# ENFORCING CORPORATE PURPOSE: COMPARATIVE APPROACHES

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*Business leaders seem to be embracing a new paradigm where the purpose of for-profit corporations is to profit but lawfully, ethically, sustainably, and in the interests of non-shareholder stakeholders. Skeptical of this Damascene conversion to stakeholderism, some corporate law scholars question how directors might be held accountable for falling short of their commitment to some corporate purpose. One suggestion raised is to concretize corporate purpose as a legally binding director's duty to the company. As legal enforcement plays an essential role in compliance with law, the critical question is: How might a corporate purpose duty be effectively enforced? This Article argues that the answer likely lies with neither classic private enforcement by shareholders nor public enforcement*

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*by regulators, but rather a third way with elements of both. Drawing on comparative insights from three East Asian jurisdictions – Taiwan, the People's Republic of China, and Japan – this Article contributes to the enforcement literature in two ways. First, it identifies a novel form of hybrid enforcement ("quasi-private") with distinct characteristics. Second, it critically compares this new enforcement model with an existing hybrid ("quasi-public") in the context of enforcing corporate purpose. Quasi-private enforcement offers a potential solution that avoids most of the serious downsides of private, public, or quasi-public enforcement; is uniquely compatible with a corporate purpose duty; and opens fresh perspectives on making directors more legally accountable.*

https://scholarship.law.upenn.edu/jil/vol45/iss4/1
DOI: https://doi.org/10.58112/jil.45-4.1

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## INTRODUCTION

Corporate purpose is all the rage. The British Academy project on "The Future of the Corporation" led by business school scholar Colin Mayer ambitiously redefines the purposes of business as "solving problems of people and planet."[1] The United Kingdom's Code of Corporate Governance calls on boards of directors to "establish the company's purpose" and align business culture with it.[2] Almost two hundred CEOs of leading corporations in the United States—and therefore of the world—have signed the Business Roundtable's landmark statement in 2019 ("BRT Statement") that each corporation "serves its own corporate purpose" but "share a fundamental commitment to all of [their] stakeholders."[3] The Business Roundtable reaffirmed this statement in 2022, indicating that this change is likely to stay.[4] A seemingly new paradigm, in which the purpose of for-profit corporations is to profit but lawfully, ethically, sustainably, and in furtherance of the interests of critical stakeholders other than shareholders, appears to be emerging.[5]

Business leaders and company directors may be all too happy to profess belief in stakeholderism, and the press no less eager to lap it

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[1] *Future of the Corporation*, BRIT. ACAD. (June 3, 2021), https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/ [https://perma.cc/NS6R-9QGK] [hereinafter *Future of the Corporation*].

[2] FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 4 (2018), https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf [https://perma.cc/7AA4-ZVMJ] (archived June 3, 2021) ("The board should establish the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned. All directors must act with integrity, lead by example and promote the desired culture.").

[3] *Business Roundtable Redefines the Purpose of a Corporation to Promote "an Economy That Serves All Americans"*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/HTT2-CPRJ] [hereinafter BRT Statement].

[4] *See For Long-Term Success, Companies Must Deliver for All Stakeholders*, BUS. ROUNDTABLE (Aug. 19, 2022), https://www.businessroundtable.org/for-long-term-success-companies-must-deliver-for-all-stakeholders [https://perma.cc/7LLA-2ZZH].

[5] *See, e.g.*, Martin Lipton, *The New Paradigm in the C-Suite and the Boardroom*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 8, 2021), https://corpgov.law.harvard.edu/2021/01/08/the-new-paradigm-in-the-c-suite-and-the-boardroom/ [https://perma.cc/6JP2-8WQL]; Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 223, 224–26 (2021); Dan W. Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-America's "Discovery" of Corporate Purpose*, 4 REVUE EUROPÉENNE DU DROIT [Eur. Rev. L.] 14 (2022).

