

The sustainable enterprise.  
The multi-fiduciary perspective  
to the EU Sustainability Strategy.

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## ABSTRACT

This essay tries to describe, via the concept of enlarged fiduciary proviso, the contribution of Corporate Social Responsibility (CSR) to the implementation of the EU Sustainability Strategy. Through the concept of sustainability, a concern for the welfare of future generations of stakeholders is introduced in the enterprise's decisional processes. As such, sustainability can be framed within Corporate Responsibility, defined here as a governance framework that extends fiduciary protection from a mono-stakeholder perspective, in which the sole relevant constituency for the design of corporate-policy is the shareholders', to a multi-stakeholder perspective, in which legitimate claims are held by a variety of constituencies, possibly operating at different times. Moreover, this essay tries to establish a bridge between the concept of sustainability and a Social Contract account of the business enterprise. The Social Contract of the stakeholders, an ideal reference point for corporate policy-makers, is formed behind a veil of ignorance, resulting in an agreement that is both impartial and nonhistorical.

Keywords: Corporate Social Responsibility (CSR), Sustainability Strategy, Fiduciary Duties.

Journal of Economic Literature Classification System: M14, O16, Q01.

## **Introduction**

This essay focuses on the business enterprise, as the peculiar place that is gaining weight *vis-à-vis* other decisional centers as the result of the privatization of previously public decisions, focusing on its contribution in order to progress towards sustainable development. I shall argue that an enterprise in which corporate decision-makers are fiduciaries of all legitimate stakeholders creates reliable safeguards in order to stimulate the specific investments of an array of actors. Furthermore, in this framework decisions are to be neutral with respect to those who do not take part in the transactions, *in primis* the future generations.

This paper does not deal with environmental law and its enforcement; it assumes that corporations comply with the “rules of the game”, and make a further step, on the basis of self-regulation alone. They should do so upon recognising that contemporary and future stakeholders have a legitimate claim on present-time corporate activities. I try also to provide the reader with a framework of impartial justification for managers’ abidance by an intergenerationally calibrated Social Contract amongst the corporate stakeholders.

The paper is structured as follows. I start by pointing out the basic descriptive features of the modern big business. A possible answer to the problems of abuse of control and contractual incompleteness arising from such characterisation comes from the extension of fiduciary protection to an array of stakeholders. Section 2 describes the notion of fiduciary obligation, and Section 3 describes in greater details the structure of the multi-fiduciary model. A full-fledged attempt to build a multi-fiduciary model of corporate governance can be found in the works by Sacconi, whose model is outlined in Section 4. Section 5 describes sustainability, with references to the European institutions’ contribution to its achievement. Section 6 tries to link the discourse on sustainability to the model of the Social Contract amongst the stakeholders. Final remarks follow.

## **1. Theory of the firm foundations**

Subtle variations in the way we characterise the firm can produce major differences in the definition of the firm’s objective, specifically with respect to the question *In whose interest should the firm be managed?*. The theory of the firm that we have in mind shapes the way in which we conceive corporate finance and governance (Zingales 2000: 1651). Zingales’s proposal is to consider the firm as a nexus of specific investments, a combination of mutually specialized assets and people. In this approach, power relationships and access to critical resources are more important than the contracts existing between the enterprise and its constituencies, and more important than ownership of the physical assets. The firm lies at the centre of a web of specific investments that need to be remunerated with tangible or intangible payoffs, according to some distributive principle. The fundamental problem that we face is then “how to allocate *de jure* control rights when there are multiple sources of *de facto* control rights” (Zingales 2000: 37), rights that are granted by access to some valuable resources.

On the contrary, the nexus of contracts theory (Fama & Jensen 1983) stresses that all nonshareholder constituencies are completely indifferent as to the choices taken by equity holders, or by their fiduciaries, given that they are contractually protected in all possible future contingencies. Very broadly, this latter view seems to leave unaddressed two questions of crucial importance: contractual

incompleteness and the possibility of abuse stemming from the attribution of control rights. I start by analysing the second problem, assuming for now that contracts cannot be complete.

It has been correctly pointed out that “for control rights to be valuable, the party in control must be able to make decisions that alter the distribution of payoffs among the members of the nexus” (Zingales 2000: 149). Interestingly, the possibility to “divert” a part of the cooperative rent produced by the firm towards the holder of control rights implies that other constituencies as well, and not only the equity holders, are unprotected in some circumstances, those in which their contract is silent. Control right holders may indeed threaten to exclude other constituencies from the team, by withdrawing the right to access the firm’s physical capital (Grossman & Hart 1986), to the point that the stakeholders will be indifferent between accepting such drawings in the *ex post* bargaining stage, taking place whenever an unforeseen and *ex ante* un-contracted upon contingency occurs, and dropping out from the corporate team, losing the cost of their initial investments. The question is then why, if the exercise of control interferes with the welfare of multiple categories, the shareholders are worth exclusive control rights, as the shareholder primacy view prescribes.

We face in fact a problem of “abuse” of the authority position, which arises whenever control rights are attributed to a single constituency, and whenever such constituency enjoys exclusive fiduciary duties from those who actually manage the corporation<sup>1</sup>. It does not come as a surprise that, given the possibility of *ex post* opportunism in the renegotiation stage, Grossman & Hart (1986) conclude that control rights should be assigned to the party whose investment is the most crucial, and the easiest to expropriate. The way in which control rights are attributed, and the way in which the surplus is divided *ex post*, affect in relevant ways the *ex ante* incentives to make specific investments by all stakeholders. This happens for two reasons: first, rational agents will not be willing to make investments in firm-specific resources if they have the expectation that they will not be properly (and equitably) rewarded *ex post*. Problems of efficiency and of distributive equity are thus best treated in a joint fashion (Sacconi 2006b). Second, rational agents will spend resources in inefficient power-seeking activities, whose only aim is to increase their bargaining strength in the *ex post* stage (Zingales, 2000). It follows that the nexus of contracts theory, whence the shareholder primacy norm typically derives, does not provide for *generalised* safeguards against the hazards deriving from the attribution of exclusive rights of control over the firm. The theory of the firm as a nexus of specific investments arguably provides a better framework in order to analyse the sources and the remedies to this problem.

