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## Aligning Corporate and Community Interests: From Abominable to Symbiotic

Barnali Choudhury

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# Aligning Corporate and Community Interests: From Abominable to Symbiotic

*Barnali Choudhury\**

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“I believe in corporations. They are indispensable instruments of our modern civilization; but . . . they should . . . act for the interests of the community as a whole.”<sup>1</sup>

Theodore Roosevelt

## INTRODUCTION

The notion of corporations considering community interests is not new. As early as 1905, Roosevelt highlighted the need for corporations to align their interests with those of surrounding communities. Yet, despite his sound pronouncement, the misalignment present today between corporate and community interests continues to persist.

A number of recent events highlight this ongoing conflict. It can be seen in the BP oil spill in the Gulf of Mexico, which contaminated the southern parts of the U.S.;<sup>2</sup> in the continuing release of toxic sludge by Massey Energy Corporation into the water supply of eastern Kentucky and West Virginia;<sup>3</sup> and in the environmental contamination of the rainforest by Texaco in Ecuador.<sup>4</sup> However, one of the most compelling illustrations of a corporation explicitly

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1. ADRIAN WOOLDRIDGE & JOHN MICKLETHWAIT, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 182 (2003) (quoting President Theodore Roosevelt).

2. Jim Polson, *BP Oil Still Ashore One Year After End of Gulf Spill*, BLOOMBERG, July 15, 2011, available at [www.bloomberg.com/news/print/2011-07-15/bp-oil-still-washing-ashore-one-year-after-end-of-gulf-spill.html](http://www.bloomberg.com/news/print/2011-07-15/bp-oil-still-washing-ashore-one-year-after-end-of-gulf-spill.html).

3. Geraldine Sealey, *Sludge Spill Pollutes Ky., W. Va. Waters: Worst Regional Disaster in Years*, ABC NEWS, Oct. 23, 2002, available at [abcnews.go.com/US/print?id=95285](http://abcnews.go.com/US/print?id=95285); Dylan Lovan, *Inez Coal Slurry Spill: Toxic Sludge From Massey Facility Still Pollutes Kentucky Town a Decade After Disaster*, ASSOCIATED PRESS, Oct. 10, 2010, available at [www.huffingtonpost.com/2010/10/11/inez-coal-slurry-spill-to\\_n\\_757900.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/2010/10/11/inez-coal-slurry-spill-to_n_757900.html?view=print&comm_ref=false).

4. AMAZON WATCH, CHEVRONTOXICO: THE CAMPAIGN FOR JUSTICE IN ECUADOR (2012), available at <http://chevrontoxico.com/about/amazon-watch-campaign>.

choosing to disassociate itself from the interests of its operating community is that of Royal Dutch and Shell (“Shell”) in Nigeria.

Shell has conducted oil exploration activities in the Niger Delta region of Nigeria for many years, much to the discontent of the local community, the Ogoni.<sup>5</sup> In the late 1990s, the Ogoni community formally organized its oppositional efforts against Shell and, shortly thereafter, the Nigerian government threatened to execute some of the Ogoni leaders.<sup>6</sup> Despite mounting pressure on Shell to intervene in the execution, it chose instead to publicly dissociate itself from the interests of the Ogoni.<sup>7</sup> As Shell stated, a “commercial organization such as ours cannot and should not sit in judgment on [these] matters.”<sup>8</sup>

Nevertheless, after the execution of the Ogoni leaders, Shell began to face international boycotts of its products<sup>9</sup> and a host of lawsuits for its alleged participation in the executions.<sup>10</sup> Even today, Shell’s actions in the Ogoni community are under scrutiny as the Supreme Court decides liability in the highly publicized *Kiobel* case.<sup>11</sup> Thus, despite a marked attempt to disassociate itself from the interests of its operating community, Shell’s corporate interests remain, at least partially, linked to the community’s fate.

Shell’s and other corporations’ failures to align their interests with that of the community, in many ways, are indicative of the practice of separating issues of business from issues of the

5. For an account of Shell’s activities in the Niger Delta, see generally BRONWEN MANBY, CARNEGIE COUNCIL ON ETHICS AND INT’L AFFAIRS, *SHELL IN NIGERIA: CORPORATE SOCIAL RESPONSIBILITY AND THE Ogoni CRISIS*, CASE STUDY #20, (2000).

6. *Id.* at 5–6.

7. Rob Nixon, *The Oil Weapon*, N. Y. TIMES, Nov. 17, 1995, at A31; Press Release, Shell Petroleum Development Company, Execution of Ken Saro-Wiwa and His Co-Defendants (November 14, 1995), available at <http://crudeimpact.com/discuss-the-issues/ken-saro-wiwa/execution-of-ken-saro-wiwa>.

8. WILLIAM F. SCHULZ, IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL 68 (2001).

9. Mel Wilson & Rosie Lombardi, *Globalization and its Discontents: The Arrival of Triple Bottom-Line Reporting*, IVEY BUS. J., Sept.–Oct. 2001, available at <http://www.iveybusinessjournal.com/topics/global-business/globalization-and-its-discontents-the-arrival-of-triple-bottom-linereporting#.UH7GS2dJF0s>.

10. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). Along with *Wiwa v. Andersen*, *Wiwa v. Royal Dutch Petroleum* was ultimately settled by Shell for \$15.5 million. A third lawsuit was dismissed: *Wiwa v. Shell Petroleum Development Co.*, No. 04-cv-02665-KMW-HBP (S.D.N.Y. Mar. 4, 2008).

11. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), *aff’d in part and rev’d in part*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S.Ct. 472 (2011).

community. German scholar Ferdinand Tönnies has argued that the world is divided into a community or *Gemeinschaft*, as he terms it, and society or *Gesellschaft*, by which he means business or the commercial.<sup>12</sup> For Tönnies, the separation of these two aspects of the world is so marked that he finds the notion of a corporate-*Gemeinschaft* "abominable."<sup>13</sup> For Tönnies, corporations that ignore or discount community issues are seemingly unable or unwilling to view corporations and communities as complements.

Yet, there are a small but growing number of corporations that have adopted a contrary view. These corporations contend that corporate and community interests are not distinct but can, in some cases, be united. Corporations adopting this approach cite several advantages to this approach, including increased public trust in the company, development of local talent, easier recruitment of new employees, and sustainability of their investments.<sup>14</sup> At the same time, communities in which this approach has been adopted view the investments in their community as sustainable and responsive to their interests.

Given the mutual benefits to both corporations and communities that corporate consideration of community interests can bring, this Article argues that corporations should adopt a proactive stance to community interests. In particular, it contends that corporations should leverage their core business capabilities to foster the sustainable interests of the community in consultation with the community. In doing so, it rejects Tönnies' abhorrence of a corporate-community relationship and instead proposes a novel approach to corporate governance that views the relationship between corporations and community as symbiotic—a redefined

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12. FERDINAND TÖNNIES, *COMMUNITY AND SOCIETY* 34 (Charles P. Loomis trans., 2011).

13. *Id.* The late 18<sup>th</sup> century, when Tönnies first drew a distinction between *Gemeinschaft* and *Gesellschaft*, was a time of growing industrialization and urbanization. Tönnies' observations were made as he despaired the growing shift from a community-based society towards a commercial-based society in which self-interest would dominate. Whereas membership in a *Gemeinschaft* would entail a member serving the interests of the group, membership in a *Gesellschaft* was instrumental: membership in the group would only be useful insofar as it furthered his individual goals. For this reason, Tönnies could not envision a *Gemeinschaft-Gesellschaft* as they would be antithetical to each other's purposes.

14. THE CONFERENCE BOARD, INC., *BUILDING THE CORPORATE COMMUNITY ECONOMIC DEVELOPMENT TEAM* 12 (1998); A.M. Esteves, *Mining and Social Development: Refocusing Community Investment Using Multi-Criteria Decision Analysis*, 33 *RESOURCES POL'Y.* 39, 40 (2008).

*Gesellschaft-Gemeinschaft* to borrow Tönnies' terms. Under this view, corporate decision-making for community interests is premised on aligning and fostering both the interests of corporations and the interests of communities.

This Article's approach does not wholly adopt either contractarianism or stakeholder theory, the two dominant theories of corporate governance.<sup>15</sup> Instead, this Article makes a distinctive contribution to the literature in the area by proposing that corporations *identify* with their operating communities as a means of fostering sustainable community interests. Drawing from social identity theory, it contends that corporations that adopt the "identity" of the communities in which they operate are better able to adhere to the values and norms of the community. As a result, identification can offer the basis under which corporate fostering of community interests gives rise to sustainable impacts on the community rather than a mere public relations exercise.

This Article proceeds as follows. Part I introduces and defines the notion of community and describes the importance and the idiosyncratic nature of the relationship between corporations and communities. It concludes by exploring the shortcomings of existing models for governing corporate community relations. Part II begins to develop the *Gesellschaft-Gemeinschaft* approach to corporate governance for community interests by revisiting the two dominant strands of corporate governance theories, contractarianism and stakeholder theory, and examines their advantages and disadvantages. It then goes on to describe the *Gesellschaft-Gemeinschaft* approach, its benefits, and how it draws from, but fails to wholly adopt, both dominant corporate governance theories.

Part III turns to a discussion of aligning corporate community interests by having the corporation identify with the operating community. This Part provides a brief overview of social identity theory before exploring three case studies in which corporations have sought to identify with the communities in which they operate. It concludes by exploring the benefits of corporate identification with the operating community. Finally, Part IV turns to explore methods by which corporate-community interest alignment can be regulated. It explores both public regulation and self-regulation as possible

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15. David K. Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 523–25 (2011).

mechanisms and concludes that a hybrid system may be best to facilitate a *Gesellschaft-Gemeinschaft* approach to corporate decision-making.

## I. CORPORATIONS AND COMMUNITIES

While many corporations—like Shell in Nigeria—have chosen to dismiss or discount community interests, there have been a number of different efforts taken to ensure a more harmonious relationship between corporations and communities. Before reviewing existing corporate-community governance mechanisms, however, it may be prudent to begin by defining the term “community” and examining the importance and uniqueness of corporate-community relationships.

### A. *What is the Community?*

The Oxford dictionary defines the term “community” as a group of people living in the same place or having common interests or attitudes.<sup>16</sup> Community sociologists argue, however, that community cannot be ascribed such a basic definition. One highly noted study in the field found, for instance, that there are over ninety competing definitions of the term “community” with the only commonality between the definitions being that they dealt with people.<sup>17</sup>

German sociologist Ferdinand Tönnies’ 1887 book, *Gemeinschaft and Gesellschaft* (“*Community and Society*”), a pioneer in community studies, offers a starting point for defining the term “community.”<sup>18</sup> Tönnies defines *Gemeinschaft* as a small, close-knit community unified by shared experiences, values, and norms.<sup>19</sup> He contrasts this against *Gesellschaft*, or large-scale, impersonal, commercial society, linked only by the transactions involved in the pursuit of individual self-interests.<sup>20</sup> For Tönnies then, a community is marked by unified values and norms and is antithetical to the notion of pursuit of rational self-interest.

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16. OXFORD DICTIONARY ONLINE, <http://www.oxforddictionaries.com/definition/english/community?q=community> (last visited Jan. 10, 2014).

17. See generally George A. Hillery, *Definitions of Community: Areas of Agreement*, 20 RURAL SOCIOLOGY 111 (1955).

18. TÖNNIES, *supra* note 12.

19. FERDINAND TÖNNIES, TÖNNIES: COMMUNITY AND CIVIL SOCIETY xli (Jose Harris ed., 2001).

20. *Id.*

Building on the work of Tönnies, modern community sociologists have further subdivided the types of communities.<sup>21</sup> Among these types of communities are “community of place”—defined by the physical proximity of the members—and “community of interest,” which includes members who share the same interests but are not necessarily in physical proximity to each other.<sup>22</sup>

One scholar has argued, however, that the notion of community cannot be defined so precisely. Instead, he contends that the definition of community should be fluid. As Kapelus observes:

[C]ommunities can be identified on the basis of any number of shared traits such as geographic territory, religion, culture, history, kinship, etc. . . . [P]eople can have multiple, overlapping identities and these identities can change overtime [sic]. This means that any definition of a community is always a construct, an imposing of order that does not necessarily fit the lived experience of the people in question . . . . [D]ifferent definitions based upon different criteria include and exclude different people.<sup>23</sup>

Randels, however, prefers to define a community as a framework. As he notes, a community is a “framework of shared beliefs, interests, and commitments unit[ing] a set of varied groups and activities . . . that establish a common . . . fate, . . . a sense of belonging, and a supportive structure of activities and relationships.”<sup>24</sup>

While no one definition of community is authoritative, by distilling the common elements that appear from each of these definitions, a broad definition of the term “community” begins to emerge. Accordingly, a community is a group of people who are generally proximate to each other either in location or interests, share values and norms, possess a common culture or identity, or

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21. Laura Dunham, R. Edward Freeman & Jeanne Liedtka, *The Soft Underbelly of Stakeholder Theory: The Role of Community* 11 (Darden Bus. Sch., Working Paper No.01-22, 2001).

22. *Id.* at 12–13.

