.<sup>64</sup>

These two partly conflicting trends seem to lead to reporting being seen as the solution, as a compromise satisfying both groups, especially in the form it takes in most countries, where the extent to which companies internalize environmental externalities<sup>65</sup>, for example, is voluntary, while the reporting itself is not—an approach that may be seen as underpinned through theories of reflexive law.<sup>66</sup> We see this in EU law and it is taken further in Norway<sup>67</sup> and Denmark.<sup>68</sup> We see the same tendency in some corporate governance codes, notably in the Netherlands.<sup>69</sup> There are some court cases that arguably indicate a new approach, inter alia, in cases concerning the piercing of the corporate veil.<sup>70</sup>

There are also some business initiatives, in Germany and in Ireland for example, that seem to be working to contribute toward sustainable development.<sup>71</sup> There are some institutional investors, some pension funds, which are on their way toward what may become truly socially responsible investment.<sup>72</sup> And we see a very

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64. See Sjäffjell, *supra* note 59.

65. And other societal externalities.

66. Karin Buhmann, *Reflexive Regulation of CSR to Promote Sustainability: Understanding EU Public-Private Regulation on CSR Through the Case of Human Rights* 18 (Univ. of Oslo Faculty of Law Research Paper Series, Paper No. 2010-07), available at <http://ssrn.com/abstract=1712801>.

67. Sjäffjell, *supra* note 25.

68. Karin Buhmann, *The Danish CSR Reporting Requirement: Migration of CSR-Related International Norms into Companies' Self-Regulation Through Company Law?*, 8 EUR. COMPANY L. 65 (2011).

69. TINEKE LAMBOUY, CORPORATE SOCIAL RESPONSIBILITY: LEGAL AND SEMI-LEGAL FRAMEWORKS SUPPORTING CSR 107–46 (2010).

70. Although the Supreme Court expressly indicated the result in *Hempel* was an interpretation of the Norwegian Pollution Act, the case may arguably be the forerunner of a special type of piercing the corporate veil, with its own set of conditions. Beate Sjäffjell, *Environmental Piercing of the Corporate Veil: The Norwegian Supreme Court Decision in the Hempel Case*, 7 EUR. COMPANY L. 154, 154–60 (2010), available at <http://papers.ssrn.com/abstract=1616820>.

71. See Deipenbrock, *supra* note 62, at 7–8 (explaining the concept of the German “econsense”).

72. Anita M. Halvorssen, *Addressing Climate Change Through the Norwegian Sovereign Wealth Fund (SWF)—Using Responsible Investments to Encourage Corporations to Take ESG Issues Into Account in Their Decision-Making* 13–14 (Univ. of Oslo Faculty of Law Research Paper Series, Paper No. 2010-06), available at <http://ssrn.com/abstract=1712799>. See generally BENJAMIN J. RICHARDSON, *SOCIALLY RESPONSIBLE INVESTMENT LAW: REGULATING THE UNSEEN POLLUTERS* (2008) (providing background material on socially responsible investment).

slowly growing tendency in public opinion to require more from companies.<sup>73</sup>

However, the positive tendencies are not sufficient, neither in their current scope nor in their capacity to develop—it is too little and most likely going to be too late. Even more seriously, there is a two-pronged danger of the CSR talk and of reporting as the preferred perceived solution. First, concerning reporting: when the core duty is not in place, when the decision makers in companies are not required to integrate environmental concerns into the decisions of how the core business of the company is to be run, and when there is no hard law stating that companies must be run in a socially responsible manner, we risk that environmental reporting is neither relevant nor reliable.<sup>74</sup> There are even studies that indicate “a negative relation, i.e., the more a firm discloses, the worse its environmental performance.”<sup>75</sup> The uglier the company, the more makeup it uses. Similar problems are reported concerning the disclosure of social issues.<sup>76</sup> Second, concerning CSR: corporate charity work is often used instead of true CSR, leading to greenwashing and deflecting our attention from how the core business of the company is actually run.<sup>77</sup> Further, all the CSR talk creates a danger of the wool being pulled over our eyes—making us believe that enough is being done. This is the danger with the company law reforms that are perceived by some as positive, notably the codification of the so-called enlightened shareholder value of the U.K. Companies Act.<sup>78</sup> If this is seen as a step forward, it may serve to take the pressure off of legislators to undertake proper reform, due to the misconception that progress is made in terms of internalising externalities in business decision making, when the truth seems to be that nothing has changed at all—at least not for

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73. See, e.g., Oliver Ralph, *All Change: Long-term Success Requires Flexibility and Co-operation*, FIN. TIMES, Oct. 10, 2011, <http://www.ft.com/intl/cms/s/2/097d7244-f10d-11e0-b56f-00144feab49a.html> (discussing how companies must maintain strong relationships with consumers, staff, shareholders, and investors when facing productivity challenges).