Is the description of contracting used so far accurate? Nexus of contracts theorists argue that fixed-claim holders, such as the employees, should bargain for the most desired terms in a contract, viewed as a complete representation of what the parties consent to. The literature, however, has identified three main reasons why contracts may be written incompletely: first, agents are only boundedly rational (*cf.* Simon 1947); secondly, negotiating is costly; thirdly, specifying contingencies in contracts is costly too, as the information possessed by the parties is usually asymmetric (Hart 1993). It has been appropriately observed that only in a world in which contracts are incomplete corporate governance can be

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<sup>1</sup> The point has been made, among others, by Sacconi (2006, 2007) and Blair & Stout (1999).

a topic of interest (Zingales 1998: 499). If contracts were complete, authority and corporate governance would be redundant: a series of spot contracts would suffice, so that corporate governance would boil down to contractual governance.

Still, the challenge for the firm as a nexus of specific investments is to create reliable safeguards ensuring that the attribution of control, with particular regard to the right to appoint Board members, does not lower the non-controlling constituencies' incentives to invest. My view is that fiduciary duties are a critical tool to this end.

## **2. The notion of fiduciary obligation**

My attempt here is to specify the basic features of the multi-fiduciary approach to corporate governance. I shall show in subsequent sections that under certain conditions the multi-fiduciary model does not leave managers free to pursue their interest alone by exploiting their role of “mediating hierarchs”<sup>2</sup>.

The first point I shall be dealing with is whether the fiduciary relationship between the corporate managers (directors and officers) and the shareholders can be interpreted as an agency relationship. Interestingly, for a long time, the category of fiduciary duties has been analysed with the instruments of the law of trusts (Brudney 1985: 1407). Great examples of a trusteeship approach to the problem of managers' duties come from Berle's work of 1931, and from Dodd's answer in 1932, on the *Harvard Law Review*. The opinion of the two authors differed on the crucial question *For whom are corporate managers trustees?*. Both authors substantially agreed, however, on framing the problem of managers' fiduciary duties within a *trusteeship* framework. The word trusteeship is an English jurisprudence invention, and stands for the appropriate standard of conduct of individuals or groups who control or manage assets they do not beneficially own (Kay 1997: 114)<sup>3</sup>. In their fundamental work, Grossman and Hart (1986) have described ownership as the right to take residual and un-contracted upon decisions within an incomplete contractual arrangement. The authors described, perhaps unintentionally, exactly the role of a trustee (Kay 1997: 114). The settlor of property, for example, unable to determine the circumstances that can arise after his death, appoints a trustee who has authority to determine the courses of action in those contingencies that could not be foreseen at the time of the establishment of the contractual relationship (Leslie 2005: 1).

The great contender to a trusteeship approach to corporate directors' duties is agency theory, a line of thought much more developed analytically than trusteeship. In his celebrated 1985 article, Professor Clark wondered whether the agency model describes accurately the relationship between the stockholders

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<sup>2</sup> The expression is borrowed from Blair & Stout (1999). The point that managers need a single-valued objective function in order to be evaluated in a principled way is typically associated to Jensen (2001). He remarks that “stakeholder theory should not be viewed as a legitimate contender to [shareholder] value maximisation because it fails to provide a complete specification of the corporate purpose or objective function. To put the matter more concretely, whereas value maximisation provides corporate managers with a single objective, stakeholder theory directs corporate managers to serve ‘many masters’ ” (Jensen, 2001: 9). This essay tries to show the inaccuracies of this reasoning, by showing that an inclusive and multi-valued objective function can indeed be prescriptive and morally binding for corporate managers.

<sup>3</sup> The leading case is *Learoyd v. Whiteley* (House of Lords, August 1<sup>st</sup>, 1887). In this ruling it was established that “as a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs”.

and the directors and officers, and the relationship between directors and officers and the corporation as such. *The answer he gave was clearly negative.* Normatively, while agency theory (equated here to shareholder primacy) asks directors to maximise the value of the equity holders' investment, trusteeship asks them to sustain the value of all assets of the corporation (Kay 1997: 114). In the trusteeship perspective, therefore, the claim of the shareholders is one of the claims the trustee has to take into account, an idea coherent with the framework of Sacconi (2006a), discussed in Section 4.

The extent to which trust is granted to managers is usually limited by a set of standards (or fiduciary duties). In this regard, Frankel (1998: 129) has underlined that the overarching aim of fiduciary law is promoting trust: fiduciary law vests in fact in the trustor the legal right to rely on the trustworthiness of his trustee, by imposing obligations on the latter.

After this brief introduction to the concept of trusteeship, I come back to the question of extending fiduciary protection to an array of trustors, the stakeholders of the corporation. Saying that trusteeship provides us with better analytic tools than agency, as argued by the prominent American law scholar quoted above, is in fact not enough: we must still identify who the trustors are<sup>4</sup>.

Two analytical levels in trusteeship theory can be distinguished, (Licht 2004: 7):

1. trustee's duty to mediate among the trustors' legitimate interests, and to preserve and enhance the value of the assets under her control. These assets are the specific investments of all the corporate stakeholders, investments that are used as inputs in the production stage, processed through the competencies that amass at the top management layers of the corporation<sup>5</sup>;
2. trustee's conflict of interests, i.e. the peculiar case in which she can be tempted to divert to herself a share of the cooperative surplus which would seem irrational under ideal bargaining conditions. This constitutes a powerful deterrent for specific investments to take place *ex ante*.

Two remarks are under way at this point. First, although the behavioural foundations of the model cannot be explored here, suffice it to say that the trusteeship strategy complicates the agent's motivational structure<sup>6</sup>. Trusteeship is in fact an *ex ante* strategy that tries to act on the economic agent's incentives, much in the same way in which rewards try to do the same from an *ex post* perspective (Hansmann and Kraakman 2004b). Secondly, trusteeship does not apply only to directors: the law may call to act as trustees external institutions, such as Courts or consulting firms. For example, trusteeship is encouraged by most corporate law jurisdictions, whenever laws (or self-regulation codes) provide for a number of independent directors to sit on the Board (*cf.* e.g. article 2387 of the Italian Civil Code).