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DOI: https://doi.org/10.58112/jil.45-4.1

up. [6] Non-jurist business school scholars have espoused stakeholderism since before the BRT Statement and continue to do so.[7] But just because company leaders say they believe in doing the right thing, this is completely different from a guarantee that they will act in accordance with it, or refrain from doing anything contrary to it—or even try. Articulating a vision of the good is one thing; whether it can or should be realized, and the role of law in realizing it, is another thing entirely. It is the latter set of questions that occupies *legal* scholars, as evidenced by mainstream corporate law discourse's focus on agency costs and its solutions in the form of *legal* strategies.[8] To corporate law scholars, the question of interest in the corporate purpose wave is: Will company directors be held accountable when they fall short of their commitment to some corporate purpose? If not, then corporate purpose seems hardly distinguishable from yet another non-legally binding public relations effort [9] that seems hardly worth the trouble for *legal* scholars. If yes, interesting questions of what such accountability would look like, the best legal mechanisms for achieving it, and which and how institutions would do the job can be explored.

Unsurprisingly, as a first step, legal scholars suggested that corporate purpose could be given legally binding effect by

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[6] *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 124–25 (2020) [hereinafter Bebchuk & Tallarita, *Illusory Promise*] (citing examples).

[7] *See, e.g.*, Nien-he Hsieh et al., *The Social Purpose of Corporations,* 6 J. BRIT. ACAD. (SUPPLEMENTARY ISSUE 1) 49 (2018); COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013); *see also Research: Investigating the Relationship Between Business and Society, Future of the Corporation*, BRIT. ACAD., https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/research/ [https://perma.cc/H66M-GUHQ] (providing a list of publications and research associated with the Future of the Corporation Project).

[8] *See generally* JOHN ARMOUR ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d ed. 2017) (the leading canonical treatment of corporate law as agency cost problems and solutions).

[9] *See, e.g.*, Jill Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1337 (2021) ("These problems highlight two difficulties inherent with trying to use corporate purpose statements as a legally binding mechanism for effecting operational change—they are neither concrete nor enforceable."); Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1086 (2022) [hereinafter Bebchuk & Tallarita, *Will Corporations Deliver*] ("[T]he BRT Statement did not represent a meaningful commitment."); *see also* discussion *infra* Part a (summarizing a range of perspectives).

incorporation into the law of directors' duties to the corporation.[10] This leads to the next problem: How do we know—or ensure—that company directors would in fact comply with a new corporate purpose duty? This is a critical question: unless there is a reasonable prospect that those subject to the duty, principally directors, would (more or less) comply, it seems hardly worth the effort for jurists to work on conceptualizing and advocating a *legal duty* for corporate purpose. One intuitive jurist's answer to ensuring substantial compliance would be to enforce legal obligations using legal mechanisms against non-compliant subjects and hold them personally accountable for failure to comply.[11] However, law school-based scholars such as "law and social norms" theorists have also from time to time advanced claims as to why persons such as directors would nonetheless perform their legal obligations even without legal liability via enforcement.[12] It was observed that factors of a non-legal but normative (*e.g.*, morals and sense of civic duty) and social (*e.g.*, desire to avoid disapproval from others) nature may motivate compliance with norms even in the absence of law.[13] If compliance with laws and norms is not exclusively driven by law and legal enforcement, does legal enforcement matter? Translated to the corporate purpose context: Is legal enforcement of a corporate purpose duty essential for corporate purpose compliance?

This Article proceeds from the premise that the answers to the above questions are in the affirmative. Without legal enforcement, not only are normative and social factors weakened, but actors, motivated by calculated factors such as the costs versus utility of

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[10] *See, e.g.*, Rosemary Teele Langford, *Use of the Corporate Form for Public Benefit – Revitalisation of Australian Corporations Law*, 43 UNIV. N.S.W. L.J. 977, 990 (2020) [hereinafter Langford, *Use of the Corporate Form for Public Benefit*]; *see also* discussion *infra* Part b (describing approaches to enforcing corporate purpose through legalization).