74. See generally Sylvie Berthelot et al., *Environmental Disclosure Research: Review and Synthesis*, 22 J. ACCT. LITERATURE 1 (2003) (analyzing environmental disclosures and concerns over their reliability).

75. *Id.* at 20.

76. William. S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253, 255–57 (2003).

77. Sjøfjell, *supra* note 25.

78. See generally Surya Deva, *Sustainable Development: What Role for the Company Law?*, 8 INT'L & COMP. CORP. L.J. 76 (2011). The question may even be raised whether what has been seen as a codification of a previously existing enlightened shareholder value norm may have been a shift to the detriment of the environmental and other societal interests through the clear hierarchy that has now been set out in the Act, with other interests to be taken into account as far as that benefits the shareholders—previously that relationship could at least be seen, by some, as open for discussion.

the better. In the United Kingdom, as in most of the rest of the world, we are still seeing business as usual—or, with the current financial unrest following the financial crisis of 2008, desperate attempts to keep business going as usual.<sup>79</sup> But business as usual is not and cannot be an alternative for humanity desiring to ensure viable ecosystems for future generations.<sup>80</sup>

C. *Tentative Results: The Main Barrier*

The role of the board is central to the way companies are run and thereby to the contribution of companies to the mitigation of climate change and the mitigation of the destruction of biodiversity.<sup>81</sup> Inspired by the ideas of agency theory, directors of the board are increasingly seen as agents for the shareholders as principals, with profit maximization as the goal.<sup>82</sup> The tentative results of our cross-jurisdictional analysis indicate that shareholder primacy and the perceived overarching goal of maximizing shareholder profit present the most important barriers to the contribution of companies to environmental sustainability.<sup>83</sup> Indeed, all tentative possibilities, all glimmerings of hope, are negated through the dominance of shareholder primacy and the short-term shareholder profit maximization drive.

This does give rise to the question: How can shareholder primacy be perceived as a main barrier in an analysis of company law, when shareholder primacy arguably is more of a social norm than a legal one?<sup>84</sup> However, there is a clear link between this social norm and company law, because the social norm has developed within the framework of the law, as a result of what the law does and does not regulate.<sup>85</sup> In my opinion, understanding this relationship may be a significant step in understanding how we can

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79. Martin Wolf, *Britain Must Escape its Longest Depression*, FIN. TIMES, Sept. 1, 2011, <http://www.ft.com/intl/cms/s/0/c6c14d92-d332-11e0-9ba8-00144feab49a.html#axzz1nQSC16qz>.

80. “[A]n 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, *Comm’n v. Council*, 2005 E.C.R. I-7879, I-7896 n.51 (citing Demetrio Loperena Rota, 3 *Los derechos al Medio Ambiente adecuado y a su protección*, 3 REVISTA ELECTRÓNICA DE DERECHO AMBIENTAL 87 (1999)).

81. SJAFJELL, *supra* note 3.

82. *Id.*

83. *Id.*

84. Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOVERNANCE: AN INT’L REV. 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.”).

85. *Id.* at 13–14.

achieve change, and it certainly is also indicative of the possibility that lies in company law as it is today.

In what way has company law allowed this myth of shareholder primacy and profit maximization as a mandatory requirement to develop? To understand that, it may be useful to return to the starting point of this Article, namely that the company is one of the most ingenious inventions of our time. We mostly take it for granted today, but the company with limited liability for its shareholders is a relatively recent innovation, and much younger than the enforceable contract, that perhaps was the most innovative contribution of Roman law.<sup>86</sup> Contracts and private property rights are necessary prerequisites for business as we know it and have much deeper historical roots as such.<sup>87</sup> The idea of the company with limited liability, where people can invest their money in a business venture and expect a cut of future profits if successful and not lose more than their investment if unsuccessful, is relatively speaking the newcomer in the world of business.<sup>88</sup> From one perspective, this was arguably not new: banks lend money to business projects along the same principles.<sup>89</sup> The major difference is, however, that banks are protected through contract, while shareholders are not.<sup>90</sup> Nor are shareholders owners, in any full, traditional sense of the word ownership.<sup>91</sup>

History saw the rise of this innovative way of financing companies, putting capital to its purportedly most efficient use, but for that to work on a grand scale, investors needed some kind of protection. Naturally, therefore, Companies Acts setting up rules for companies with limited liability for their shareholders emphasize regulating the relationship between the shareholders on the one hand and the company, through its board and management, on the other. This is not to say that no other interests involved in or affected by companies are dealt with in Companies Acts—most Companies Acts have some rules concerning creditor protection.<sup>92</sup>

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86. See generally Watson, *supra* note 1.

87. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA*, 4 (2003).

88. *Id.* at 46–54.

89. JESPER LAU HANSEN, *NORDIC COMPANY LAW: THE REGULATION OF PUBLIC COMPANIES IN DENMARK, FINLAND, ICELAND, NORWAY, AND SWEDEN* 34–36 (2003).

90. *Id.* at 31–36.

91. SJAFJELL, *supra* note 3, § 3.3.3.

92. Some, such as the Norwegian Companies Acts, also include rules on the involvement of employees in the decision making of companies, while the most central rules concerning the protection of employees is in a separate act—the Working Environment Act. Norway has two limited liability companies acts: the Public Limited Liability Companies Act of June 13, 1997, No. 45 and the Private Limited Liability Companies Act of June 13, 1997, No. 46, both available (for a fee) in English translations in the Norwegian Institute of Public Accountants' product *Norwegian Company Legislation*. REVISORFORENINGEN, <http://www.revisorforeningen.no/a9356038/English/eBooks> (last visited Mar. 11,

The rights of creditors are, however, mainly regulated through other areas of law, with historical roots far surpassing those of companies with limited liability.

The focus on shareholders in the Companies Acts has in many jurisdictions led to company law being perceived as regulating the purpose of the company through its regulation of the relationship between shareholders and the company. Nordic Companies Acts, for example, typically state that companies that do not have profit for shareholders as a purpose should regulate in their articles of association how the profit of the company is to be distributed.<sup>93</sup> This is misconstrued, in my opinion, as setting out the purpose of the company understood as the company's only or main purpose. Understood historically, the Companies Acts set out the typical purpose that shareholders have with their relationship with companies in which they have shares, and serves as a protection of that purpose in the sense that if companies do not intend to distribute dividends to shareholders at all, then potential investors should be given a forewarning in the articles of association. What the Nordic Companies Acts do not say anything about—and neither do Companies Acts, generally speaking, expressly regulate this issue—is what the purpose of the company on an aggregated level is, and what the guidelines are according to which the company is to be run. The interlinked concepts of the purpose of the company and the interests of the company are therefore topics for debate in academic contributions, while in more pragmatic, practitioner-oriented literature the inference is simply drawn that shareholder focus in the Companies Acts translates into a prioritization of shareholder interest by the legislators. The historically explicable fact of the focus of the relationship between the shareholders and the company organs in the Companies Acts, and the lack of express regulation of the core company issues of the purpose of the company and the interests of the company, has therefore led to the development within this vacuum of an idea of shareholder primacy.<sup>94</sup> This is not to say that shareholder primacy cannot be

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2012). The Working Environment Act of June 17, 2005, No. 62 is freely available in an English translation. *Working Environment Act*, ARBEIDSTILSYNET, <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156> (last visited Mar. 11, 2012).

93. See Norwegian Public Limited Liability Companies Act § 2-2(2) (“If the objective of the company’s activities is not to generate a financial return for its shareholders, the articles of association must contain provisions on the allocation of profit and the distribution of assets upon dissolution of the company.” (my translation)).

94. The development and rise of shareholder primacy has other explanations as well, but in a legal analysis this is a main point. For a broader discussion, see generally Andrew Keay, *Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado about Little?*, 22 EUR. BUS. L. REV. 1 (2011).

substantiated as having legal support in any jurisdiction. However, the dominance of the Anglo-American law-and-economics<sup>95</sup> inspired shareholder primacy<sup>96</sup> does seem to go far beyond anything that can be substantiated in a comparative analysis of company law.<sup>97</sup> Certainly the narrow, short-term perspective that the shareholder primacy drive has led to is contrary to company legislation anywhere, and detrimental to the societal goals to which the regulation of companies is meant to contribute.<sup>98</sup>

The vacuum in the Companies Acts of many jurisdictions and the resulting development of the shareholder primacy drive, with its detrimental effects, has led to the extraordinary state of affairs of the Reflection Group on the Future of EU Company Law<sup>99</sup> suggesting that companies should be allowed to include in their articles of association that boards are allowed to promote the interests of the company<sup>100</sup> and to employ a long-term perspective.<sup>101</sup> The Reflection Group thereby proposes to codify an acceptance of what, from any proper, in-depth company law analysis seems to be the state of law today—namely that shareholder profit maximization and shareholder primacy are not the only, nor should they be, the dominant guidelines in the narrow, short-term sense that we see today and that may be seen as contributing to the convergence of crises that we face.<sup>102</sup> The perverse effect of that well-intended proposal may unfortunately be that it is used as an argument to say that narrow, short-term shareholder primacy is the norm according to European company law—otherwise, why would

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95. The positive contributions of law and economics to our understanding of company law and the consequences of various forms of regulation are, in my opinion, indisputable. However, so are the negative effects of the abuse of legal-economic theories meant to be descriptive as normative, and of the abundance of postulates based on concepts and ideas removed from the theories in which they originated and disconnected from the assumptions on which they are based. See Sjäfjell, *supra* note 25.