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<sup>4</sup> As the Supreme Court of the United States wrote in the case *SEC v. Chenery Corp.* (318 US 80 [1943]), "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?". Framing directors' duties as trustees' duties, therefore, is only a (descriptively coherent) starting point to ask ourselves to whom the fiduciary protection should be accorded.

<sup>5</sup> I have argued along these lines in Chapter 2 of Danese (2007).

<sup>6</sup> Trusteeship, in fact, "assumes that, in the absence of strongly-focused or 'high-powered' monetary incentives to behave opportunistically, agents will respond to the 'low-powered' incentives of conscience, pride and reputation and are thus more likely to manage in the interests of their principals" (Hansmann & Kraakman 2004a: 27). Trusteeship thus complicates the rudimentary anthropology of *homo economicus*, a feature that opens the possibility to establish a link between this heterodox approach to fiduciary duties and the recent behavioural literature on the motivational complexity of the agents (Fehr and Schmidt, 2000).

The jurist's viewpoint on fiduciary duties is that they are an example of legal claims (Hohfeld 1917). Legal claims are demands addressed on other subjects: in this sense they are *correlative*, for a legal claim makes sense only if we look at the correlated duties it brings about, i.e. the kind of obligations it imposes on subjects other than the rightholder (*cf.* Sacconi 1991: 56). I turn now to a description of the multi-fiduciary model, where notions will be applied that have been outlined so far.

### 3. The structure of the multi-fiduciary model

I outline in this section the fundamental steps that justify the contention that fiduciary protection should be attributed in an *inclusive* rather than *exclusive* fashion:

1. the stakeholders' contracts with the firm, arising out of formal contracts or of stakes alone (implicit contracts), are incomplete: they do not contain clauses, i.e. applicable standards of behaviour, for unforeseen contingencies;
2. the investments of the stakeholders are firm-specific: they are made with regard to a specific contractual (or governance) relationship. In the case of non-specific assets, transaction cost considerations would lead rational agents to use market contracting, rather than an authority-based system. Asset specificity determines that the resources used for a certain purpose cannot be transferred elsewhere without loss of value, which leads stakeholders to keep their investments in the firm rather than to resort to the marketplace to realise their value;
3. the joint cooperative surplus, on which legitimate claims arise in the distribution stage, depends crucially upon *ex ante* investments by all stakeholders, investments in human, equity, debt and trust capital, as well as on valuable elements such as reputation and leadership;
4. if the parties are assumed to be opportunistic in their contractual behaviour, which is particularly likely whenever the corporate controllers do not undertake a credible commitment to abide by a principle of distributive fairness, asset specificity determines that in unforeseen contingencies there will be space for renegotiation, where those who enjoy control have a favourable bargaining position; every non-controlling constituency's investment is thus potentially at risk;
5. if control rights are given to a party only, then that constituency can make a credible threat to exclude others from the nexus of investments. In this sense, for control to be wielded legitimately, and for specific investments to take place at second-best levels<sup>7</sup>, authority holders have to choose such corporate policies that bring about a state of the world whose distributive characteristics resemble the ones that would be settled upon in an ideal bargaining situation.

I argue that, in order to keep all these pieces together, we need to guarantee that those who can take relevant decisions in the corporation, even if elected by a party only, are fiduciaries of all stakeholders. The fiduciary duty to reward all parties as would seem rational in a hypothetical deliberative setting (Sacconi's *pactum unionis*, which I shall explore later on in this essay) constitutes a credible

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<sup>7</sup> Grossman and Hart (1986) show that the attribution of control rights lowers inescapably someone's investment decision, precluding the possibility to reach first best investment decisions.

safeguard for all stakeholders that they will be equitably treated and fairly remunerated by the corporation in the distributive stage.

*The five points I have outlined above are meant to provide a descriptive argument in favour of a normative stakeholder theory implying an extension of fiduciary protection to all legitimate stakeholders.*

A potential critique to this argument is that non-shareholder constituencies are protected enough by contract, and that fiduciary protection should be accorded to the residual claimants only. This is opinion of scholars of the calibre of Macey & Miller (1993: 410). They claim that fiduciary protection should be accorded to shareholders, and to them only, for the aggregate value of the fiduciary duties to the corporate constituencies diminishes as the number of beneficiaries grows. This contention overlooks, however, the central claim that authority, and exclusive fiduciary protection accorded to one constituency only, interferes negatively with many constituencies' investment decisions. Fiduciary protection cannot, therefore, be regarded as a commodity whose value is negatively correlated with the number of trustors.

A point that should be retained from the nexus of contracts literature, however, is that fiduciary duties should be narrowly defined. It is interesting to ask whether this is at odds with the *scope* of fiduciary protection attribution. The answer to this question seems to be negative: managers can be required to refer to an ideal bargaining situation, where the stakeholders are ignorant about the specific attributes of their entitlement. The correlative duties that arise out of such enlarged fiduciary obligation, which descends from an ideal bargaining setting, are thus not arbitrary. Rather, a new corporate objective function and a balancing criterion which respects basic criteria of equity and rationality will be the result of this approach to moral thinking, which is known as *Social Contract ethics*. Emphasis is laid on the assumptions of this model and on its conclusions. The interested reader finds references in the text for a formal exposition.

#### **4. The Social Contract amongst the corporate stakeholders<sup>8</sup>**

The firm's characterisation as a nexus of specific investments opens the door to a normative problem of mediation among possibly competing claims. Furthermore, I have argued that responsibilities arise for corporate managers to manage the relationships with an array of stakeholders, arguably the essence of Corporate Social Responsibility (CSR). In this section possible answers are provided to the question of how we can specify the content of the extended fiduciary obligations towards all stakeholders, in such a way as to provide clear managerial guidance<sup>9</sup>.

The definition of CSR with which Sacconi provides us is the following:

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<sup>8</sup> This section draws substantially from Sacconi (2004, 2006, 2007).

<sup>9</sup> Compare Jensen (2001) and note 2. The introduction of an intergenerational dimension within the corporate-policy design process can possibly add even more indeterminacy about the managerial bottom line. It was Rawls who first noticed that the problem of intergenerational justice "subjects any ethical theory to severe if not impossible tests" (Rawls 1999: 251). If, however, following Rawls, we interpret the original position as a perspective that we can adopt at any time we might be seeking guidance, then it is straightforward that it must not make any difference when or who is taking this perspective. The conclusions reached should be constant (Rawls, 1999: 120).