23. Paul Kapelus, *Mining, Corporate Social Responsibility and the “Community”*: *The Case of Rio Tinto, Richards Bay Minerals and The Mbonambi*, 39 J. OF BUS. ETHICS 275, 281 (2002).

24. George D. Randels, Jr., *Loyalty, Corporations, and Community*, 11 BUS. ETHICS Q. 27, 35 (2001) (alteration in original) (emphases removed) (quoting PHILIP SELZNICK, *THE MORAL COMMONWEALTH. SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 358–59 (1992)).



share a common fate. A community may possess only one of these attributes or some combination of all of them.<sup>25</sup>

### *B. The Importance of Corporate-Community Relationships*

Having defined “community,” we now turn to examine the importance of corporate-community relationships. Corporate social responsibility literature is rife with references to community interests yet, for the most part, the individual importance of the corporate-community relationship has not been given much importance. Instead, the need for corporations to consider community interests has usually been consolidated with the interests of a wide variety of other corporate constituents—creditors, employees, and suppliers, for instance—suggesting that the community’s interests are comparable to the interests of these other stakeholders.<sup>26</sup>

However, in many instances, the corporate-community relationship is very different from a corporation’s relationship with other stakeholders. This is in part because communities—unlike creditors, employees, and suppliers—usually lack the ability to negotiate their relationship with the corporation.<sup>27</sup> As the residents of the Niger Delta or Louisiana communities can attest, their relationship with Shell and BP, respectively, was involuntary.<sup>28</sup>

At the same time, although communities do not necessarily willingly enter into relationships with the corporation, it is the community that is most directly affected when corporations engage in adverse acts.<sup>29</sup> For instance, while a corporation’s gas leak will

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25. A government, however, is not a proxy for a community. As Dunham et al. note, “[g]overnment, while it derives its legitimacy *from* community, cannot be equated *with* community.” Dunham et al., *supra* note 21, at 13.

26. For instance, Blair and Stout argue in their team production model that a corporation depends upon the firm-specific investments of numerous stakeholders, including shareholders, employees, creditors, and communities, seemingly suggesting that the interests of these stakeholders are comparable. See generally Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

27. As the government of a country cannot be equated to a local community, even if a government negotiates with a corporation to locate its operations in a particular community, the community does not necessarily consent to the corporation’s presence. See Dunham et al., *supra* note 21, at 13.

28. See Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1920 (1991). As Hansmann and Kraakman observe, “[t]ort victims, unlike contract creditors, cannot assess the potential credit-worthiness of a corporation before they are injured,” making them “involuntary creditors.” *Id.*

29. Kapelus, *supra* note 23, at 280.

inevitably damage its relationships with its employees, creditors, and even shareholders, it is the community that will most heavily bear the consequences.<sup>30</sup>

The corporate-community relationship also differs from the corporation's relationship with other stakeholders since in some cases the collective action power of the community to interfere with the corporation's operations far exceeds that of creditors, employees, or suppliers. Indeed, in some cases, communities have been able to completely halt the operations of large multinational corporations.<sup>31</sup> Fostering good relations with the community can, in some cases, therefore, be integral to the overall viability of corporate operations.

Furthermore, good corporate-community relations can reduce costs for the corporation. Corporations that possess good relationships with their operating communities face less community disruptions or protests.<sup>32</sup> As one corporation observed, good community relations "cut down" on lead time, disputes, and project delays.<sup>33</sup> Fostering community interests can also save corporations indirect costs that arise from charges from external environmental or labor groups.<sup>34</sup> Indeed, corporations that can convincingly evidence that the community is benefiting from its operations are provided with a "cloak of legitimacy that serves to protect them from charges" from outside interest groups.<sup>35</sup> Corporate attention to community interests can also serve to increase the legitimacy of the corporation

30. For example, in the Bhopal disaster, forty tons of toxin leaked out of Union Carbide Co.'s pesticide factory and settled over the local community in Bhopal, killing 3,500 people within days and more than 15,000 since the incident occurred in 1984. *See Bhopal Trial: Eight Convicted Over India Gas Disaster*, BBC NEWS (last updated June 7, 2010), [http://news.bbc.co.uk/1/hi/world/south\\_asia/8725140.stm](http://news.bbc.co.uk/1/hi/world/south_asia/8725140.stm).

31. For instance, both the Tambogrande community in Peru and the Esquel community in Argentina were able to completely halt two giant mining corporations from commencing operations in their community. *See Peru | Tambogrande: Manhattan Minerals*, EARTHWORKS (last visited Oct. 3, 2012), [http://www.earthworksaction.org/voices/detail/tambogrande\\_voice](http://www.earthworksaction.org/voices/detail/tambogrande_voice); Marcela Valente, *Argentina: Local Opponents of Mine Sued by Meridian Gold*, INTER PRESS SERVICE NEWS AGENCY (Feb. 15, 2007), <http://www.ipsnews.net/2007/02/argentina-local-opponents-of-mine-sued-by-meridian-gold>.

32. Dunham et al., *supra* note 21, at 5.

33. Kapelus, *supra* note 23, at 285.

34. Dunham et al., *supra* note 21, at 5.

35. Kapelus, *supra* note 23, at 280; *see also* Dunham et al., *supra* note 21, at 5.

with governments facilitating governmental permits and consent to future projects.<sup>36</sup>

### *C. Governing the Relationship Between Corporations and Communities*

Given the importance of positive relations between corporations and communities, it is not surprising that rules governing corporate activities authorize corporate consideration of community interests. For example, the American Law Institute's (ALI) Principles of Corporate Governance observe that corporations create "interdependencies" with groups such as members of the communities in which the corporation operates and sanction the subordination of short-term profits to maintain community interests.<sup>37</sup> Similarly, state constituency statutes, which enable corporate managers to consider non-economic interests when faced with a takeover bid, also permit corporations to consider community interests.<sup>38</sup> Courts have also recognized the discretion given to directors to consider community interests.<sup>39</sup> However, neither the ALI principles nor constituency statutes nor courts *mandate* corporate consideration of community interests. In fact, the one constituency statute that obliged directors to consider community interests was recently amended and rephrased in the permissive.<sup>40</sup>

Conversely, the recently revised OECD Guidelines for Multinational Enterprises have attempted to impose positive duties on corporations in relation to communities. The Guidelines state that corporations should encourage local capacity by working with the local community,<sup>41</sup> implement self-regulatory practices in order to foster a relationship of confidence and trust with the operating community,<sup>42</sup> and "engage with relevant stakeholders" in order to be

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36. Kapelus, *supra* note 23, at 287.

37. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 cmt. f (1992).

38. For an overview of constituency statutes, see Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 644-45 (2009).

39. *See, e.g.*, Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968).

40. CONN. GEN. STAT. ANN. § 33-756 (West 2010).

41. ORG. FOR ECON. CO-OPERATION AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 19 (2011), *available at* <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (Guideline A(3)).

42. *Id.* (Guideline A(7)).

able to take into account their views in planning.<sup>43</sup> Nevertheless, as the Guidelines are not legally enforceable and contain only recommendations aimed at creating a best practices guide for corporations, their influence over corporate decision-making vis-à-vis community interests remains mainly aspirational.<sup>44</sup>

Several industry groups have also advocated in favor of corporate consideration of community interests. Under the Equator Principles, for instance, certain lending institutions involved in project financing recommend that corporations engage with the community.<sup>45</sup> The Forest Stewardship Council adopts a comparable approach, requiring corporations to obtain community consent for certain forest operations.<sup>46</sup>

More recently, both the International Finance Corporation (IFC), the private sector arm of the World Bank, and the European Bank for Reconstruction and Development (EBRD) have adopted a mandatory approach to corporate consideration of community interests. The IFC, for instance, requires that corporations operating projects that it funds adhere to community-focused performance standards.<sup>47</sup> Although the IFC acknowledges the role of public authorities in protecting public health and security, it mandates that corporations “avoid or minimize the risks and impacts to community health, safety, and security that may arise from project related-activities, with particular attention to vulnerable groups.”<sup>48</sup>

Similarly, the EBRD requires that corporations whose projects involve impacts on traditional or customary lands under use, cultural

43. *Id.* at 20 (Guideline A(14)).

44. For example, Goldcorp Corporation in Guatemala has repeatedly violated these community interest guidelines without facing repercussions. *See* ORG. FOR ECON. CO-OPERATION AND DEV., ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011: A NEW AGENDA FOR THE FUTURE 55–60 (2011), *available at* [http://www.keepeek.com/Digital-Asset-Management/oced/governance/annual-report-on-the-oecd-guidelines-for-multinational-enterprises-2011\\_mne-2011-en](http://www.keepeek.com/Digital-Asset-Management/oced/governance/annual-report-on-the-oecd-guidelines-for-multinational-enterprises-2011_mne-2011-en).

45. EQUATOR PRINCIPLES ASS’N, THE EQUATOR PRINCIPLES 1, 3, 4 (2006), *available at* [http://www.equator-principles.com/resources/equator\\_principles.pdf](http://www.equator-principles.com/resources/equator_principles.pdf).

46. FOREST STEWARDSHIP COUNCIL, FSC PRINCIPLES AND CRITERIA FOR FOREST STEWARDSHIP 5 (2002), *available at* [https://ca.fsc.org/download.principles-\(Principle 2.2\)](https://ca.fsc.org/download.principles-(Principle 2.2)).

47. INT’L FIN. CORP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 27 (2012), *available at* [http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afd998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afd998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES) (Performance Standard 4).

48. *Id.*

resources, or resettlement of communities, obtain the prior consent of the community to the project.<sup>49</sup> As part of the process of obtaining the community's consent to the project, the corporation is mandated, first, "to avoid adverse effects" and second, to minimize and mitigate any potential adverse impacts.<sup>50</sup>

While the IFC and ERBD's policies foster a more stringent approach to corporate consideration of community interests, they are limited in their scope. Both policies only pertain to projects funded by these institutions. In addition, the ERBD only mandates its community consent policy for certain specified projects and only for projects that affect indigenous communities.<sup>51</sup> Thus, to date there remains an absence of an industry-neutral, overarching governance approach to corporate consideration of community interests.

## II. CORPORATE GOVERNANCE THEORIES AND COMMUNITY INTERESTS

While the value of corporate consideration of community interests is discernible from the myriad of existing corporate-community governance mechanisms, it is unclear why most of the mechanisms have taken a relatively lax approach to the issue. A possible answer is that they permit, but generally do not oblige, corporate consideration of community interests because they mirror the ambiguous approach of corporate law. While the debate over whether the purpose of the corporation is to serve shareholders' interests exclusively or whether it is to serve the interests of a wider array of corporate constituents has persisted since the 1930's,<sup>52</sup> corporate law has chosen an indeterminate position within the two sides of the debate, failing to wholly adopt either position.<sup>53</sup> Existing

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49. EUROPEAN BANK FOR RECONSTRUCTION AND DEV., ENVIRONMENTAL AND SOCIAL POLICY 50 (2008), available at <http://www.ebrd.com/downloads/research/policies/2008policy.pdf> (Performance Requirement 7).

50. *Id.* at 52.

51. EUROPEAN BANK FOR RECONSTRUCTION AND DEV., INDIGENOUS PEOPLES: GUIDANCE NOTE 6 (2010), available at <http://www.ebrd.com/downloads/research/guides/indp.pdf>.

52. This debate began in the pages of the Harvard Law Review between Berle and Dodd. See Adolf A. Berle Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

53. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 261 (1992); Choudhury, *supra* note 38, at 633. More recently, in

governance mechanisms for corporate-community relationships have, seemingly, continued this approach.

To be sure, the lacuna in the law's definition of corporate purpose has not prevented scholars from developing their own models. Today, scholarly literature on corporate governance falls essentially into one of two factions: contractarianism, which views corporations as vehicles of shareholder wealth maximization, and stakeholder theory, which both views corporations as public institutions that should serve more than the interests of shareholders and tends to equate the interests of shareholders with the interests of non-shareholders.

Governing corporate-community relationships, however, does not necessarily fall into either existing faction. Corporate consideration of community interests may appear initially at odds with a concept of shareholder wealth maximization. However, it does not fall comfortably into a stakeholder theorists' notion of equivalency between shareholders and non-shareholders. Instead, governing corporate-community relationships may best be achieved by aligning corporate-community interests in a manner that seeks to foster the interests of both the corporation and the community. The result is a corporation-community—or, to use Tönnies' terms, a *Gesellschaft-Gemeinschaft*—approach to decision-making. Under this approach, corporate decision-making in relation to community interests is premised on some of the advantages of both contractarianism and stakeholder theory while, at the same time, assuaging their shortcomings. However, to fully understand how a *Gesellschaft-Gemeinschaft* approach differs from the two dominant theories, it may be useful to briefly review these theories and ascertain their principal benefits and flaws in the context of community interests.

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*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010), the Delaware Chancery Court held that directors must act “to promote the value of the corporation for the benefit of its stockholders,” suggesting that the debate of the corporate purpose had been resolved. *Id.* at 60–61. Nevertheless, the court went on to acknowledge that directors could act to protect non-shareholder interests so long as the act benefits shareholder interests in the long run and noted that, under the business judgment rule, it would not scrutinize the benefits ultimately obtained by the shareholders. *Id.* at 57–58. Consequently, the *eBay* decision still allows considerable discretion for directors to pursue non-shareholder interests, thereby reinforcing corporate law's agnostic position.