96. To the extent that the end of history at one point was declared, see generally Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* (Yale L. Sch., L. & Econ. Working Paper No. 235, 2000), available at [ssrn.com/abstract=204528](http://ssrn.com/abstract=204528).

97. Even in jurisdictions where the prioritization of shareholders over other interests may be said to have legal basis, such as the U.K., see Deakin, *supra* note 88, at 11.

98. See Sjäfjell, *supra* note 3, § 4.3.5.4 (discussing the means and end).

99. *Report of the Reflection Group on the Future of EU Company Law*, EUROPEAN COMM'N (Apr. 5, 2011), [http://ec.europa.eu/internal\\_market/company/docs/modern/reflectiongroup\\_report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf).

100. *Id.* at 37. “[Promoting the interests of the company] may have priority over the interest of individual shareholders if these two are in conflict and if serving the short term interest of shareholders would have a direct negative impact on the long-term viability of the company.” *Id.* at 37–38.

101. *Id.*

102. *Id.* at 7–8.

the Reflection Group suggest that the opposite should be expressly allowed?

*D. The Way Forward: Tentative Reflections*

We see that what is perhaps the main barrier to sustainable companies has been allowed to flourish because of what the law regulates and what it does not. This also indicates a way forward. If a key problem is the lack of regulation of what the purpose of companies and the interests of companies are, then a clarifying regulation of those issues will not be just an additional layer of detailed regulation that entails only more expenses and aggravation for companies, but will set a key issue straight in a principle-based manner that could be the start of a shift in a sustainable direction.<sup>103</sup> However, as we are so far off track from sustainable development, with a dramatic shift needed to achieve the presumed safe harbour of no more than two degrees Celsius warming,<sup>104</sup> we probably need to go beyond stipulating long-term, inclusive concepts of the purpose of the company and the interests of the company. In my opinion, what urgently needs to be done is to clarify that the company, on an aggregated level, may and should have profit as a core of its purpose<sup>105</sup>—business cannot survive in the long run without making profit—but this should be sought within the overarching societal purpose of sustainable development. This would be turning inside out the purpose of the company that shareholder primacy drive today promotes, where profit is the overarching purpose and perhaps some good may be sought in the name of CSR.

Because shareholder primacy in the narrow, short-term sense has been allowed to develop for so long, we will also need to consider incentives to support a shift towards sustainable development, and removing disincentives for sustainability that encourage the myth of shareholders as owners and shareholder profit maximization as the dominant guideline. The concept of the interests of the company as a guideline should be developed accordingly, and as I have suggested elsewhere, be teamed together with a concept of sustainable development as an overarching guideline.<sup>106</sup>

A tentative conclusion from my point of view is that legal reform seems to be necessary to not only support the possibilities that

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103. Sjøfjell, *supra* note 59.

104. Which in itself may be assumed to have severe, negative effects, as the IPCC has in its very reticent form shown us. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, [www.ipcc.ch](http://www.ipcc.ch) (last visited Mar. 11, 2012) (containing various reports on the scientific, technical and socio-economic aspects of climate change). And climate change is but one of several pressing issues as a case in point for sustainable development.

105. *See* SJAFJELL, *supra* note 3.

106. *Id.* at ch. 5; *see also* Sjøfjell, *supra* note 26, at 987, 1003–06.

company law today actually gives sustainable business, but to codify these possibilities expressly, preferably as mandatory guidelines, so that the competitive advantage is given to companies that wish to contribute to sustainable development and taken away from those that do not. Legal reform seems to be necessary to start the difficult process of removing the barriers created mainly through social norms that have been allowed to develop in the vacuum caused by the lack of definition of the purpose of companies and of the interests of the company in company law.

Only once these issues are clarified as a matter of company law do we have a good basis for discussing incentives and sanctions, such as liability, and necessary supportive measures such as accounting and reporting—taken seriously—and not as marketing and greenwashing and wool-over-the-eyes pulling as we have today.