“a model of extended corporate governance whereby those who run a firm (entrepreneurs, directors, managers) have responsibilities that range from fulfilment of their fiduciary duties towards the owners to fulfilment of analogous fiduciary duties towards all the firm’s stakeholders” (Sacconi 2006a: 262).

CSR is viewed hence as a *corporate governance framework*<sup>10</sup> which extends fiduciary protection from a mono-stakeholder perspective, in which the only relevant stakeholder for the design of corporate policy is the shareholders, to a multi-stakeholder one, in which valid entitlements over the firm’s cooperative surplus are held by a variety of claimants. The enterprise creates a legitimate system of governance only in the case in which the residual right of decision is completed by fiduciary duties towards all those constituencies that are at risk of abuse from the enterprise, and that do not enjoy the residual right of control.

Given that in cooperative ventures, such as the firm, several legitimate claims compete for a share of the cooperative surplus, “[...] we need a criterion able to identify the balance that any whatever stakeholder would accept as the basis for its voluntary cooperation with the firm: that is, an impartial criterion” (Sacconi 2004: 13). The First Social Contract (or *pactum unionis*) has been proposed by Sacconi as the balancing criterion we are seeking, i.e. an ideal bargaining situation where force and fraud are not allowed, and with the possibility of dropping out. The First Social Contract is a constitutional agreement which the stakeholders reach amongst themselves to set up a generic *Vereinigung*, once they recognize

that if they cooperate they can benefit from the super-additivity of benefits (formally:  $\frac{\partial Y}{\partial x_1 \partial x_2} \geq \frac{\partial Y_1}{\partial x_1} + \frac{\partial Y_2}{\partial x_2}$ ),

or sub-additivity of costs ( $\frac{\partial C}{\partial c_1 \partial c_2} \leq \frac{\partial C_1}{\partial c_1} + \frac{\partial C_2}{\partial c_2}$ ). In the *pactum unionis*, the contractors single out one constituency, the one that minimises governance costs while minimising the contracting costs of all other parties, as in Hansmann (1996).

The *pactum unionis* is complemented in Sacconi’s analysis by a second agreement, named Second Social Contract (or *pactum subjections*). Here, the stakeholders constitute a real governance structure for the association, and agree to accept authority (and appointment and residual rights to a single constituency) if the corporate decision-makers respect two different kinds of proviso:

1. A NARROW FIDUCIARY PROVISIO: the “owners”, who manage the corporation directly (closely-held corporations) or appoint the Board of Directors (as it typically happens in public companies), are remunerated with the maximum residual revenue possible. However, all other stakeholders will accept the wielding of authority only in the presence of a further, extended, fiduciary proviso.

2. AN EXTENDED FIDUCIARY PROVISIO:

2.1 towards the non-owners: the firm must abstain from activities that impose negative externalities on constituencies that do not take part in the corporate activities, or compensate them

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<sup>10</sup> This definition of CSR as a corporate governance framework, albeit not the only possible one, seems coherent with the definition to be found in the Green Paper on *Promoting a European Framework for CSR* which talks of CSR in terms of “open governance”.

so that they remain neutral. Furthermore, the firm must remunerate the stakeholders participating in the activities of the corporation with payoffs which, taken for granted a fair status quo, must be somewhat tied to the firm's economic performance. The aim is to approximate fair shares of the cooperative surplus, which would seem rational in a hypothetical bargaining situation (the *pactum unionis*);

2.2 towards the owners: the firm must remunerate the owners with the maximum residual, compatible with fair remuneration of the specific investments made by all other constituencies.

Authority is thus delegated to the stakeholder who is most efficient in performing governance functions. This class is remunerated with the residual earnings, and is chosen to appoint those who will actually manage the firm, i.e. the managers. The wielding of authority is legitimate as long as the controlling constituency, or its appointees, conforms to the First Social Contract. The resulting corporate goal is not the univocal maximisation of any constituency's stake. Rather, the manager faces a hierarchy of goals descending from the *pactum unionis*, which can be ordered from the broadest to the narrowest:

- minimize the negative externalities that affect individuals or constituencies which do not participate in the transactions, both in regard to present and future corporate stakeholders. By minimizing externalities on future stakeholders, corporate decision-makers take care of a sub-class of future generations' members. In so doing, they provide a relevant contribution to the implementation of any sustainability strategy, as will be argued later in this essay. The absence of externalities constitutes thus the first filter for admissible corporate policies under the Social Contract (amongst the stakeholders) view. Those not participating directly in the transactions have a right to remain unaffected by the activities of the firm.
- devise the appropriate corporate policy that results in the maximization of the value of the stakes, as approximated by the Nash solution to the bargaining problem, of all legitimate stakeholders.
- within this "subset" of admissible policies, the manager should pursue the maximum possible shareholder value.

It is evident that such a hierarchy of goals determines fairly univocally compliant (with the Social Contract) and uncompliant corporate policies. The distribution of the cooperative surplus is thus not left to managers' discretion: each stakeholder should get a share that approximates what each category would get in an ideal bargaining situation. Managerial guidance as to the maximand<sup>11</sup> that should be pursued comes from Nash's solution to the bargaining problem over the cooperative surplus, providing a solution to the bargaining problem we have dubbed *pactum unionis*. The properties of this solution are well known. In particular, Nash's solution to the bargaining problem ensures that:

1 the bargaining parties obtain at least the payoff that they would obtain had they abstained from entering the team;

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<sup>11</sup> Maximand, a term proposed by Licht (2004), stands here for the corporate objective function that managers are asked to maximise.

2. the solution distributes the product in such a way that, in a two-persons game,  $\frac{\partial U_1}{\partial U_2} = -\frac{a_1}{a_2}$ , where  $U_i$

is the utility of stakeholder  $i$  associated to a generic transaction, and  $\frac{a_1}{a_2}$  is a distributive ratio: for each unit of utility given to player 1, it measures how much it is given to player 2. Nash's solution distributes utilities proportionally to the ratio between the marginal variations in the players' utilities. If the utility units are interpersonally calibrated, this can be interpreted as equivalent to a distribution proportional to the relative needs of the players, a characteristic that makes up to the fairness (and acceptability from an impartial position) of the solution. Similarly, guidance as to the way in which distributive conflicts should be adjudicated comes by reference to the *pactum unionis*, i.e. an impartial setting in which ignorance about one's particular objectives prevails.