*A. Contractarianism*

Contractarians view corporations as a “nexus of contracts,” a metaphor that represents the implicit and explicit voluntary arrangements that affected parties will work out among themselves.<sup>54</sup> Viewed in this manner, the corporation is seen not as a thing, but as a legal fiction representing the complex arrangements set up by those who provide inputs to the firm.<sup>55</sup> The focus for contractarians is thus on private ordering, making freedom of contract essential, and limiting governmental intervention to enforcing private contacts.<sup>56</sup>

An important implication of viewing the corporation as a “nexus of contracts” is that wealth maximization is the guiding norm of the corporation. Contractarians assume that wealth maximization is a “bargained-for term” of the shareholders’ contract with the corporation.<sup>57</sup> As one contractarian observed, shareholders will only provide equity capital to a corporation if “the directors are charged with managing the corporation so as to maximize shareholder wealth.”<sup>58</sup> Contractarians also presume that other stakeholders similarly enter into voluntary bargains with the corporation, and they protect their interests by adjusting the contract price to account for the fact that corporate managers will not give primacy to their interests.<sup>59</sup>

The problems with contractarianism arise principally because of its assumption of perfect market conditions under which the supposed voluntary bargaining between affected parties takes place. In truth, information asymmetries, unanticipated consequences, inequalities in bargaining power, ambiguities, and complexities may undercut the actual bargaining process that takes place between

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54. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989).

55. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 27 (2002).

56. For a good overview of this argument, see Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 526 (1999).

57. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 3, 6–39, 92–93 (1991); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577–87 (2003).

58. BAINBRIDGE, *supra* note 55, at 58; David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 1, 3 (Lawrence E. Mitchell ed., 1995).

59. Stephen M. Bainbridge, *In Defense Of The Shareholder Wealth Maximization Norm: A Reply To Professor Green*, 50 WASH. & LEE L. REV. 1423, 1443 (1993).

affected parties.<sup>60</sup> For example, communities “contracting” with a corporation to establish a branch or plant in its area may not be able to engage in an efficient bargain with the corporation because they cannot accurately anticipate the project’s unforeseen contingencies or do not fully understand its complexities.<sup>61</sup>

Contractarians also fail to give considerable weight to the externalities that can be imposed on third parties because of contracts made between the corporation and a stakeholder. Thus, a contract between employees and the corporation to have a factory continue to operate despite significant safety problems fails to consider the externalities that will be imposed on the surrounding community if the factory’s safety problems spill over its four walls. The communities surrounding the Deepwater Platform in the BP oil spill or the city of Bhopal after the Union Carbide factory explosion,<sup>62</sup> for example, are unlikely to have bargained to be a party to the externalities eventually imposed upon them.

Moreover, while the wealth maximization mantra of a contractarian corporation prizes, and may maximize, the economic efficiency of corporations,<sup>63</sup> it does so only in terms of the corporation’s status in the present. By choosing interests that favor wealth maximization over stakeholder interests, corporate managers may, in many instances, be making decisions within a temporal limit. Hedgefunds, for instance, are well-known for their ability to push corporate managers to make wealth-maximizing decisions in the short-run.<sup>64</sup> A strict wealth maximization guiding norm therefore

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60. Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT’L L. 829, 836 (2000); Christoph Loch & Svenja Sommer, *Incomplete Incentive Contracts Under Ambiguity and Complexity*, 1 (INSEAD Working Paper Series, 2003/72/TM, 2003), available at <http://www.insead.edu/facultyresearch/research/doc.cfm?did=1305>.

61. Loch and Sommer characterize ambiguities in contracts as the impossibility to recognize all influence variables and to foresee all possible events, and complexity as the difficulty to estimate the overall performance because of the interaction of many performance influence variables. Loch & Sommer, *supra* note 60, at 1.

62. For an overview of the Bhopal disaster, see *1984: Hundreds Die in Bhopal Chemical Accident*, BBC NEWS (Dec. 3, 1984), [http://news.bbc.co.uk/onthisday/hi/dates/stories/december/3/newsid\\_2698000/2698709.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/3/newsid_2698000/2698709.stm).

63. Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. OF CORP. L. 637, 656 (2006); EASTERBROOK & FISCHER, *supra* note 57 at 38.

64. Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PENN L. REV. 1021, 1083 (2007) (observing “hedge funds come close to being the archetypal short-term investor”); *Battling for Corporate America*, ECONOMIST, Mar. 11, 2006, available at <http://www.economist.com/node/5601741>



forces corporate managers to consider only the immediate impacts of their decision, potentially constraining their ability to consider the long-term interests of the firm. Adoption of a contractarian view of corporations, and its ingrained wealth maximization norm, therefore can impede the long-term viability of the firm.<sup>65</sup> In particular, a community in which a corporation operates that emphasizes short-term decision-making driven exclusively by wealth generation can be compromised in terms of its sustainability.<sup>66</sup>

However, even if managers adopt a long-term view of a wealth maximization norm, a number of problems persist. Most notably, although contractarians argue that wealth maximization will serve to further the interests of stakeholders by creating “a larger pie” from which stakeholders can take a larger serving,<sup>67</sup> this notion is not supported by empirical evidence. Rather studies demonstrate that gains to shareholders are often a result of wealth transfers from other stakeholders.<sup>68</sup> Thus, an exclusive wealth maximization norm, even if adopted on a long-run view, neither necessarily furthers the interests of

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(arguing that if rampaging shareholders scared bosses into short-term decisions, their companies would fail to make potentially crucial long-term investments).

65. Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., 11 (Dec. 2006), available at <http://www.salesforcefoundation.org/files/HBR-CompetiveAdvAndCSR.pdf>.

66. Sustainability entails a community being able to meet the needs of the present without compromising the ability of future generations to meet their own needs. See U.N. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 43 (1987).

67. Ronald Chen & Jon Hansen, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1124 (2004) (for shareholders, legal economists focus on maximizing the size of the pie, a theoretical focus that is said to maximize the pie for all constituencies); David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 241 (1991) (One could safely assume that corporate profitability would benefit nonshareholders as well as shareholders. Especially in times of general prosperity, larger pies imply larger servings for all.).

68. See, e.g., Andrei Schliefer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33 (Alan J. Auerbach ed. 1988). See also RONALD J. GILSON & BERNARD BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS, 610 (2d ed. 1995); Ronald W. Masulis & Randall S. Thomas, *Does Private Equity Create Wealth? The Effects of Private Equity and Derivatives on Corporate Governance*, 76 U. CHI. L. REV. 219, 234 (2009).

the community or other corporate stakeholders and may result in little or no overall efficiency gains.<sup>69</sup>

At the same time, contractarianism offers some advantages. For one, it facilitates corporate decision-making. Because corporate managers are driven only by a need to maximize wealth, there is no need to take into account the multiple interests of a variety of stakeholders. Corporate managers, therefore, do not have to weigh shareholder interests against stakeholder interests; do not have to determine whether shareholder or stakeholder's interests should prevail if they conflict; and do not decide which of the variety of stakeholder interests should prevail if the interests between stakeholders and themselves conflict.

Second, a contractarian view of corporations can reduce agency costs.<sup>70</sup> As Bainbridge argues, a wealth maximization norm ensures that corporate managers do not pursue their "own self-interest by playing shareholders off against non-shareholders."<sup>71</sup>

Third, contractarianism offers an easier standard by which to ascertain the effectiveness of corporate decision-making. Assessing whether a corporation has increased its wealth is easily determined by examining objective numerical data. In comparison, since there is no common standard by which to assess whether a corporation has furthered the interests of the environment or society, determining whether corporate decision-making has been effective in these areas remains speculative and prone to manipulation.<sup>72</sup>

Finally, adhering to an exclusive wealth maximization norm enables corporate managers to focus on the generation of profits. If in so doing it does not generate externalities or result in perpetual wealth transfers from stakeholders to shareholders, continual profit

69. See generally Schliefer & Summers, *supra* note 68. The authors argue that shareholder gains in takeovers often come at the expense of employees' employment and wage losses, meaning that net gains to society from a takeover may be small or non-existent.

70. Agency costs relate to divergences of interest between the principal and the agent and are the sum of the contracting cost, the principal's monitoring cost (the cost to monitor the agent), the bonding cost by the agent (payments to the agent to protect against the agent's deviations from the principal's interest), and residual loss (reduction in principal's welfare due to divergences). See MICHAEL C. JENSEN AND WILLIAM H. MECKLING, *THEORY OF THE FIRM: MANAGERIAL BEHAVIOR, AGENCY COSTS AND OWNERSHIP STRUCTURE* 5-6 (1976).

71. Bainbridge, *supra* note 59, at 1427, 1435, 1438. See also EASTERBROOK & FISCHER, *supra* note 57, at 38; Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001).

72. Pascual Berrone & Luis R. Gomez-Mejia, *The Pros and Cons of Rewarding Social Responsibility at the Top*, 48:6 HUMAN RESOURCE MGMT. 959, 965 (2009).

generation will help to ensure the economic viability of the corporation.

### *B. Stakeholder Theory*

While contractarians argue that shareholder interests should prevail over all other interests, stakeholder theorists contend that corporate managers should consider not only the interests of shareholders, but also the interests of a variety of corporate constituents, the so-called stakeholders. The reasons for this conclusion are varied, and unlike contractarianism, do not draw from a unified theory.

Consideration of stakeholder interests is, for instance, justified by viewing the corporation as a social or public institution,<sup>73</sup> as an entity capable of doing both good and harm,<sup>74</sup> or as a moral organism.<sup>75</sup> Alternatively, commentators argue that stakeholder interests should factor into corporate decision-making because stakeholders are constituent elements of the overall corporation,<sup>76</sup> because of the need to maximize social welfare,<sup>77</sup> because otherwise shareholders can inflict harms on stakeholders,<sup>78</sup> or because the “legal, economic, political and moral challenges” to the current nexus of contracts view of the firm require it.<sup>79</sup> The need for corporate managers to consider stakeholder

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73. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 46 (2d ed. 1968); Thomas Lee Hazen, *The Corporate Persona, Contract (And Market) Failure, and Moral Values*, 69 N.C. L. REV. 273, 309 (1991); David K. Millon, *New Directions in Corporate Law Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1379 (1993).

74. Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 41–47 (1999).

75. William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J. L. ETHICS & PUB POL’Y 141, 148 (2012).

76. Millon, *supra* note 15, at 525; Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1090 (2000).

77. Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1055 (2008).

78. Ronald M. Green, *Shareholders as Stakeholders, Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1417 (1993).

79. R. EDWARD FREEMAN, *A Stakeholder Theory of the Modern Corporation*, in *ETHICAL THEORY & BUSINESS* 39 (Tom L. Beauchamp & Norman E Bowie eds., 6th ed. 2001).

interests has even been justified under a modified “nexus of contracts” view of corporations.<sup>80</sup>

In any case, regardless of the underlying theory justifying stakeholder theory, stakeholders are unanimous in arriving at three arguments. First, corporate managers should consider the interests of stakeholders; second, wealth maximization should not be an overriding concern guiding corporate decision-making;<sup>81</sup> and third, corporate managers should balance the interests of all stakeholders, including shareholders, against each other.<sup>82</sup>

The benefits of stakeholder theory, at first glance, appear overwhelming. Corporations that consider and balance stakeholder interests in their corporate decision-making are less likely to inflict externalities on third parties,<sup>83</sup> more likely to foster greater stability in the economy,<sup>84</sup> more likely to treat others ethically,<sup>85</sup> and are further inclined to encourage firm-specific investments from stakeholders and discourage opportunistic behavior.<sup>86</sup> There is seemingly no disadvantage to creating a means by which corporations have a greater predisposition to “improve the quality of people’s lives beyond what they can bargain for.”<sup>87</sup>

Contractarians are, however, quick to point out stakeholder theory’s shortcomings. As Bainbridge argues, adopting a multi-fiduciary approach to corporate decision-making falls afoul of two problems that he terms “two masters” and “managerial sins.” The “two masters” problem arises in situations when it is impossible to protect non-shareholders from harm without advancing shareholder

80. Blair and Stout reformulate the nexus of contracts theory to argue that a corporation is a “nexus of firm-specific investments.” See Blair & Stout, *supra* note 26, at 275, 285. Without arguing *per se* in favor of promoting the interests of stakeholders, Blair and Stout’s Team Production theory concludes that corporate managers must consider the interests of stakeholders who have made firm-specific investments. *Id.* at 286.

81. John Kaler, *Differentiating Stakeholder Theories*, 46 J. OF BUS. ETHICS 71, 71 (2003).

82. Blair & Stout, *supra* note 26 at 281; FREEMAN, *supra* note 79, at 44; Bradford, *supra* note 75, at 149.

83. Green, *supra* note 78, at 1417.

84. Greenfield, *supra* note 77, at 1058.

85. Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173 at 176.