Reforming core company law seems in short to present itself as a necessary prerequisite to achieving sustainable companies, both to make the external regulation of companies more effective and to realize the potential within each company to make its own independent, creative, and active contribution to the mitigation of climate change.

#### IV. THE PROPOSALS OF THE “SUSTAINABLE COMPANIES” PROJECT

The “Sustainable Companies” project seeks in the last phase of the project<sup>107</sup> to identify necessary measures to dismantle the barriers preventing business from becoming sustainable and legal mechanisms and incentives to propose to promote truly responsible business.<sup>108</sup> For the European part of the project,<sup>109</sup> EU law, the common framework for thirty European countries, contains the legal basis for making necessary changes to achieve sustainable business (and sustainable development in general).<sup>110</sup> However, the necessary steps have not been taken.<sup>111</sup> This lack of movement may be seen as indicative of a general problem: we may presume that the legislators have sufficient knowledge and on the EU level they have

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107. Through the end of 2012.

108. The project’s results—our proposals for reform—will be presented at the final conference in Oslo on November 12 and 13, 2012. Updated information will be available at <http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/events/>.

109. Europe was the starting point for the project, but the project happily has developed into an international research endeavour.

110. SJAFJELL, *supra* note 3, § 10.7; Beate Sjøfjell, *Quo Vadis, Europe? The Significance of Sustainable Development as Objective, Principle and Rule of EU Law*, in NON STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES (C. Bailliet ed., forthcoming 2012).

111. See NELE DHONDT, INTEGRATION OF ENVIRONMENTAL PROTECTION INTO OTHER EC POLICIES: LEGAL THEORY AND PRACTICE 482 (2003).

not only knowledge and sufficient legal basis to move forward,<sup>112</sup> but even legal obligations to take action to achieve the goal of sustainable development.<sup>113</sup> Legislators nevertheless often seem to be powerless to move beyond path-dependent ways of dealing with the pervasive issues of our time. Legislative work tends to be reactive rather than proactive, based on postulates and superficial discussions, with a striking lack of time and energy devoted to in-depth analysis of the underlying issues and the consequences of existing and proposed new legislation.<sup>114</sup> The “Sustainable Companies” project therefore aims to conclude its work with research-based concrete proposals for any necessary change on the EU level, as well as jurisdiction-specific proposals for a number of the countries represented in the project team.<sup>115</sup> These may take the form of proposals for legal reform within and beyond company law as well as proposals for guidelines for companies wishing to become true contributors to sustainable development.

#### CONCLUSION: GLOBAL CHALLENGES CALL FOR GLOBAL DEBATE

The challenges we face are global by nature. Global challenges ideally require a global approach and an unprecedented holistic and forward-looking approach.<sup>116</sup> The international climate negotiations in Copenhagen and in Cancun have shown, as presumably will the coming negotiations in Durban, that we cannot depend on the governments agreeing to the necessary measures to mitigate climate change as far as still possible. And even if the international community against all odds was to reach an agreement on a sufficient reduction in greenhouse gas emissions,<sup>117</sup> regulators around the world would be in dire need for effective proposals regarding how to achieve those goals. And to reiterate: climate

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112. Which I expect legislators on a national level have worldwide through their general competence.

113. *Quo Vadis, Europe?*, *supra* note 110.

114. See SJAFJELL, *supra* note 3, pt. V.

115. A list of the research team members and their countries of representation is available at <http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/members/>.

116. “The economic analysis must therefore be global, deal with long time horizons, have the economics of risk and uncertainty at centre stage, and examine the possibility of major, non-marginal change.” NICHOLAS STERN, STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE: EXECUTIVE SUMMARY i, xxii (Report presented to the UK Government on Oct. 30, 2006), available at [http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/Executive\\_Summary.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/Executive_Summary.pdf).

117. IPCC recommends a peak by 2015 and a reduction of at least fifty per cent by 2050. See Brian Fisher et al., *Issues Related to Mitigation in the Long Term Context*, in MITIGATION, *supra* note 19.

change is but one case in point for the necessity of a shift toward sustainable development.<sup>118</sup>

The “Sustainable Corporation” Symposium organized by the *Wake Forest Law Review* is one piece of an important jigsaw puzzle of international debate and collaboration necessary to move forward;<sup>119</sup> the “Sustainable Companies” research project, with its international team of scholars, is another. Let us hope that there will be enough jigsaw puzzle pieces in time to make the picture complete.

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118. See, e.g., BIODIVERSITY SYNTHESIS, *supra* note 9, at 2; Benjamin, *supra* note 9.

119. For more information, see the issue from the *Wake Forest Law Review Symposium* “The Sustainable Corporation,” 46 WAKE FOREST L. REV. 383 (2011).