The single most interesting result of this argument is that shareholders have now a legitimate claim to a fair remuneration, and not to the maximum possible remuneration, of their investment. This opens the way both to a multi-stakeholder governance style and to the concept of sustainability, in order to ensure that flows of specific investments will be provided *now* and *in the future*. The sustainable corporation secures itself future stakeholders' investments by committing itself at the current time to provide them with a fair share of the cooperative surplus at future times. This can only be achieved if current corporate policies do not undermine future generations' ability to meet their needs.

Sacconi's *pactum unionis* arguably constitutes an important starting point in order to shape a constructivist methodology capable of delivering principles of intergenerational justice. Moreover, Rawls's characterisation of the motivational structure and of the information available to contractors seems applicable to the corporate stakeholders' constitutional problem. We need in fact "to create (or, more precisely, to imagine the creation of) a certain kind of choice situation – an 'original position' – such that whatever principles are chosen it will be just" (Barry 1989: 265). These are issues of intergenerational justice to which I turn my attention in the remainder of this paper. The next section defines sustainability, referring succinctly to the European Union institutions' documents on the subject.

## 5. Sustainability and the European Union

I adopt here the conventional definition of Sustainable Development (SD) of the Brundtland Report (WCED 1987: 43): development is sustainable whenever the satisfaction of the needs of the present does not compromise the ability of future generations to meet their own needs. Otherwise stated, sustainable development implies a weighing of present needs against those of future generations (Postma 2002: 44), with the aim of "minimising our interference with the lives of future generations" (*id.* at 47), what the author names a "negative morality" approach. The compatibility of this approach with the principles of justice stemming from Sacconi's *pactum unionis* is striking.

Two different dimensions of sustainability are usually patched together in the EU institutions' documents<sup>12</sup>, and must be clearly spelled out (Vercelli 2005a): on the one side, a criterion of equity in the

<sup>12</sup> To quote an example, *cf.* 10255/1/05 (Presidency Conclusions- Brussels European Council of June 2005).

intergenerational distribution of resources; on the other, an issue of resource allocation among contemporaries. I shall concentrate here on the first aspect, involving the equitable treatment of future generations, leaving the second for future study.

Generally speaking, corporations can hardly be expected to take care of the welfare of future generations, as such an obligation would be too broad and too difficult to define. A more modest (and more realistic) contribution to any sustainability strategy would be to expect them to take care of the welfare of future generations of their most likely stakeholders<sup>13</sup> (a similar contention can be found in Steurer et al. 2005: 274, and in the works quoted therein).

The firm, like society at large (Rawls 2005: 15), is interpreted here as a fair system of cooperation over time. This provides us with a first, convincing answer to the question of why corporate decision makers should take care of the stake in a venture operating at the present time of future generations of stakeholders. The answer can be found in the remark that future generations have a legitimate stake in the corporate decisions taken now. I subscribe therefore to Vercelli's definition of the sustainable enterprise: it is that enterprise which *enduringly* creates value for its stakeholders (Vercelli 2005b: 361)<sup>14</sup>.

The European Union has devoted a considerable effort in promoting the adoption of sustainable practices at all levels of public and private decision-making. In COM (2001) 264 final (*Commission's proposal to the Gothenburg European Council*), it is stressed that the EU sustainability strategy completes the Lisbon framework by adding an environmental dimension to the social cohesion and economic growth objectives (p. 2). The report quotes several problems that pose a serious threat to sustainable development: emissions of greenhouse gases and the resulting global warming and loss of biodiversity, above all. Intended as a concern for environmental issues and new generations' welfare, CSR has a well-established link to sustainability, as implied by the Commission's definition of CSR:

“by stating their social responsibility, and voluntarily taking on commitments which go beyond common regulatory and conventional requirements, which they would have to respect in any case, companies endeavour to raise the standards of social development, environmental protection and respect of fundamental rights and embrace an open governance, reconciling interests of various stakeholders in an overall approach of quality and sustainability” (COM(2001) 366: 3).

The proper framework in order to analyse the problem of balancing contemporary and future interests comes from Sacconi's Social Contract. The bridging between a static model such as Sacconi's and the

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<sup>13</sup> In a recent motion for a European Parliament resolution on *CSR: A New Partnership*, Rapporteur Richard Howitt states that “whereas companies cannot be a substitute for public authorities when the latter fail to exercise control over compliance with social and environmental standards, ... increasing social and environmental responsibility by business, linked to the principle of corporate accountability, represents an essential element ... of Europe's Strategy for Sustainable development” (p. 6, 2006/2133 (INI)).

<sup>14</sup> Similarly, the sustainable enterprise has been defined in the managerial literature as the enterprise with a long-term orientation, aiming at a 'zero-discharge' and 'zero-risk' goal, just as the 'zero-defects' goal in quality control demands preventative action and continuous improvement at each step of the production process (Shrivastava 1995: 945).

issue of sustainability can be established by drawing insights from Rawls's characterisation of the original position.

## 6. Sustainability in the context of Social Contract Business Ethics

Corporations should take care of contemporary and future stakeholders' interests as they recognise the legitimacy of their entitlement. This obligation calls for a normative theory providing corporate managers with both a maximand, capable of replacing the unsatisfactory present share-value maximisation norm, and a criterion for adjudicating conflicts among potentially diverging claims. The normative theory adopted here is Social Contract Business Ethics (SCBE), a position grounded on the "idea that human interaction and association should be guided and constrained only by those norms and institutions that freely consenting agents could and possibly would agree to if they had the choice" (Heugens et al. 2006: 213). The term *SCBE* merges the contractarian and contractualist approaches to the justification problem of contracting, in particular mutual advantage versus impartiality, a much debated divide within such normative theory I shall leave unaddressed here (*cf.* Barry 1989).