86. Blair & Stout, *supra* note 26, at 271.

87. Millon, *supra* note 15, at 1389.

interests.<sup>88</sup> In an “irreconcilable conflict” between shareholder and non-shareholder interests, stakeholder proponents suggest that management make trade-offs between the two groups or even subordinate profit goals in order to further non-shareholder interests.<sup>89</sup> For Bainbridge, this proposal is problematic as it transfers wealth from shareholders to non-shareholders and perpetuates the managerial sins problem.<sup>90</sup>

Stakeholder theory critics also argue that the stakeholder approach further raises problems of agency costs, or what Bainbridge terms the “managerial sins” problem. The principal critique is that by releasing corporate managers from a wealth maximization norm, management can play different corporate constituents off one another in an effort to pursue their own self-interest.<sup>91</sup> That is, corporate managers will make decisions that primarily benefit their own interest and then use any of a myriad of corporate constituents whose interests are reflected in their decision to justify the decision taken.<sup>92</sup> As Roe argues, the stakeholder approach “could leave managers so much discretion that [they] . . . maximize neither shareholder, employee, consumer, nor national wealth, but only their own.”<sup>93</sup>

Critics charge that stakeholder theory faces a number of additional shortcomings. These include its failure to assign relative weights to the interests of the various stakeholders,<sup>94</sup> to devise a method by which conflicts between shareholders and non-shareholders or between non-shareholders themselves can be resolved,<sup>95</sup> to offer an operational framework by which corporate managers can make decisions on a day-to-day basis,<sup>96</sup> and to define

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88. Bainbridge, *supra* note 59, at 1435. *See also* Fort, *supra* note 85, at 173, 180.

89. Bainbridge, *supra* note 59, at 1419, 1435.

90. *Id.* at 1433.

91. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 581 (1992); Bainbridge, *supra* note 59, at 1438; Roe, *supra* note 71, at 2065.

92. Bainbridge, *supra* note 59, at 1438 (“When management’s interests coincide with those of shareholders, management could justify its decision by saying that shareholder interests prevailed in this instance, and vice-versa.”).

93. Roe, *supra* note 71, at 2065.

94. THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 45–47 (1989); Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252 (1994).

95. Bainbridge, *supra* note 59, at 1435.

96. THOMAS M. JONES, ANDREW C. WICKS & R. EDWARD FREEMAN, *Stakeholder*

which individuals are entitled to status as a stakeholder.<sup>97</sup> In addition, stakeholder theory is further criticized for failing to explain why the political process, rather than corporate law, is not the more appropriate venue for preventing firms from generating social costs or externalities.<sup>98</sup> Enacting environmental, social, or criminal laws that deter corporate misconduct, critics contend, is the more “efficient” vehicle for curbing corporate misconduct.<sup>99</sup>

### C. *Gesellschaft-Gemeinschaft*

As we have seen, contractarianism may promote efficiency, reduce agency costs, and facilitate corporate decision-making, but can result in corporate generation of social costs or other externalities. Conversely, stakeholder theory promotes social welfare and elevates the interests of stakeholders vis-à-vis shareholders, but suffers from a well-defined framework to guide corporate decision-making and may amplify problems of managerial sins. Parsing through the “good” and “bad” elements of contractarianism and stakeholder theory, the aim is now to develop a new model for corporate governance—in the context of community interests only—that draws from the benefits of both theories while assuaging their shortcomings.

#### 1. *Developing the Gesellschaft-Gemeinschaft approach*

Using the benefits of both contractarianism and stakeholder theory, developing a model to govern corporate-community

*Theory: The State of the Art, in THE BLACKWELL GUIDE TO BUSINESS ETHICS 25 (Norman E. Bowie ed., 2002).*

97. George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, 58 CASE W. RES. L. REV. 1107, 1107–08 (2008). *See also generally* Donaldson & Dunfee, *supra* note 94, at 252; Dunham et al., *supra* note 21, at 3.

98. JOHN R. BOATRIGHT, *Ethics and Corporate Governance: Justifying the Role of Shareholder, in THE BLACKWELL GUIDE TO BUSINESS ETHICS, supra* note 96, at 50, 55; Dent, *supra* note 97, at 1112–13 (“If . . . labor markets do not adequately protect, relief should come directly through changes in employment laws rather than through tinkering with corporate governance.”); Bainbridge, *supra* note 59, at 1431. *See also* Matthew T. Bodie, *NASCAR Green: The Problem of Sustainability in Corporations and Corporate Law*, 46 WAKE FOREST L. REV. 491, 520–21 (2011) (arguing that sustainability practices of a corporation are “peripheral” to corporate law).

99. Bainbridge, *supra* note 59, at 1431. *See also* Dent, *supra* note 97, at 1124 (“Reliance on external forces (i.e., the law) to deter anti-social corporate behavior is likely to produce a better result than simply instructing directors to act in the public interest.”).

relations must begin by adopting the advantages either theory can offer if they further the interests of both shareholders and the community. For example, neither shareholders nor communities benefit when agency costs are high. If corporate managers are given too much latitude, that enables them to prioritize their own interests over the interests of either shareholders or the community, wealth transfers from shareholders and the community to corporate managers become plausible. For this reason, a corporation-community governance model must seek to keep agency costs low.

Second, shareholders and the community both benefit when the firm generates wealth without causing externalities or social costs. Shareholders benefit through dividends, and the community benefits through spillovers, like local employment or the firm's use of local suppliers. Consequently, the model should seek to preserve the importance of wealth generation but balance it against the need to minimize the production of social costs. Nevertheless, because the model aims to minimize social costs, it may result in instances in which wealth generation will not be maximized.

Finally, shareholders and the community may both benefit more when a firm *ex ante* prevents corporate misconduct. *Ex ante* approaches obviously prevent a community from having to suffer the consequences of corporate misconduct while in some cases, shareholders may benefit when the costs arising from correction—such as reputational costs, costs arising from project delays and disruptions, and costs arising from successful lawsuits emanating out of the misconduct—are greater than the costs to prevent them.<sup>100</sup> Accordingly, a model governing corporate-community relations should seek to anticipate and proactively resolve potential sources of corporate abuse directed at the community.

What this leaves us with is a corporate governance model that does not wholly abandon the wealth maximization norm espoused by contractarians, but seeks to reduce the social costs that corporations can generate that concern stakeholder theorists. In some ways, it adopts the model of corporate constituency statutes, which arguably permits corporate managers during a takeover “to select a plan that is second-best from the shareholders’ perspective,”

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100. See Martin Petrin, *Assessing Delaware's Oversight Jurisprudence: A Policy and Theory Perspective*, 5 VA. L. & BUS. REV. 433, 463 (2011); HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE SARBANES-OXLEY DEBACLES: WHAT WE'VE LEARNED; HOW TO FIX IT* 92 (2006).

but which enhances the welfare of one or more of the firm's stakeholders.<sup>101</sup> However, the model goes further in that its applicability is not limited to instances of takeovers, and more importantly, it seeks to balance wealth maximization norms against community interest enhancement under a business-led approach that also prizes a community's sustainability.

The thrust of this model is that the relationship between a corporation and a community should be viewed symbiotically, enabling both the corporation and the community to benefit in a multitude of ways. Under this approach then, corporations should invest in their operating communities by leveraging activities integral to their business operations in an effort to achieve sustainable social gains and improve the business environment in which they operate.<sup>102</sup>

More specifically, a *Gesellschaft-Gemeinschaft* approach to corporate decision-making is based on corporate strategy, not philanthropy. Accordingly, corporate decision-making under this model is guided by two factors. First, corporations should primarily focus on investments in the community where they can extract benefits that improve their operating environment.<sup>103</sup> In doing so, a corporation aligns economic and social goals, thereby improving both its long-term business prospects and the sustainability of the community investment. As the World Bank has found, linking investments in the community to business needs results in greater internal support and resources from management and shareholders, more efficient coordination with other business units enabling easier management of issues that can impact the company-community relationship, community investments with well-defined objectives and with a clear direction and purpose, and greater resilience of the

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101. Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 994–95 (1992). Nevertheless, Bainbridge argues managers that select a second best plan for shareholders must demonstrate that their acts were “in the exercise of the utmost good faith.” *Id.* at 995–96.

102. Compare this model with leading models of strategic community investment. *See, e.g.*, Shilpi Somaya, *Non-Philanthropic Corporate Involvement in Community Development*, 97 BUS. & SOC'Y REV. 32 (1996); Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 56; John A. Pearce II & Jonathan Doh, *The High Impact of Collaborative Social Initiatives*, 46 MIT SLOAN MGMT. REV. 29 (2005).

103. A business' operating environment includes but is not limited to access to labor, capital, infrastructure, natural resources, land, related and supporting industries, and customers.



investment during budget cuts.<sup>104</sup> Moreover, because the approach is business-led, or aligned with the corporation's business performance and goals, there is less inclination for the corporation to simply provide handouts to the community, which is not sustainable in the long run.<sup>105</sup>

A business-led approach to investing in a community, however, limits the breadth of a corporation's community investment endeavors. While this may appear, at first glance, to be beneficial only to shareholder interests, it also ensures that corporations are less likely to engage in community investment in an overly paternalistic manner or in a manner that assumes too extensive of a state role. Unlike governments, corporations may simply be ill-equipped to engage in all types of community investment programs. Tying their community investments to their business interests ensures that they foster community interests that meet their capabilities.<sup>106</sup>

Second, corporations should primarily engage in enhancing those community interests that leverage their core capabilities. While supporting worthwhile causes that have no relationship to the business is commendable, corporations that leverage their core capabilities engage in more efficient and better managed community investments.<sup>107</sup> Contributing areas of strength in which companies have specialized expertise or a comparative advantage further ensures

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104. INTERNATIONAL FINANCE CORPORATION, STRATEGIC COMMUNITY INVESTMENT: A GOOD PRACTICE HANDBOOK FOR COMPANIES DOING BUSINESS IN EMERGING MARKETS 13 (2010) [hereinafter INTERNATIONAL FINANCE CORPORATION].

105. *Id.* at iv (providing free goods and services creates dependency and a sense of entitlement from which companies find it hard to extricate themselves during times of economic contraction or at project end).

106. See generally Thomas E. Cavanagh, *Corporate Community Development: Meeting the Measurement Challenge*, in THE CONFERENCE BOARD—RESEARCH REPORT R-1310-02-RR (2002); John Rolfe, Galina Ivanova & Stewart Lockie, *Assessing the Social and Economic Impacts of Coal Mining on Communities in the Bowen Basin: Summary and Recommendation*, in SOCIO-ECONOMIC IMPACT ASSESSMENT AND COMMUNITY ENGAGEMENT TO REDUCE CONFLICT OVER MINE OPERATIONS RES. REP. NO. 11 (2006); Deanna Kemp, Richard Boele & David Brereton, *Community Relations Management Systems in the Minerals Industry: Combining Conventional and Stakeholder-Driven Approaches*, 9 INT'L J. SUSTAINABLE DEV. 390 (2006); David Humphreys, *A Business Perspective on Community Relations in Mining*, 26 RESOURCES POL'Y. 127 (2000).

107. Porter & Kramer, *supra* note 102, at 59; INTERNATIONAL FINANCE CORPORATION, *supra* note 104, at 21; Pearce & Doh, *supra* note 102, at 34. A corporation's core capabilities may encompass its areas of expertise, where it boasts a comparative advantage, or products or services that are based on expertise used in, or generated by, their normal operations. See Pearce & Doh, *supra* note 102, at 34.

that corporations have sufficient expertise to address the social problems raised by the community<sup>108</sup> and can facilitate adoption of these types of programs into a corporation's overall strategic planning.<sup>109</sup> In effect, by harnessing the corporation's "comparative advantage" over other actors, including in some cases governments, corporations can offer value to the community that extends beyond just money.<sup>110</sup> For example, British Petroleum used its cost and technical advantages over local governments in providing solar-powered refrigerators to store anti-malaria vaccines in Zambia.<sup>111</sup>

Corporations that leverage their core capabilities can, in addition to maximizing gains to the community, minimize their own costs and diversions.<sup>112</sup> Thus, J.P. Morgan, using its core competence of structuring and financing projects, managed low-interest loans for community projects using only a few new resources.<sup>113</sup> Centering corporate-community interest alignment around core capabilities therefore furthers both economic and community goals.

Finally, although a *Gesellschaft-Gemeinschaft* approach is business-led, it also seeks to foster a community's sustainable development,<sup>114</sup> with the aim that the effects of the corporate activity are expected to survive beyond the corporation's exit. Consequently, in order to offer meaningful gains to communities, corporations should strive to enhance those aspects of the community that will have a lasting impact. The goal here is to move away from the typical corporation-community model's approach to fostering community interests as a mere public relations tool<sup>115</sup> to one in which corporate and community interests are meaningfully improved. Thus, if corporations identify multiple areas in which their interests align with

108. As a community's social problems have traditionally been administered by the state, in many cases, a corporation may simply not have sufficient expertise to properly address the issue. See generally Somaya, *supra* note 102; Cavanagh, *supra* note 106; Rolfe et al., *supra* note 106; Kemp et al., *supra* note 106.

109. David Hess et al., *The Next Wave of Corporate Community Initiatives: Corporate Social Initiatives*, 44 CAL. MGMT. REV. 110, 112 (2002).

110. *Id.* at 113, 116 ("Social programs based on a firm's core competencies means that it may be one of only a few firms (or perhaps the only firm) capable of providing such aid.").