[11] *See* ARMOUR ET AL., *supra* note 8, at 30 ("Law can play an important role in reducing agency costs. Obvious examples are rules and procedures that enhance disclosure by agents or facilitate enforcement actions brought by principals against dishonest or negligent agents."); *see also id.* at 39 (observing that each legal strategy against agency costs "depends on the existence of other legal institutions—such as courts, regulators, and procedural rules—to secure *enforcement* of the legal norms").

[12] *See* discussion *infra* Part 0 (summarizing several theories of how corporate law institutions and non-legal factors function to create compliance even without legal liability for non-compliant persons).

[13] *See* Renee M. Jones & Michelle Welsh, *Towards a Public Enforcement Model for Directors' Duty of Oversight*, 45 VAND. J. TRANSNAT'L L. 343, 366–67 (2012) (drawing on Søren C. Winter & Peter J. May, *Motivation for Compliance with Environmental Regulations*, 20 J. POL'Y ANALYSIS & MGMT. 675 (2001)).

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DOI: https://doi.org/10.58112/jil.45-4.1

compliance, would also have little incentive to comply. Even the function of corporate law in shaping corporate behavior by generating information and imposing reputational sanctions is premised upon the existence of formal enforcement and the litigation process. The enforcement of such duties through formal legal mechanisms is therefore essential. [14] However, despite enforcement's importance, an enforcement gap for directors' duties persists. Breaches of directors' duties are theoretically enforceable by shareholders in civil proceedings through derivative actions and certain direct actions, but *private enforcement* attempts against directors for breaches of any duties remain (save perhaps in the United States) underutilized in the views of many scholars.[15] This in turn has implications for the effectiveness of deterrence of non-compliant directorial behavior and perceptions of their moral culpability.[16] In a select few jurisdictions, *public enforcement* may be available through dedicated state agencies such as the Australian Securities and Investments Commission ("ASIC"), which enforces the statutory directors' duties under Australia's Corporations Act 2001.[17] While public enforcers have extensive enforcement tools at their disposal, their broad and often conflicting objectives, structural and resource limitations, and need for public funding may lead to difficult compromises that reduce the effectiveness of public enforcement.[18] Less well-resourced or politically stable jurisdictions may also be hard-pressed to find space on the government agenda for public enforcement of corporate law. While private enforcement and public enforcement play vital roles in corporate law

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[14] *See* discussion *infra* Part 0 (arguing in favor of legal enforcement of the corporate purpose duty).

[15] *See infra* note 93 and accompanying text.

[16] As the content of the law, the sanctions imposed for transgressions, and the intensity of enforcement shape how individuals perceive their moral obligations, law and its enforcement impact normative compliance. *See* Renee M. Jones, *Law, Norms and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 130 (2006); *see also* Jones & Welsh, *supra* note 13, at 368. On how law can interact with morality, *see also* Mark Greenberg, *How to Explain Things with Force*, 129 HARV. L. REV. 1932, 1974 (2016) (reviewing FREDERICK SCHAUER, THE FORCE OF LAW (2015)) ("What is needed is an institution that can both change the moral profile—altering what is morally required and permissible and what moral powers people have—and deter or otherwise constrain the behavior of those who are not morally motivated . . . . [L]egal systems can change the moral profile, and it is no surprise that they can deter or constrain those who are not morally motivated.").

[17] *See infra* Parts i and ii (describing and evaluating ASIC).

[18] *See infra* Part ii.

enforcement, neither are complete solutions appropriate for every context or jurisdiction.