The sustainable corporation internalises in its objective function the welfare of the future generations of stakeholders and of the environment, intended as a stock of natural resources. In this regard, the Social Contract should provide guidance as to the responsible treatment of the environment and of the stakeholders operating in the future. Regarding the environment, as a stock of natural resources, the Social Contract should be an ideal reference point for corporate decision-makers in managing the ecological footprint<sup>15</sup> of the corporation. A ready example comes from decisions on CO<sub>2</sub> emissions, a point explicitly mentioned in the *Communication from the Commission on the Review of the Sustainable Development Strategy* (COM(2005) 658 final, p. 4).

But how can we account for the entitlement of the environment in the design of corporate policy? Can the environment even be considered as a stakeholder *strictu sensu*, i.e. one of the participants to the formation of the Social Contract? My answer is that the interest of the environment is accounted for whenever future generations of stakeholders are guaranteed a fair share of the cooperative surplus. This is to say that environmental protection, and sustainable development, if the two terms are taken to be coextensive, is a natural follow-up to the equitable treatment of contemporary and future stakeholders of the firm. In this regard, my view diverges from the position of those theorists defending an approach based on the notion of corporate environmental responsibility (*cf.* e.g. DesJardins 1998). These authors typically derive from this responsibility a duty to use sustainably the natural resources. Alternatively, I argue here that the Social Contract should contain enough specifications as to the corporate policies that should be adopted in order to make environmental protection a natural result of the process of corporate policy design. The perspective of the "users" of the environment is thus privileged, assuming a sustainability approach in that we consider all generations of users, instead of an approach based on the notion of natural environment as primordial stakeholder, i.e. as a separate category of analysis (an example of this approach

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<sup>15</sup> The concept was first introduced by William Rees in 1992, and stands for the demand of humans (or aggregates of humans) on nature.

can be found in Driscoll & Starik 2004). This is coherent also with the spirit of several institutional documents dealing with Sustainable Development issues, such as the Brundtland Report, whereby it is stressed that the main aim of Sustainable Development is not the minimisation of negative environmental effects, but rather the maximisation of intergenerational welfare (*cf.* Steurer 2005: 273).

The results of the two approaches are, however, markedly similar. In particular, both Social Contract and environmental responsibility theorists would agree on the fundamental point that each “business has the obligation to use resources at appropriate rates and compensate ecosystems for the loss of productive capacity caused by its activity” (DesJardins 1998: 832). From the Social Contract viewpoint, in fact, doing otherwise would impinge on the ability of future stakeholders to enjoy an intergenerationally fair share of the cooperative surplus.

In sketching the basic features of the “sustainable” Social Contract amongst the stakeholders, we find important insights in the Rawlsian construction of the original position. From the viewpoint of a mutual advantage version of SCBE (*contractarianism*), the relationship between the contemporaries and later generations is characterised by an asymmetry of power and knowledge (Barry 1977: 273). Consequently, the establishment of a genuinely moral relationship is compromised. In this sense, following a remark by Barry (1989: 192), it seems appropriate to talk about a problem of justice *with respect to* other generations, rather than of justice *between* generations.

Rawls provides us with an influential analysis of this problem, whereby the fair terms of social cooperation are grounded on the notion of *reciprocity*, i.e. a blend of impartiality and mutual advantage (Quong 2007; Rawls 2005: 16-17).

In *A Theory of Justice* (revised edition of 1999) Rawls describes a fair procedure capable of delivering impartial principles of justice. The idealised deliberative setting Rawls describes is called “original position” (Rawls 1999: 118), while the procedural method “veil of ignorance” (*id.*). In the original position, “no one knows his situation in society nor his natural assets, and therefore no one is in a position to tailor principles to his advantage” (Rawls 1999: 120-121). Furthermore, ignorance is to be assumed about the stock of natural resources available and the state of technology (Rawls 2005: 273). Since the contractors cannot identify themselves in the original position by description, several problems such as coalition formation or tailoring one’s own interests are solved. The fundamental feature of contractors in the original position is that they are to be understood solely as free and equal moral persons, deliberating behind a “thick” veil of ignorance (Rawls 2005: 273).

From an *informational* point of view, therefore, the contractors face ignorance about their own identities, i.e. ignorance regarding their actual role in society and regarding the exact time in which they will be operating. He adds:

“There is also, theoretically anyway, the question of a reasonable genetic policy. In these cases too, in order to carry through the idea of the original position, the parties must not know the contingencies that set them in opposition.

They must choose principles the consequences of which they are prepared to live with whatever generation they turn out to belong to” (Rawls 1999: 119).

The Social Contract, therefore, should contain rules that apply to each possible generation in which the constituents may be called to live. The relevance of such argument for the present purposes is evident. The sustainability problem is in fact eased in the moment in which the Social Contract is viewed as a bargaining stage in which the contractors choose an appropriate constitution without specific regard to time.

I must briefly mention, however, some of the problems raised by the early Rawlsian analysis of the problem of intergenerational equity, difficulties illustrated in Brian Barry’s *Justice Between Generations* (1977). Rawls (1999: 121; 2005: 273) postulates that those behind the veil of ignorance form an assembly of contemporaries, taking as a reference point the time of entry. The contractors know that they will all be living at the same time, albeit they ignore in which specific time they will be operating. According to Barry, this opens the door to an  $n$ -generation prisoner’s dilemma: each cohort of contemporaries may be willing to constrain its choices, for the sake of sustainability, only on the condition that predecessors have done the same. Notice, however, that the Rawlsian original position entails ignorance about predecessors. It is a straightforward conclusion that it would be optimal to exploit the environment at one time, after all other generations have adopted an optimal saving rate. As all generations are symmetrically rational, the classical prisoner’s dilemma failure obtains (*cf.* for a practical example De-Shalit 1995: 96)<sup>16</sup>.

According to Barry, Rawls should have dropped the postulate of contemporaneousness, and allow for contractors belonging to all possible generations of human history, in order to make comparisons with predecessors irrelevant. This, however, is not the path followed by Rawls, who in the *Theory* ties together “predecessors”, “contemporaries” and “successors” in a more subtle fashion, by imagining the contractors as family lines:

“to achieve a reasonable result, we assume first, that the parties represent family lines, say, who care at least about their more immediate descendants; and, second, that the principle adopted must be such that they wish all earlier generations to have followed it. These constraints, together with the veil of ignorance, are to insure that one generation looks out for all” (Rawls 1999: 255).