111. *Id.* at 116.

112. Pearce & Doh, *supra* note 102, at 34.

113. Cavanagh, *supra* note 106, at 37-44.

114. The United Nations defines sustainable development as being able to meet the needs of the present without compromising the ability of future generations to meet their own needs: U.N. WORLD COMM'N ON ENV'T & DEV., *supra* note 66.

115. See, e.g., Kapelus, *supra* note 23, at 291.

community interests, they should prioritize those areas in which their actions will contribute to a community's sustainable development. Corporations will, therefore, have to make tradeoffs between corporate and community interests on a continuum. That is, the more a decision enhances a corporation's operating environment and the more it results in a sustainable community investment, which draws from the corporation's core capabilities, the greater priority a corporation should accord to this activity. Table 1 depicts this continuum and offers a decision-matrix.

Table 1- Decision Matrix—Continuum of Community and Corporate Interests<sup>116</sup>

	↑	Medium Priority	High Priority	High Priority
Enhancement of Corporation's Operating Environment		Low Priority	Medium Priority	High Priority
		Low Priority	Low Priority	Medium Priority
	→	Sustainable Impact on Community		

Drawing from the decision matrix, we see that activities that land on the higher end of the continuum for improvements to both the corporation's operating environment and the sustainable impact on community are accorded the highest priority. Medium priority is then accorded to activities that result in maximum improvements to either corporate or community interests while simultaneously resulting in low improvements to the contrary interest or where both interests are only somewhat improved. Finally, low to medium improvements to both corporate and community interests are accorded the lowest priority.

The aim of this mode of decision-making is to move away from a notion where pursuing community interests is seen as a transfer of wealth from shareholders to the community and pursuing

116. This matrix draws in part from van Huijstee and Glasbergen's issue matrix for topics of dialogue selection between corporations and stakeholders. See Mariëtte van Huijstee & Pieter Glasbergen, *The Practice of Stakeholder Dialogue Between Multinationals and NGOs*, 15 CORP. SOC. RESP. ENV'T. MGMT. 298, 303 (2008).

shareholder interests is viewed as a transfer of wealth from the community to shareholders. Instead, the goal of this decision-making model is to proceed under the view that the risks inherent in corporate decision-making should be shared between shareholders and the community.

Implicit in the decision-matrix is also the idea that corporate decisions that improve a corporation's operating environment, but which result in a negative effect on the sustainable development of the community, should not be undertaken. As the premise of this model is a symbiotic view of corporations and communities, a corporate act that imposes high social costs on the community undercuts the base notion of the model. Corporate imposition of externalities onto the community is therefore antithetical to a *Gesellschaft-Gemeinschaft* approach. While shareholders beholden to a strict notion of short-term wealth maximization may be reluctant to embrace this idea, the approach is premised on the idea that in the small number of cases of a true conflict between profits and a diminishment of a community's sustainable development, the long-term viability of the firm and the interests of the community demand that the generation of short-term profits should not be prioritized.<sup>117</sup>

## 2. Contractarian or stakeholder?

Neither wholly contractarian nor wholly an advocate of stakeholder theory, a *Gesellschaft-Gemeinschaft* approach to decision-making therefore hovers between the two dominant models. While it seeks to adopt some aspects of each model, it is reluctant to fully embrace either.

In terms of the contractarian model, a *Gesellschaft-Gemeinschaft* approach adopts, in part, and also departs from the notion of wealth maximization that underlies contractarianism. For contractarians, wealth maximization is the guiding norm of corporate decision-making; if in so doing, the interests of non-shareholders are served, this is a by-product of the overarching norm.<sup>118</sup> Accordingly, under a

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117. For examples of where companies have foregone short-term profits to promote a community's sustainable development and benefitted in the long-run from this decision, see the case studies in Part III(C)(1).

118. See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 600 (2003) ("[I]f the board considers the interests of non-shareholder constituencies when making decisions, it does so only because shareholder wealth will be maximized in the long-run."). See also Kaler, *supra* note 81, at 78.

strict contractarian approach, serving non-shareholder interests should be done to the minimum extent possible. In contrast, under the approach proposed here, serving community interests is not a by-product, but an overarching complementary aim. While this means that corporate managers will still have to make trade-offs between wealth maximization and community interests, the trade-offs will not result in a zero sum game between the two interests. Instead, corporate managers will need to choose corporate actions that foster—but likely do not maximize—wealth generation as well as foster community interests. Still, since business considerations will dictate which of the numerous community interests the corporation should serve, the model should not increase agency costs. In addition, unlike contractarianism, in the case of a true conflict between economic and community interests, economic interests will not necessarily prevail as the model disavows corporate acts that impede a community's sustainable development.

The model also adopts, in part, and again departs from stakeholder theory. While it embraces the notion of serving the interests of more than just shareholders and seeks to minimize the harms that concern stakeholder theorists, it is reluctant to put shareholders on an equal footing with other stakeholders, in this case the community. This is because a business-led approach improves the relevance, sustainability, and effectiveness of the corporation's ability to promote community interests.<sup>119</sup> It also does not view trade-offs between economic and community interests as zero-sum games, but rather as integral to the long-run sustainability of *both* the corporation and the community. Indeed, the focus of this model is on the ways in which the community's interests can be encompassed into the corporation's interests. The ultimate goal is thus to view the community's interest as the corporation's (and, consequently, the shareholders') interest.

In effect, the *Gesellschaft-Gemeinschaft* model is based on the notion that corporate investment in the community is desirable

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119. INTERNATIONAL FINANCE CORPORATION, *supra* note 104, at 13. See also Bryan W. Husted, *Governance Choices for Corporate Social Responsibility: To Contribute, Collaborate or Internalise?*, 36 LONG RANGE PLANNING 481, 491 (2003) ("CSR activities in areas closely related to the core business of the firm are usually internalized because of the greater competence of the firm and consequent increased ability to evaluate the decisions and activities of recipients."); Somaya, *supra* note 102, at 32 (Strategic involvement is often more congruent, enduring, . . . and has greater long-term effects on the community).

because “the company is part of the community where the investment is being made. Returns on the investment are . . . seen as a public good that benefits the company by making its . . . community a more desirable place to live and work.”<sup>120</sup>

### III. ALIGNING CORPORATE-COMMUNITY INTERESTS THROUGH IDENTIFICATION

As we have seen, a *Gesellschaft-Gemeinschaft* approach seeks to foster benefits for both the corporation and the community by aligning corporate and community interests. However, the approach is only viable if the corporation can correctly identify the community’s interests. If it aligns its actions with interests that do not reflect the interest of the community, it has not furthered the community’s sustainable development. In that scenario, it may be better off simply pursuing a wealth maximization norm. Accurate community interest identification is, therefore, a critical first step to the success of a *Gesellschaft-Gemeinschaft* approach.

While a corporation is likely clear on its own interests, it may not have a thorough understanding of the community’s interests. As critics have observed, a business-led approach to strategic community investment can be “self-serving,” “corporate-centric,” and fail to include the participation or engagement of the community.<sup>121</sup>

This type of approach, which often “assumes that the pursuit of competitive advantage automatically leads to better social development,” is premised on exploiting the community for the corporation’s benefit, and may effectively be a public relations program.<sup>122</sup> Meaningful pursuit of the community’s interests is thus not necessarily served under a traditional business-led approach.

One way for a corporation to meaningfully ascertain a community’s interests is to have the corporation “identify” with the operating community, through a process known as “social identification.” Social identity theorists argue that when an individual identifies with a group it facilitates goal integration and

120. Cavanagh, *supra* note 106, at 4.

121. Judy N. Muthuri, *Participation and Accountability in Corporate Community Involvement Programmes: A Research Agenda*, 43COMM. DEV. J. 177, 184 (2008); Diana Klein & Ulrike Joras, *Natural Resources and Peacebuilding: The Role of the Private Sector*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10511, 10515 (2012).

122. Muthuri, *supra* note 121, at 184; Kapelus, *supra* note 23, at 291.

congruence between the individual and a group.<sup>123</sup> Although they acknowledge that individual identification with a group may be only partial or a matter of degree,<sup>124</sup> they contend that it is the *process* of social identification that gives rise to the individual's perception of "oneness" with the group. In turn, this enables the individual to conceptualize or commit to the culture, values, or norms of the group.

Drawing from social identity theory, we can thus see that if a corporation identifies, even partially, with the operating community, it is better placed to comprehend, support, and adhere to the norms, values, and culture of the community. Aligning corporate and community interests then becomes less of a matter of assuming improvements to the community through pursuit of a competitive advantage strategy and more of an effort to further the interests of the community because the corporation views itself as intertwined with the fate of the community.

In the next section, we examine case studies in which corporations have attempted to "identify" with their operating communities and assess the benefits and disadvantages stemming from this approach. However, before proceeding to the case studies, the following section provides a brief background on the mechanics of social identity theory.

### *A. An Overview of Social Identity Theory*

Social identity theory is a social-psychological perspective on how individuals identify with particular groups. According to social identity theory, people tend to classify themselves and others into various social categories as a means of ordering their social environment and in order to locate or define themselves in the social environment.<sup>125</sup> Social identification is the means by which an individual can partially answer the question: Who am I?<sup>126</sup>

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123. Blake E. Ashforth & Fred Mael, *Social Identity Theory and the Organization*, 14 ACAD. OF MGMT. REV. 20, 26 (1989) (arguing that goal commitment and internalization is a consequence of social identification). *See also* Douglas T. Hall et al., *Personal Factors in Organizational Identification*, 15 ADMIN. SCIENCE Q. 176, 176-77 (1970).

124. Ashforth & Mael, *supra* note 123, at 21.

125. *See generally* Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in PSYCHOLOGY OF INTERGROUP RELATIONS 7 (William G. Austin & Stephen Worchel, eds., 2d ed., 1985).

126. *See generally*, Sheldon Stryker & Richard T. Serpe, *Commitment, Identity Salience*,

Identification can occur despite any effort by the individual to further the group's goals. Indeed identification begins once the individual perceives himself as being "psychologically intertwined with the fate of the group."<sup>127</sup> For this reason, when an individual has identified with a group, he will vicariously partake in the successes and status of the group.<sup>128</sup>

Social identification, however, is a matter of degree. As most individuals can categorize themselves into multiple groups (e.g., American, father, attorney. . .), the extent of identification with each group will vary and may be dependent on the extent to which the individual values the group's persona.<sup>129</sup> Nevertheless, regardless of the degree of identification, identification with a group will enhance an individual's support and commitment to the group. Identification also fosters a positive view of the group and may "engender internationalization of, and adherence to, group values and norms."<sup>130</sup>

The process of social identification occurs primarily through interactions. Interactions between the individual and group can be verbal or non-verbal (e.g. through symbols or images), may involve interpreting the responses of others in certain social interactions, or can result from immersing the individual in the social milieu of the group.<sup>131</sup> Identification may also arise through reification.<sup>132</sup> That is, regard for individuals in the group may be generalized to the group

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*and Role Behavior: Theory And Research Example*, in PERSONALITY, ROLES, AND SOCIAL BEHAVIOR 199 (William J. Ickes & Eric S. Knowles eds., 1982); John C. Turner, *Towards A Cognitive Redefinition of The Social Group*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS 15 (Henri Tajfel ed., 2010).

127. Ashforth & Mael, *supra* note 123, at 21.

128. *Id.* at 22.

129. *Id.* at 21.

130. *Id.* at 26.

131. *Id.* at 27. See also John Van Maanen, *The Self, the Situation, and the Rules of Interpersonal Relations*, in ESSAYS IN INTERPERSONAL DYNAMICS 43 (W. Bennis et al. eds., 1979); Howard S. Becker & James W. Carper, *The Development of Identification with an Occupation*, 61 AM. J. OF SOC. 289 (1956).

132. Ashforth & Mael, *supra* note 123, at 28. See also John C. Turner, *Social identification and Psychological Group Formation*, in THE SOCIAL DIMENSION: EUROPEAN DEVELOPMENTS IN SOCIAL PSYCHOLOGY 2, 518 (Henri Tajfel et al. eds., 1984).



itself.<sup>133</sup> In addition, socialization and social cues develop an individual's identities or reinforce them.<sup>134</sup>

*B. Framework for Applying Social Identity Theory to Corporations*

Social identity theory suggests a unique approach to aligning corporate and community interests. Encouraging a corporation to identify with its community, even if only partially, facilitates the corporation's support and commitment to the community's interests, and is more likely to foster an interest in adhering to the community's values and norms.

Still, there may be reason to be skeptical about the applicability of a social psychological theory focusing on individual behavior to corporations. Because social identity theory focuses on defining an individual's perception of himself or herself within a group, it may be difficult to comprehend how it could be equally applicable to corporations, which are nothing more than legal entities, and which lack the human ability of self-perception.

However, behind the legal artifice, corporations are simply composites of individuals. It is individuals who work for, organize, operate, and manage the corporation. It is also these same individuals who possess the ability to define themselves in a group setting, thereby enabling the application of social identity theory.

Moreover, it is these individuals, acting behind the legal artifice of the corporation, who have now begun to spend considerable effort in creating separate identities for corporations.<sup>135</sup> For instance, well-known corporate identities include Johnson & Johnson, which is known as "the caring company," and Apple Inc., which is known as the innovative company. Indeed, defining a corporate identity is akin to the practice of defining oneself under social identity theory. Whereas under social identity theory, an individual will answer the question "Who am I?", in defining a corporate identity, the

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133. Ashforth & Mael, *supra* note 123, at 28. See also generally BERNARD M. BAS, LEADERSHIP AND PERFORMANCE BEYOND EXPECTATIONS (1985).

134. Kay Deaux, *Social Identity*, in ENCYCLOPEDIA OF WOMEN AND GENDER, VOLUMES ONE AND TWO 7, 9 (Judith Worell ed., 2001).

135. See generally Stuart Albert & David. A. Whetten, *Organizational Identity*, in RESEARCH IN ORGANIZATIONAL BEHAVIOUR (L. L. Cummings & Barry M. Staw eds., 1985); T.C. Melewar & Elizabeth Jenkins, *Defining the Corporate Identity Construct*, 5 CORP. REPUTATION REV. 76 (2002).

organization will answer the question, “Who are we (as an organization)?”<sup>136</sup>

Nevertheless, while the identity of the individual defining himself or herself in a social situation is clear, it is less clear who is responsible for defining an identity in the corporate context. Similarly, in applying social identity theory to corporations in the community context, it is unclear who the actors are behind the corporation’s identification with the community. Identification by a corporate actor with the community can theoretically occur at any organization level. An employee is as likely to be drawn to a community’s interests as a manager or director would be. Yet, not all of the corporate actors are equally placed to understand the interests of the corporation such that any proposed alignment of corporate and community interests will be meaningful.

For this reason, corporate identification with the interests of the community must resonate at the board level. As the ultimate decision-makers of the firm, the board enjoys wide discretion to take into account and make trade-offs between different corporate constituents.<sup>137</sup> Accordingly, a board that has identified with its operating community is better placed to understand the trade-offs between shareholder and community interests that are needed to foster alignment of corporate and community interests. Thus, identification works best when the board itself interacts with the community or delegates the interactions to a manager or employee. In other words, while identification can move up the organizational hierarchy from an employee to board level or down from the board to employees,<sup>138</sup> board ownership of identification with the community remains imperative.

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136. Albert & Whetten, *supra* note 135, at 263.

137. Robert C. Clark, *Agency Costs versus Fiduciary Duties*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 56 (John W. Pratt & Richard J. Zeckhauser eds., 1985) (noting “the board of directors is the ultimate decision-making body of the corporation (and in a sense is the group most appropriately identified with ‘the corporation’)”); Blair & Stout, *supra* note 26, at 291 (arguing “directors [have] tremendous discretion to sacrifice shareholders’ interests in favor of . . . deciding what is best for ‘the firm’”).

138. Interactions with the community that begin below board level must eventually be transmitted to the board and the board must “buy-in” to the importance of these interactions with the community before identification with the community can occur.

*C. Examples of Corporate Identification*

Despite the benefits of corporate identification with their operating communities, requiring interactions between corporations and communities has not traditionally been an important aspect of the corporate-community relationship. As the president of a community association observed in connection with the arrival of a multinational company into his community: the company acts “without consulting us, acting as if everything belongs to them . . . .”<sup>139</sup>

Even those scholars who advocate corporate consideration of community interests fail to acknowledge the need for corporations to interact with their operating communities.<sup>140</sup> Instead, these scholars acknowledge corporate hegemony and the “unbalanced” corporate-community relationships that derive from that attribute, but assume that unilateral corporate decisions to invest in the community will automatically benefit the community.<sup>141</sup>

The failure of corporations to interact with their operating communities is somewhat surprising as there is considerable support for the notion that dialogue between parties is essential to problem solving. For example, a proactive dialogue in which dilemmas are openly shared has been found “to stimulate a mutual learning process that spurs creativity and innovation,”<sup>142</sup> to be important for detecting and deriving solutions to complex business-related sustainability problems, and to be essential to managing risk related to stakeholders and integral for gaining a competitive advantage on stakeholder-related issues.<sup>143</sup>

Perhaps with the benefits of dialogue in mind, a small but increasing group of corporations are seeking to identify, through interactions, with their operating communities. In some instances these are corporations that previously had combative relationships with their community. As one corporation admits, its past

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139. Paulo Flávio Machado, President of the Barra do Riacho Community Association as cited in ARACRUZ CELULOSE—2008 ANNUAL AND SUSTAINABILITY REPORT 34 (2008), available at <http://www.unglobalcompact.org/system/attachments/514/original/COP.pdf?1262614196>.

140. See, e.g., Muthuri’s criticisms of the dominant community investment models. Muthuri, *supra* note 121, at 184.

141. *Id.*

142. van Huijstee & Glasbergen, *supra* note 116, at 300.

143. *Id.*

community relationships were ones in which “polarization and paternalization prevailed.”<sup>144</sup> Yet the modern approach of these corporations is to emphasize engagement with the community. Three case studies of corporations that have chosen to identify with their operating communities follow. These include Fibria Celulose in various communities in Brazil, Royal Dutch and Shell in communities in southern Philippines, and Cascade Engineering in Grand Rapids, Michigan.

### *1. Case studies*

Fibria Celulose, a pulp and paper company headquartered in Brazil, is an example of a corporation that has decided to revise its approach to community interests after years of acrimonious relationships with its operating communities. Its new approach is an engagement model designed to optimize corporate-community engagement.<sup>145</sup> The model is tripartite in nature and encompasses dialogue, a participative agenda, and engagement.

In dialogue, the corporation engages in discussions with affected communities to ascertain its impacts on the communities and to take action for any negative impacts. The “participative agenda” component then requires a company representative, chosen through the regional office, to become acquainted with the people of the community and become “a constant presence in the community.” The aim is to have a “physical presence” in the community that will facilitate the company’s access to the people of the community and vice-versa. Finally, the model involves engagement in which corporate discussions with stakeholders bring to light issues of mutual interest. Engagement is designed to deepen the corporation’s relationship with the community and establish it as a partner in local development.

Fibria cites its engagement model as a method by which it garners a better understanding of the community’s critical issues and by which it can then take into consideration the community’s issues in its decision-making process.<sup>146</sup> Some community members seem

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144. FIBRIA CELULOSE S.A., SUSTAINABILITY REPORT 2010, at 66 (2010), *available at* <http://www.fibria.com.br/rs2010/en/>.

145. FIBRIA, INVESTOR RELATIONS, STRATEGY AND COMPETITIVE STRENGTHS (Mar. 9, 2012), *available at* <http://fibria.infoinvest.com.br/static/enu/estrategia-vantagens-competitivas.asp?idioma=enu>.

146. *Id.*

to agree. As one community member notes, “the company is getting to know our culture better,”<sup>147</sup> while another comments that “our lives. . . have changed a lot [for the better] since Fibria came here and settled in our midst.”<sup>148</sup> Moreover, although community members note that problems between the corporation and the community persist, they praise the company for being “really . . . open to listening. [T]hey take the situation, discuss it there, then come back with a response; we are not left without a response . . . .”<sup>149</sup> Similar to Fibria, Shell has adopted a greater interest in community matters as a result of its poor previous community relationships, such as its previously discussed experience in the Niger Delta. The Malampaya Deep Water Gas-to-Power Project<sup>150</sup> in the Philippines was Shell’s first project under its new approach. Shell’s aim was to obtain the community’s *ex ante* consent to its operations. Two years before project construction began, Shell began the process to obtain community consent using four strategies. These included community outreach and interviews with key opinion leaders and decision makers; information dissemination, education, and communication activities; perception surveys and participatory workshops to introduce the project and validate initial survey results; and participatory involvement in the formulation of environmental management plans.<sup>151</sup> It also held town hall meetings to hear and respond to community concerns and public hearings to review the results of an environmental impact report of the project.<sup>152</sup>

Through its interactions with the affected communities, Shell became aware of the community’s needs and found venues through which they could allay the community’s concerns about the environmental impacts of the project. More importantly, once Shell became aware of the community’s needs, it could directly align its

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147. ARACRUZ CELULOSE, SUSTAINABILITY REPORT 2008, at 33 (2008), *available at* <http://www.unglobalcompact.org/system/attachments/514/original/COP.pdf?1262614196>. (Aracruz was the predecessor company to Fibria).

148. FIBRIA, SUSTAINABILITY REPORT 2011, at 92 (2011), *available at* <http://www.fibria.com.br/rs2011/en/>.

149. *Id.* at 94.

150. The Malampaya project involves the extraction of natural gas from below the seabed and the transportation of the gas by undersea pipeline to a natural gas refinery plant more than five hundred kilometers from the extraction site.

151. STEVEN HERZ ET AL., DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT 21 (2007).

152. *Id.* at 21

interests with pertinent community interests. For example, the community expressed an interest in working for the project, but most members of the community did not have the necessary skills.<sup>153</sup> Shell, therefore, trained the local residents in skills such as welding and masonry, and then employed them.

Moreover, once the construction of the project was complete and Shell no longer needed the workers they had trained, they retrained the workers in skills such as electronics and animation, and helped them find employment with other neighboring businesses.<sup>154</sup> Shell also rerouted a pipeline, at three times the initial cost, when it learned, through meetings with community leaders, that the original route for the pipeline would impact areas of rich biodiversity or cross the ancestral waters of one of the indigenous communities.<sup>155</sup> Finally, Shell maintains ongoing community relations by having its representatives meet monthly with community leaders to provide updates on project operations and to enable the community to raise concerns.<sup>156</sup>

Corporate identification with the community is not, however, confined to corporations operating globally. Cascade Engineering, a plastic injection moldings business based in Grand Rapids, Michigan, has been identifying with its community for a number of years. Possessing comparative advantages in manufacturing and inventory management, Cascade also offers a particular expertise in employee training.<sup>157</sup> Due to the high level of skill necessary to produce its product, Cascade has developed a “human capital” program that offers cutting edge skills training.<sup>158</sup> The program is considered one of the most comprehensive training programs in the United States.<sup>159</sup>

Due to its experience in human capital development, in the late 1990s, Cascade was approached by local county officials to participate in a newly formed welfare-to-work program. The program was designed to move welfare recipients into paid employment as quickly as possible. Cascade managers were drawn to

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153. *Id.* at 23.

154. *Id.*

155. *Id.* at 24.

156. *Id.* at 25.

157. Cavanagh, *supra* note 106, at 29–30.

158. *Id.* at 30.

159. *Id.*

the program as its aims aligned with the general philosophy of Cascade, which was “to improve and strengthen the community in which you live.”<sup>160</sup> At the same time, Cascade identified a business advantage to participating in the program. Since recruitment and retention efforts from the local labor pool in Grand Rapids were intensely competitive, the program gave them access to an untapped pool of labor.<sup>161</sup>

After three iterations, the program that Cascade ultimately developed to recruit and retain welfare workers was based on its pre-existing training program, but was modified based on research on generational poverty.<sup>162</sup> Working with an expert manual, Cascade introduced programs to combat typical problems of generational poverty employees.<sup>163</sup> For instance, it identified and worked to remove barriers to sustained employment, such as lack of childcare and reliable transportation, and provided an orientation program that introduced employees to the culture and norms of working life.<sup>164</sup> Cascade considers the program a success as it is able to retain on average 97.4% of the ninety candidates it recruits each year.<sup>165</sup> A past CEO of Cascade attributes the success of the program to working with the community. “You can’t work on one part of that system, or it’s just like squeezing a balloon”, he explains. “You have . . . to look at the *whole* system and understand it . . . .”<sup>166</sup>

## 2. Assessment

The Fibria, Shell, and Cascade Engineering case studies highlight both the mechanisms by which corporations can identify with communities as well as the mutual corporate-community benefits that identification can garner. In terms of identification, all three of the corporations relied on two methods: immersion and formalized

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160. *Id.* at 36. As a company representative observes, involving Cascade in the community will “make Cascade a better company, . . . make society a better place to live in [and] . . . help our economy”. *Id.*

161. *Id.* at 30.

162. *Id.* at 31; Jennifer Hu et al., *Cascade Engineering: Building Frontline Employee Programs For Triple Bottom Line Impact*, ASPEN INSTITUTE CASE STUDY – LWW-02, at 5–6 (2012).

163. Cavanagh, *supra* note 106, at 31.

164. Hu et al., *supra* note 162, at 6–7.

165. *Id.* at 8.

166. Cavanagh, *supra* note 106, at 36.

interaction. Each of the companies, for instance, immersed themselves in their community by locating their company or a representative of the company in the operating community. As social identity theorists have observed, identification will be facilitated through immersion in a group.

Fibria cites locating a member of its company in the community as a way for the community to have access to the company, but the reverse may be equally true. For example, Fibria has been better able to understand the community's culture by locating itself within it. Similarly, one of Cascade's aims in becoming involved with the welfare-to-work community was to make the community where both its company and the workers were located "a better place to live in."<sup>167</sup> The corporation's physical proximity to the community was a basis, thus, for comprehension of the needs of the community and as a means of increasing its sense of solidarity with the community.