The *principle* Rawls mentions in the above quotation is the “savings principle”, according to which “each generation must not only preserve the gains of culture and civilisation, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable

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<sup>16</sup> Of a different opinion is English (1977). She points out that even assuming a present-time-of-entry interpretation without any further specifications, the savings rate will be positive, due the fact that at each time of history several generations co-exist. Each contractor behind the veil of ignorance tries to maximise her welfare over the entire life-span. She does not know, however, whether she will turn out to belong to the class which we label “young”, or “middle-aged”, or “elderly”. Even in a context of contemporary non-tuists, therefore, contractors behind the veil of ignorance will decide to save. This contention leaves unaddressed, nevertheless, the problem of decisions which produce effects beyond the reasonable life-span of the contractors.

amount of real capital accumulation” (Rawls 1999: 252). Such principle descends directly from Rawls’s characterisation of society as an intergenerationally calibrated system of fair cooperation.

The statement of the problem to be found in the later *Political Liberalism* (2005) is, however, slightly different. The construction of the original position entails here that the agreement reached is nonhistorical, by this meaning that the contractors want all previous generations to have reached a similar agreement, according to the principle of reciprocity:

“Thus the correct principle is that which the members of any generation (and so all generations) would adopt as the one their generation is to follow and as the principle they would want preceding generations to have followed (and later generations to follow), no matter how far back (or forward) in time” (Rawls 2005: 274).

In a footnote to the passage quoted above, Rawls notices that this formulation does not alter the fundamental motivational structure of the decisions-makers deliberating behind the veil of ignorance, based on non-tuism. On the contrary, in *A Theory of Justice* Rawls appeals to a “motivational dimension”, introducing a constraint according to which each contractor cares about some of her immediate successors. This motivational stipulation introduced in *A Theory of Justice* has been harshly criticised by Barry (1977: 279), who stresses the instrumentality of this constraint in order to justify obligations to posterity. Furthermore, this constraint would be incoherent with the original position’s basic features, especially with the principle of non-tuism that leads to the maximisation of one’s own self-interest in terms of primary goods<sup>17</sup> (*cf.* in particular section 25 of Rawls’s *Theory of Justice*).

However, Barry’s proposal of a gathering of all generations behind the veil of ignorance does not seem as a practicable alternative. This solution entails in fact formidable cognitive and descriptive problems, difficulties recognised by Barry himself (1977: 280). As Rawls notices:

“the original position is to be characterised with sufficient exactness so that it is possible to work out from the nature of the parties and the situation they confront which conception of justice is favoured by the balance of reasons” (Rawls 2005: 274).

The exactness problem mentioned in the above quotation seems therefore to disqualify Barry’s solution. I have mentioned, however, the difficulties of the family-lines argument proposed in the *Theory*.

Overall, the analysis of the “genetic problem” to be found in *Political Liberalism* seems to constitute a better reference point for the present purposes than the one defended in *A Theory of Justice*. The approach based on the notion of reciprocity is in fact more coherent with the fundamental descriptive features of the Rawlsian original position and with the characterisation of the *pactum unionis* of section 4, which is a direct application of the original position methodology.

## **Final Remarks**

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<sup>17</sup> These are goods that increase the contractors’ ability “to achieve whatever she wants or desires”, and comprises basic liberties (De-Shalit 1995: 101).



I have tried in this essay to sketch some features of the multi-fiduciary approach to corporate governance. I have also tried to link this model to the issue of sustainability, and in particular to the EU sustainability strategy. I have proposed that the business enterprise can contribute effectively towards Sustainable Development if corporate decision-makers grant fiduciary protection to all legitimate stakeholders at present and future times, by referring to a decisional setting deprived of time-references (the Social Contract amongst the stakeholders). In the approach defended in this essay, and coherently with Rawls' analysis in *Political Liberalism*, contractors behind the veil of ignorance deliberate about the rate of consumption of natural resources in the same way in which they would have desired all previous generations had deliberated.

## References

- Barry, B.M. 1977. 'Justice Between Generations'. In Hacker, P.M.S. and Raz, J. (Ed.), *Law, Morality, and Society. Essays in Honour of H.L.A. Hart*. Oxford: Clarendon Press.
- Barry, B. 1989. *Theories of Justice*. Berkeley: University of California Press.
- Berle, A. 1931. 'Corporate powers as powers in trust'. *Harvard Law Review*, 44, 1049-1074.
- Blair, M.M. and Stout, L.A. 1999. 'A Team Production theory of Corporate Law'. *Virginia Law Review*, 85: 2.
- Brudney, V. 1985. 'Corporate Governance, Agency Costs, and the Rhetoric of Contract'. *Columbia Law Review*, 85: 7.
- Clark, R. 1985. 'Agency costs versus fiduciary duties'. In Pratt, J., Zeckhauser, R. (Eds.), *Principal and Agents: the Structure of Business*. Cambridge, MA: Harvard Business School Press.
- Commission of the European Communities. 2001. *Green Paper. Promoting a European Framework for CSR*. COM(2001) 366.
- Commission of the European Communities. 2001. *Communication from the Commission. A sustainable Europe for a better world: a European Union strategy for sustainable development. Commission's proposal to the Gothenburg European Council*. COM(2001) 264 final.
- Commission of the European Communities. 2005. *Communication from the Commission to the Council and the European Parliament. On the Review of the Sustainable Development Strategy*. COM(2005) 658 final.
- Commission of the European Communities. 2006. *Communication from the Commission. Implementing the partnership for growth and jobs: making Europe a Pole of Excellence on Corporate Social Responsibility*. COM (2006) 136 final.
- Council of the European Union. 2005. *Presidency Conclusions- Brussels European Council*. 10255/1/05.
- Danese, G. 2007. 'Responsible Governance: the fiduciary perspective'. *Laurea Magistralis Dissertation*, available at the website [www-ceel.economia.unitn.it/staff/danese/index.html](http://www-ceel.economia.unitn.it/staff/danese/index.html).
- De-Shalit, A. 1995. *Why Posterity Matters*. London: Routledge.
- DesJardins, J. 1998. 'Corporate Environmental Responsibility'. *Journal of Business Ethics*, 17, 825-838.
- Dodd, E. M. 1932. 'For Whom are Corporate Managers Trustees?'. *Harvard Law Review*, 45, 1145-63.
- Driscoll, C. and Starik, M. 2004. 'The Primordial Stakeholder: Advancing the Conceptual Consideration of Stakeholder Status for the Natural Environment'. *Journal of Business Ethics*, 49, 55-73.
- English, J. 1976. 'Justice Between Generations'. *Philosophical Studies*, 31, 91-104.
- European Parliament. 2001. *Report on corporate social responsibility: a new partnership. Rapporteur: Richard Howitt*. 2006/2133 INI.
- European Parliament. 2006. Resolution of 13 March 2007 on CSR: a new partnership. 2006/2133 INI.
- Fama, E.F. and Jensen, M.C. 1983. 'Separation of Ownership and Control'. *Journal of Law and Economics*, 26: 2, 301-325.