Each of the companies also interacted with the community in a number of ways. Cascade, for instance, which was not well versed in the meaning and symbols of the welfare community relied on expert advice to become familiar with its inner workings and then interacted with the welfare workers using their own terminology and language. Conversely, Fibria and Shell initiated a dialogue process with their communities. Fibria, for instance, organized both dialogue processes to garner feedback on their projects and engagement processes that involve discussions to create sustainable corporate-community projects. Shell, on the other hand, organized town hall meetings and public hearings in order to enable a broad range of community members, and not just elites, to voice their opinion on its project. Indeed, while dialogue processes with communities have often been prone to manipulation—for example where a corporation "educates" a community about its project as a public relations exercise—these companies made concerted efforts to engage in a bidirectional communication process with the community, which sought to utilize or act upon their views.<sup>168</sup>

Each of the case studies also exemplifies the mutual benefits, to

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167. *Id.*

168. See generally Jane Fiona Cumming, *Engaging Stakeholders in Corporate Accountability Programmes: A Cross-Sectoral Analysis of UK And Transnational Experience*, 10:1 BUS. ETHICS: EUR. REV. 45 (2001); Abigail Oxley Green & Lynsey Hunton-Clarke, *A Typology of Stakeholder Participation For Company Environmental Decision-Making*, 12:5 BUS. STRATEGY & ENV'T. 292 (2003).



both the community and to the corporation, to which corporate identification with the community can give rise. Fibria, for instance, has fostered community interests by supporting over seventy community projects, including using unused portions of the company's eucalyptus plantations to run small-scale forestry and agribusiness projects, running environmental and conservation education programs in schools, and providing employment skills workshops.<sup>169</sup> Fostering community interests has also given Fibria a social license to operate, which reduces the costs of community opposition to its projects and may enhance its reputation.

Similarly, Cascade's program benefits the community by offering meaningful employment to indigent members as well as giving the company access to a new pool of local labor in a competitive employment market.<sup>170</sup> In addition, Cascade estimates that its program has resulted in a five-year cumulative net marginal benefit of \$502,000 and that the community has benefitted at a rate of just under \$900,000 per year, in part from not having to provide government assistance to each of the recipients of the program.<sup>171</sup>

Yet, it is Shell's Malampaya project that best details the extent of benefits corporate identification with the community can offer. Shell made initial investments in the community of \$6 million, and it maintains community interests through annual investments of approximately \$500,000.<sup>172</sup> More importantly, since the community collaborated on the projects chosen for the investments, the investments have had both a meaningful impact on the community, and are sustainable, in that their benefits remain even after Shell's exit.<sup>173</sup> For instance, the benefits of rerouting a pipeline to protect

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169. FIBRIA SUSTAINABILITY REPORT 2010: RELATIONSHIP WITH COMMUNITIES (2010), [http://www.fibria.com.br/rs2010/en/template?go=social/social\\_comunidades\\_relacionamento.html](http://www.fibria.com.br/rs2010/en/template?go=social/social_comunidades_relacionamento.html).

170. As Cascade notes, these are not dead-end burger flipping jobs. The program's starting salary is \$10/hour, but it offers promotions to these employees as well, meaning that for some, they will go from welfare to salaries of over \$30,000 in two years. Cavanagh, *supra* note 106, at 35.

171. James R. Bradley, *Bridging the Cultures of Business & Poverty: Welfare to Career at Cascade Engineering, Inc.*, STAN. SOC. INNOVATION REV. 80 (Spring 2003), available at [http://www.ssiereview.org/articles/entry/bridging\\_the\\_cultures\\_of\\_business\\_and\\_poverty](http://www.ssiereview.org/articles/entry/bridging_the_cultures_of_business_and_poverty).

172. HERZ, *supra* note 151, at 25.

173. The United Nations Environment Program recognized the importance of the community investments made by Shell by awarding it the World Business Summit Award for Sustainable Development Partnerships in 2002. See Alejandro R. Roces, *Malampaya Gas Project Wins Int'l Award*, PHILIPPINE STAR (Sept. 7, 2002).

the community's biodiversity or provision of transferable employment skills to local residents are not dependent on Shell's presence.

However, in addition to fostering community interests, Shell has been able to further its own economic interests. Shell estimates that it avoided \$50 to \$72 million in costs through ex ante community consent.<sup>174</sup> In particular, obtaining community approval for the project enabled Shell to avoid construction delays arising from community opposition to the project and penalty fees that it would have had to pay to the power plant operators if the gas was not delivered by the scheduled date.<sup>175</sup> Community consent also enabled Shell to complete the construction of the project ahead of schedule.<sup>176</sup>

Still, the approaches employed by the corporations are not without their flaws. Fibria, for example, may not be consistently employing its engagement model with each of the communities in which it operates. Thus, in 2010 local non-government organizations accused Fibria of compromising the way of life of the Quilombola community through the establishment of eucalyptus plantations on their lands.<sup>177</sup> Moreover, Fibria still faces problems with several communities because of the lack of engagement its predecessor corporation, Aracruz, took in conducting relations with local communities.<sup>178</sup>

Nevertheless despite their shortcomings, the case studies demonstrate that corporate identification with the community presents a number of distinct advantages. For the corporation it can offer legal and social risk minimization,<sup>179</sup> cost avoidance, new

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174. HERZ, *supra* note 151, at 25.

175. *Id.*

176. *Id.*

177. World Wildlife Federation, *Reconciling the Needs of Local People and the Pulp Industry: A Case Study From Espirito Santo, Brazil*, PANDA.ORG (Mar. 30, 2012), [http://awsassets.panda.org/downloads/brazilpulppapercasestudy\\_pdf.pdf](http://awsassets.panda.org/downloads/brazilpulppapercasestudy_pdf.pdf).

178. *Id.*; World Rainforest Movement, *Brazil: Aracruz Sows Violence and Destruction in Espirito Santo*, WRM'S BULLETIN NO. 161 (Dec. 2010).

179. Community opposition to corporate activities can manifest itself through lawsuits aimed at the corporation or physical attacks on the corporation's infrastructure, operations, or employees. See Amy K. Lehr & Gare A. Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*, FOLEY HOAG 21 (2010) (arguing that companies' failure to garner community consent to their operations "can lead to social unrest . . . decades of conflict and reputation-damaging lawsuits").

sources of labor, access to new markets, greater definition to its legal operating environment,<sup>180</sup> and enhancements to its reputation. It also avoids developing a paternalistic relationship between the corporation and the community.

At the same time, it can offer the community sustainable development, with benefits that continue beyond the exit of the corporation, and protection of its idiosyncratic interests, such as its culture or heritage. Moreover, because identification requires meaningful interactions with the community, this process is less likely to give rise to a “disingenuous public relations exercise.”<sup>181</sup> Instead, through meaningful interactions with the community, the case studies demonstrate that substantive changes can be made to corporate behavior that accommodate or foster the needs of the community.

Nonetheless, the case studies also evidence that corporate identification with the community does not necessarily optimize a corporation’s wealth nor satisfy all of the community’s interests. Still, it does avoid decision-making being transformed into a zero-sum game. Even better, it produces a less conflicted and more harmonious relationship between the corporation and the community, ultimately leading to mutual gains.

#### IV. REGULATING THE ALIGNMENT OF CORPORATE AND COMMUNITY INTERESTS

As we have seen, a *Gesellschaft-Gemeinschaft* approach to corporate decision-making, by way of corporate identification with the community, can lead to mutual benefits for the corporation and the community. Yet as this approach remains the exception and not the norm for corporate consideration of community interests, ways by which corporations can be encouraged to take this approach are considered next. Three methods for encouraging corporate and community interest alignment are discussed: public regulation, self-regulation, and a hybrid system.

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180. *Id.*

181. This has been a critique of several corporate social responsibility programs. *See, e.g.*, John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 16 (2005).

### A. Public Regulation

One method by which corporations will align their interests with those of the community is to impose this duty upon them through enactment of public regulations. For instance, the Philippine government conditions the granting of environmental licenses to corporations on the completion of a matrix on community consent. This requires a corporation to evidence that it has successfully addressed six areas,<sup>182</sup> ranging from the environmental soundness of the project to engagement of the public participation process to promotion of social and intergenerational equity. Specific evidence the regulation demands includes information about the manner in which the corporation has consulted with the community and incorporated their suggestions and/or information pertaining to the involvement of women or other vulnerable groups into livelihood programs/projects run in connection with the project.<sup>183</sup>

Similarly, the Canadian government requires corporations to consult with certain indigenous communities prior to the commencement of major development projects.<sup>184</sup> More specifically, the Canadian government mandates that corporations negotiate an “Impact and Benefit Agreement” with the affected communities, which provides for mitigation of the adverse impacts of the project and provides benefits to the affected communities.<sup>185</sup> Specific areas the government suggests should be included as topics of negotiation include training and preferential hiring for members of the affected community, protection and conservation of archaeological sites and specimens, and establishment of a liaison between the community

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182. These include: ecological and environmental soundness of the proposed project, effective implementation of the public participation process, resolution of conflicts, promotion of social and intergenerational equity and poverty alleviation, and proposed mitigation measures for adverse impacts and measures for the enhancement of positive impacts on people. HERZ, *supra* note 151, at 21–22.

183. *Id.* See also PHILIPPINES DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, *Admin. Order No. 96-37 ORDER TO FURTHER STRENGTHEN THE IMPLEMENTATION THE ENVIRONMENTAL IMPACT STATEMENT (EIS) SYSTEM* (Dec. 2, 1996) (Phil.).

184. See, e.g., *Nanavut Land Claims Agreement Act*, R.S.C. 1993, c. 29, art. 26 (Can.).

185. *Id.*

and the corporation to facilitate incorporation of the community's participation and concerns.<sup>186</sup>

Public regulation is primarily designed to exact benefits under a notion of command and control. The government commands corporations to consider community interests and controls their behavior through the threat of negative sanctions.<sup>187</sup> Corporations are thus legally obligated to follow the minimum standards for community interest consideration or face sanctions. Both the regulations used by the Philippine and Canadian governments exemplify this approach as licenses or permits to operate are denied if corporations do not meet the specified standards. Public regulation also enables governments to impose minimum standards for community interest protection and may enable it to induce greater degrees of compliance with these standards if the penalties for non-compliance are onerous.<sup>188</sup> Vigilant enforcement of the regulation further provides consistent levels of corporate compliance over a period of time.<sup>189</sup>

However, public regulation does not necessarily coincide with a *Gesellschaft-Gemeinschaft* approach to corporate decision-making. As public regulations generally employ a top-down approach, they often fail to take into account the individual circumstances of either the corporation or the community.<sup>190</sup> Having to adhere to these rules can therefore disincentivize corporations from developing individual or unique approaches to considering community interests.<sup>191</sup> It can also hamper the ability of a corporation to tie its business acumen to community interests, which as we have seen is one of the strengths of a *Gesellschaft-Gemeinschaft* approach as it avoids corporate paternalistic behavior and increases corporate-community sustainable relationships.<sup>192</sup>

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186. *Id.* at 210, Schedule 26-1.

187. Darren Sinclair, *Self-Regulation Versus Command and Control? Beyond False Dichotomies*, 19 L. & POL'Y 529, 534 (1997).

188. Anita I. Anand, *Voluntary vs Mandatory Corporate Governance: Towards An Optimal Regulatory Framework* 9 (Am. Law and Econ. Assoc. Annual Meetings, Working Paper, No. 44, 2005).

189. Sinclair, *supra* note 187, at 534.

190. *See, e.g.*, Anand, *supra* note 188, at 16-17; Jennifer Nash, & John Ehrenfeld, *Code Green: Business Adopts Voluntary Environmental Standards*, 38 ENV'T.: SCI. & POL'Y FOR SUSTAINABLE DEV., Jan.-Feb. 1996, at 16, 17.

191. Anand, *supra* note 188, at 16; Nash & Ehrenfeld, *supra* note 190, at 17.

192. *See supra* notes 105-107.

Public regulations may further impose greater costs on both the government and corporations. For governments, costs arise from drafting, implementing, monitoring and enforcing the regulation. In a time of austerity, these types of costs may be simply prohibitive for some governments.<sup>193</sup> For corporations, public regulations impose internal management costs, or the costs of organizing itself to comply with a legal rule.<sup>194</sup> Thus, under the regulations imposed by the Philippine government, corporations must first internally organize themselves in a prescribed manner such that they can report on the six designated areas in addition to expending the costs of satisfying community interests.

Public regulations may also suffer from lack of government expertise or disinterest in promoting community interests. Implementing quality corporate-community interest regulations may not be within the expertise of some governments, while other governments may be disinclined from implementing any regulations at all. In particular, governments of some developing countries have been known to be more interested in attracting the capital infusion of foreign corporations rather than protecting community interests and may view regulations that mandate community interest consideration as antithetical to their main goal.<sup>195</sup> In fact, there are even some governments which make it impossible or illegal to carry out any engagement processes with affected communities.<sup>196</sup>

In short, public regulations mandating corporations to consider community interests may not further the interests of either the community or the corporation. While use of public regulations can allow governments to impose minimum standards of community

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193. In fact even the U.S. Environmental Protection Agency (EPA) has been faced with a decreasing budget and an increasing load of mandated responsibilities. In 1996, a former administrator of the EPA observed that the EPA was not able to meet more than 80 percent of the environmental standards set by Congress. See Nash & Ehrenfeld, *supra* note 190, at 17.