- Fehr, E. and Schmidt, K.M. 2000. 'Theories of Fairness and Reciprocity - Evidence and Economic Applications'. CESifo Working Paper Series No. 403, available at the website: <http://ssrn.com/abstract=255223> (accessed 20 June 2007).
- Frankel, T. 1998. 'Fiduciary Duties' In *The New Palgrave Dictionary of Economics and the Law*. London: Palgrave-Macmillan.
- Grossman, S., Hart, O. 1986. 'The costs and benefits of ownership: a theory of vertical and lateral integration', *Journal of Political Economy*, 94, 691-719.
- Hansmann, H. 1996. *The Ownership of Enterprise*. Cambridge, MA: Harvard University Press.
- Hansmann, H. and Kraakman, R. 2004a. 'Agency problems and legal strategies'. In Kraakman, R. (Ed.), *The Anatomy of Corporate Law*. Oxford: Oxford University Press.
- Hansmann, H. and Kraakman, R. 2004b. 'The Basic Governance Structure'. In Kraakman, R. (Ed.), *The Anatomy of Corporate Law*. Oxford: Oxford University Press.
- Hart, O. 1993. 'An Economist's View of Fiduciary Duty'. *University of Toronto Law Journal*, XLIII: 3, 299-313.
- Heugens, P.P.M.A.R., Van Oosterhout, J.H. and Kaptein, M. 2006. 'Foundations and Applications for Contractualist Business Ethics'. *Journal of Business Ethics*, 68, 211-228.
- Hohfeld, W.N. 1917. 'Fundamental Legal Conceptions as Applied in Judicial Reasoning'. *Yale Law Journal*, 26, 710-770.
- Jensen, M.C. 2001. 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function'. *European Financial Management*, 7: 3, 297-317.
- Kay, J. A. 1997. *The Business of Economics*, Oxford: Oxford University Press.
- Leslie, M.B. 2005. Trusting trustees: fiduciary duties and the limits of default rules. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=711849](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=711849) (accessed 20 June 2007).
- Licht, A. 2004. 'The maximands of corporate governance: a theory of values and cognitive style'. *Delaware Journal of Corporate Law*, 29: 3, 649-746, available at the website <http://papers.ssrn.com>.
- Macey, J.R. and Miller, J.P. 1993. 'Corporate Stakeholders: a contractual perspective'. *University of Toronto Law Journal*, XLIII: 3, 401-424.
- Postma, D.W. 2002. 'Taking the Future Seriously: On the Inadequacies of the Framework of Liberalism for Environmental Education'. *Journal of Philosophy of Education*, 36: 1, 41-56.
- Quong, J. 2007. 'Contractualism, Reciprocity, and Egalitarian Justice'. *Politics Philosophy Economics*, 6, 75-105.
- Rawls, J. 1999. *A Theory of Justice*. Cambridge, MA: The Belknap Press of Harvard University Press.
- Rawls, J. 2005. *Political Liberalism*. New York: Columbia University Press.
- Sacconi, L. 1991. *Etica degli affari*. Milan: Il Saggiatore.
- Sacconi, L. 2004. 'Corporate Social Responsibility as a model of "extended" corporate governance'. Liuc Papers n. 142, available at the website: [www.biblio.liuc.it](http://www.biblio.liuc.it) (accessed 20 June 2007).
- Sacconi, L. 2006a. 'A Social Contract Account for CSR as an Extended Model of Corporate Governance (I): Rational Bargaining and Justification'. *Journal of Business Ethics*, 68: 3, 259-281.

- Sacconi, L. 2006b. Può l'impresa fare a meno di un codice morale?, Associazione per lo Sviluppo degli Studi di Banca e Borsa (Università Cattolica del Sacro Cuore, n. 10, May).
- Sacconi, L. 2007. A Social Contract Account for CSR as an Extended Model of Corporate Governance (II): Compliance, Reputation and Reciprocity. <http://springerlink.metapress.com/content/r48w63708r022432/?p=f84448c410ef4f118f74d04dc86f07bc&pi=1> (accessed 20 June 2007).
- Shrivastava, P. 1995. 'The Role of Corporations in Achieving Ecological Sustainability'. *The Academy of Management Review*, 20: 4, 936-960.
- Simon, H.A. 1947. *Administrative Behavior*. New York: Free Press.
- Steurer, R., Langer, M.E., Konrad, A. and Martinuzzi, A. 2005. 'Corporations, Stakeholders and Sustainable Development I: A Theoretical Exploration of Business-Society Relations'. *Journal of Business Ethics*, 61, 263-281.
- Vercelli, A. 2005a. 'Sviluppo sostenibile'. In Sacconi, L. (Ed.), *Guida Critica alla Responsabilità sociale e al governo d'impresa*. Rome: Bancaria Editrice.
- Vercelli, A. 2005b. 'L'Impresa Sostenibile'. In Sacconi, L. (Ed.), *Guida Critica alla Responsabilità sociale e al governo d'impresa*. Rome: Bancaria Editrice.
- WCED (The World Commission on Environment and Development, also known as the *Brundtland Report*). 1987. *Our Common Future*. Oxford: Oxford University Press.
- Zingales, L. 1998. 'Corporate Governance'. In *The New Palgrave Dictionary of Economics and the Law*. London: Palgrave-Macmillan.
- Zingales, L. 2000. 'In search of new foundations'. NBER Working Paper No. W7706, available at the website: <http://ssrn.com/abstract=232092> (accessed 20 June 2007).