194. Anand, *supra* note 188, at 13.

195. See, for example, the experience of Manhattan Mining, a U.S. corporation that was granted a concession contract by the Federal Government of Peru but which failed to dialogue with the local community. The community was ultimately able to cease the corporation's activities in Peru. See *Peru | Tambogrande: Manhattan Minerals*, *supra* note 31. Similarly, in *Metalclad*, the Federal Government of Mexico granted a license to a U.S. corporation to operate a hazardous waste facility in a community without the community's input. The community opposed the facility and passed an ordinance that ultimately left the corporation unable to use the site. See *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000) 5 ICSID 212 (2002).

196. Lehr & Smith, *supra* note 179, at 41.

interest protection and, if effectively monitored and enforced, increase corporate compliance with these standards, it also imposes considerable costs on both the government and corporations. Moreover, it may impede the development of individually tailored corporate solutions to the problems and may interfere with corporate ability to link competitive advantages to community interests. Most importantly, as many governments fail to prioritize the interests of the community, public regulations protecting these interests may be deficient in scope or size or simply not be present at all.

### *B. Self-Regulation*

A second approach to facilitating a *Gesellschaft-Gemeinschaft* approach to corporate decision-making is to have corporations, independent of government involvement, undertake to develop their own rules and enforcement mechanisms for considering community interests. As the case studies have indicated, there are a few corporations already employing this method. Some companies and industries are also seeking to develop their own principles for engaging with the community.<sup>197</sup> For instance, Talisman Energy Inc., an oil and gas company, recently commissioned a report on developing practices for community engagement for its projects.<sup>198</sup>

There are a number of advantages to self-regulation. For one, self-regulation enables corporations to tailor individualized approaches to problems, such as using business strengths as a means of fostering community interests. Self-regulation further enables corporations to act on their own initiative rather than be coerced into a particular course of action, and there is a natural tendency to prefer this course of action over the command and control approach of public regulation.<sup>199</sup> This approach may also result in greater commitment to community interest protection as self-regulation requires changes from within the corporation such as management commitment, genuine recognition of the need to protect community interests, and changes to corporate policy.<sup>200</sup>

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197. Thus, the Forest Stewardship Council now advises companies to obtain community consent for forest operations. See FOREST STEWARDSHIP COUNCIL, *supra* note 46.

198. See Lehr & Smith, *supra* note 179.

199. Sinclair, *supra* note 187, at 534.

200. Alex Wawryk, *Regulating Transnational Corporations Through Corporate Codes of Conduct*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 53, 61 (Jedrzej George Frynas & Scott Pegg eds., 2003); Nash & Ehrenfeld, *supra* note 190, at 17.

Compared to public regulation, self-regulation is also a less expensive option for both governments and corporations. Governments need not incur the costs of drafting, implementing, or enforcing the regulations and corporations do not incur added internal management costs. Self-regulation also enables corporations to align community interests with existing business strengths meaning that these investments will be achieved at low incremental costs. In addition, in countries where law enforcement or monitoring is weak, self-regulation may be more effective than public regulations.<sup>201</sup>

At the same time, corporate self-regulation is meaningless if the approach adopted does not adequately address at least some substantive community interest issues or is not diligently enforced or monitored.<sup>202</sup> For instance, a business-led community engagement program may foster some short-term community interests but fail to develop any sustainable investments that last beyond the corporation's exit. This will be particularly apparent when decisions to foster community interests are made using the best interests of the corporation, not the best interests of the community.

Similarly, without a third-party monitoring or enforcement mechanism, corporate attention to community interests is left purely to the goodwill of the corporation.<sup>203</sup> Should it choose not to foster community interests or do so only in a peripheral manner, it will not face any sanctions for its non-compliance. Finally, for those corporations wholly uninterested in furthering community interests, a self-regulatory program for community interests ensures that they can continue their status quo.

Self-regulation thus offers the benefits of individualized solutions, flexibility, greater firm commitment to fostering community interest protection, lower costs, and an opportunity to align community interests to business strengths. At the same time, self-regulation can lead to community investments that are neither substantive nor sustainable. Even worse, self-regulation will also not sanction corporations who eventually abandon community interest considerations or who wholly ignore these interests from the outset.

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201. Wawryk, *supra* note 200, at 61.

202. *Id.*

203. *Id.* at 61–62.



*C. A Hybrid Approach*

As both public regulation and self-regulation offer a number of benefits and disadvantages, it is apparent that promoting a *Gesellschaft-Gemeinschaft* approach to corporate decision-making for community interests may need to adopt a hybrid regulatory approach. Public regulation, for instance, can be used to create an enabling environment for corporate consideration of community interests, while self-regulatory practices can be used to allow corporations to determine how best to meet the principles of the public regulation.

More specifically, broadly worded regulations that mandate corporations to both consider and foster community interests should be promulgated at both the national and the international level.<sup>204</sup> Regulations can further prescribe that the determination of the interests of the community should be made through a corporate-community collaborative process, which requires corporations to “identify” or engage with all members of the community including those from marginalized or vulnerable groups.

At the same time, the regulations need not prescribe the methods by which corporations must consider or foster community interests or specify the details of the collaborative process. Instead, the regulations should prescribe a list of non-compulsory best practices for both activities. These could include elements by which identification is fostered, such as requiring the corporation to locate a representative in the local community, as well as guidelines on establishing an effective dialogue process with the community. Corporations would then be able to self-determine how they will comply with the overall principles of the regulation. Finally, to incentivize corporations to adhere to regulations in this area, corporations should be required to disclose how and when they have both considered and fostered community interests as part of their annual disclosure obligations under domestic securities law.<sup>205</sup>

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204. While this Article focuses on regulations at the national level, binding regulations could be introduced at the international level in provisions in bilateral investment treaties or free trade agreements. For an overview on these agreements, see Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*, 46 ALTA. L. REV. 983, 985–89 (2009).

205. See, e.g., Securities and Exchange Act, 17 C.F.R. § 240.13a-1 (2006) (discussing disclosure obligations for annual reports).

A hybrid approach to regulating corporate consideration of community interests is, however, less applicable for those areas where the potential impact of a corporation's activities on the community are irreversible. An example of an irreversible area is a toxic chemical spill that could lead to a public health crisis reminiscent of the Bhopal disaster.<sup>206</sup> For these types of community interest areas, the continuum of regulation from public to self-regulation should lean more heavily toward public regulation. Public regulations could, therefore, for pre-determined irreversible areas, condition operating permits or licenses on ex ante community "consent." Corporations would be required to disclose any of their activities that could cause irreversible harm to the community. The community would then be able to respond in one of three ways: negotiate ex ante compensation for this activity; require that the corporation demonstrate how it intends to minimize the possibility of this activity and the method by which compensation would be calculated if, despite precautions, harm still arises; or refuse the corporation permission to conduct this activity in its community.

Regulating a *Gesellschaft-Gemeinschaft* approach to decision-making using a hybrid approach offers several of the benefits provided by public regulations and self-regulation. Corporations will not incur high indoor management costs as they can promote community interests using their established forms of organization. They can also promote those community interests that align with their business strengths, benefitting from a synergistic approach. At the same time, while governments still incur the costs of designing the regulation, they do not incur any monitoring costs, and enforcement costs are low as government officials already review securities documents for this type of information. As a result, no new enforcement mechanisms are necessary.

Conversely, using public regulations primarily to regulate community interest areas that can suffer irreversible damage ensures the protection of these areas regardless of corporate interest in the matter. While it is more expensive than self-regulation, binding regulations further ensure that the community plays an active role in ex ante determining its fate.

Both approaches, however, suffer from three main limitations. First, as under either approach corporations are not required to

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206. For an overview of the Bhopal disaster *see supra* notes 30 and 62.

satisfy all community interests, critics may argue that community interests are not meaningfully addressed.<sup>207</sup> Yet as corporations are required to “identify” or collaborate with communities to determine the interests they will foster, it is more likely that by working with the community, the corporation will choose at least some interests of significance to the community. Moreover, use of a *Gesellschaft-Gemeinschaft* approach to decision-making favors, as the decision-matrix earlier considered indicates,<sup>208</sup> areas that both foster a community’s sustainable development and enhance a corporation’s operating environment. Accordingly, choosing to foster issues of significance to the community is already built into this model.

Second, under the hybrid approach, compliance with this regulation will likely be induced only if the sanctions for non-compliance are high. The Securities and Exchange Commission [SEC] has not, however, been particularly vigilant about sanctioning corporations for failing to adhere to disclosure rules. For instance, in relation to rules for disclosing diversity policies for board member nominating committees, the SEC has observed that corporate compliance with this rule has been “spotty”<sup>209</sup> but has not indicated that corporations that failed to adhere to the rule will face any repercussions. A similar approach has been observed for corporations that failed to adhere to climate change disclosure rules.<sup>210</sup> Still, despite lax enforcement, disclosure rules requiring corporations to demonstrate how they have considered and fostered community interests can offer benefits by way of the expressive function of law.<sup>211</sup> In particular, by formulating a rule requiring corporations to

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207. This limitation may be less relevant for the non-hybrid approach as it is likely that irreversible areas are meaningful areas of interest for a community. Still, the government may limit the interests it considers irreversible to only a few areas. If so, this criticism may still equally hold true for the non-hybrid approach.

208. See Table 1 *supra* Part II.C.1.

209. Elisse B. Walter, SEC Commissioner, Remarks at the DirectWomen Board Institute (Feb. 10, 2011), <http://www.sec.gov/news/speech/2011/spch021011ebw-2.htm> (“[T]he corporate track record for disclosure under this new requirement is quite spotty so far.”).

210. See Suriya Jayanti, *Failure to Launch: Insights from The Issuance and Non-Enforcement of the Securities And Exchange Commission’s “Commission Guidance Regarding Disclosure Relating To Climate Change”*, in PROC. OF THE 9<sup>TH</sup> INT’L CONF. ON ENVTL. COMPLIANCE AND ENFORCEMENT 275 (2011), available at [http://inece.org/conference/9/proceedings/34\\_Jayanti.pdf](http://inece.org/conference/9/proceedings/34_Jayanti.pdf); Sarah Johnson, *Does the SEC Care if You’re Green?*, CFO.COM (Jan. 24, 2011), <http://www.cfo.com/articl e.cfm/14550880>.

211. For an overview on the expressive function of law, see Cass R. Sunstein, *On the*

engage with communities, law can express the social value of protecting community interests and can work towards propelling normative changes in corporate behavior.<sup>212</sup>

In addition, for those corporations that do comply with SEC rules, despite lax enforcement, disclosure rules on community interest consideration can effect substantive changes in corporate behavior.<sup>213</sup> One commentator has colorfully described the effect of disclosure rules on corporate behavior by noting that “if every instance of adultery had to be disclosed, there would probably be less adultery.”<sup>214</sup> More specifically, as disclosure rules in this area require a corporation to analyze in detail—perhaps for the first time—its practices of considering and fostering community interests, the process of disclosure can raise management’s consciousness about the corporation’s practices in community interest areas such that improvements to behavior result.<sup>215</sup>

Third, under the non-hybrid approach, costs to both the government, in implementing and enforcing the regulation, and corporations, by way of indoor management costs, will be high. Moreover, pre-determining particular community interests that must be satisfied limits—but does not completely obviate—the ability of the corporation to link its business strengths to community interests. However, since most communities face only a few irreversible interests, the scope of this regulation should be relatively narrow. By limiting the scope of the regulation, costs should, therefore, be contained.

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*Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

212. The law’s expressive function results in norm changes as a result of internalization of the norm, through a process of shaming, or by becoming a focal point to which others gravitate towards. See, e.g., Sunstein, *supra* note 210; Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000).

213. See BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note 55, at 223.

214. A.A. Sommer, Jr., *Therapeutic Disclosure*, 4 SEC. REG. L.J. 263, 265 (1976).

215. Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1342–52 (1996); Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 LAW & CONTEMP. PROBS. 113, 123 (1999).

## V. CONCLUSION

Tönnies, it appears, was shortsighted in his view of the disparities between corporations and communities. The notion of a corporate-*Gemeinschaft* need not be abominable. On the contrary, as the small number of corporations already fostering community interests suggests, a corporation-community can be a laudable idea, not the least because it generates mutual benefits for both the community and the corporation.

Nevertheless, the most important aspect of governing corporate-community relations is the need for corporations to identify or interact with their operating community. Without this requirement, corporate consideration of community interests can easily turn into a meaningless public relations exercise or an exercise in paternalistic behavior. Indeed, as the case studies evidence, fostering sustainable improvements to a community, which can simultaneously benefit corporations, only occurs after a corporation has been able to view itself, even if only partially, as part of the community.

Yet despite the advantages of transforming corporate-community relations from antagonistic to harmonious in nature, it is unclear why there are only a few efforts at promoting good corporate-community relationships. While certain industry associations, a handful of countries, and a few international organizations have taken steps towards promoting links between corporations and their operating communities, certainly more could be done to facilitate this relationship. In this regard, the *Gesellschaft-Gemeinschaft* model is offered as one further step towards uniting the interests of corporations and communities.