But the enforcement toolbox is hardly limited to public or private enforcement. East Asia, for one, offers a wealth of alternatives. Since the 2000s, enforcement of corporate and securities law for investor protection by neither private citizens nor public regulators, but by a "quasi-public"[19] non-profit institution backed by customized legislative frameworks and via modified civil proceedings, has seized the spotlight in Taiwan. More recently, the People's Republic of China adopted a "hybrid" model adopting elements of the Taiwan NPO-led model for the protection of investors.[20]

By contrast, the Japanese state never developed a state-sanctioned institution-based enforcement model. Instead, from the mid-1990s to early-2000s, private citizens and attorneys, pooling resources and leveraging existing legal infrastructure intended for private enforcement, created an organization that enforced corporate law through ordinary civil proceedings. But in pursuing neither profit nor investor protection, but rather public interest objectives, this Japanese enforcer bore little resemblance to either private, public, or even the quasi-public enforcers elsewhere. Rather, the case of Japan gives rise to yet another model, that this Article coins "quasi-private" enforcement. Briefly, quasi-private enforcement is defined as private enforcement mechanisms used by shareholders and their allies who act—and can credibly commit to acting—with public-oriented motivations, *i.e.*, in furtherance of goals shared by other stakeholders. A model quasi-private enforcer is a non-profit organization—either an institutional body or a network—featuring litigation-qualified legal professionals in key roles. The "quasi-private" nature of such enforcers derives from their neither purely private nor public nature, public-oriented goals, and their reliance on the rights, powers, and procedures applicable to all shareholders. This Article will also show how quasi-private enforcement is uniquely promising, as compared with private, public, and quasi-public enforcement models, for use in enforcing a corporate purpose duty.

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[19] *See* Wen-yeu Wang & Jhe-yu Su, *The Best of Both Worlds? On Taiwan's Quasi-Public Enforcer of Corporate and Securities Law*, 3 CHIN. J. COMP. L. 1 (2015) (using "quasi-public" to refer to Taiwan's regime).

[20] Lauren Yu-Hsin Lin & Yu Xiang, *The Rise of Non-Profit Organizations in Global Securities Class Action: A New Hybrid Model in China*, 60 COLUM. J. TRANSNAT'L L. 493 (2022).

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DOI: https://doi.org/10.58112/jil.45-4.1

This Article's primary contribution is to the nascent scholarship on the corporate purpose duty. Absent a plausible means of bridging the enforcement gap, the fledgling movement to develop a "hard law" corporate purpose duty may well be doomed to ultimate failure. By drawing attention to the inevitable enforcement gap for the corporate purpose duty and proposing a solution that overcomes many of the known obstacles to public or private enforcement, this Article strengthens the case for introducing or formalizing a corporate purpose duty. Its second contribution is to corporate law enforcement literature. Despite decades of scholarly attention, private enforcement of directors' duties remains underutilized and undereffective across the world; public enforcement continues to be a rare feature present in few jurisdictions, and with its own intractable challenges. By introducing quasi-private enforcement as a distinct, third way of enforcement, this Article opens the door not only to a promising response to the emerging demands of the age, but perhaps also the path to breakthroughs in our understanding and pursuit of a timeless goal: greater accountability of the persons running the business behemoths that shape our future.

This Article proceeds as follows. Part I introduces recent trends in and debates over corporate purpose. It highlights emerging discussions by jurists over the mechanics of operationalizing corporate purpose as part of corporate law. Part II shows the relevance of enforcement in corporate law by engaging with theories about legal compliance. It analyzes the two classic paradigmatical modalities of enforcement—private enforcement by shareholders and public enforcement by regulators—and evaluates their compatibility with enforcement of corporate purpose. Part III dives into case studies drawn from three East Asian jurisdictions (Taiwan, China, and Japan) to explore two "hybrid" enforcement approaches. While one of these, "quasi-public" enforcement, received some scholarly recognition, this Article identifies the other—"quasi-private" enforcement—as the missing piece in the enforcement spectrum for the first time in scholarly literature. Part IV distills the key features of quasi-public and quasi-private enforcement and evaluates their potential utility for enforcing a corporate purpose duty. The conclusion provides reflections on the promise of quasi-private enforcement for corporate purpose and perhaps even new demands for enforcement of corporate law—such as climate change shareholder litigation.

## I. CORPORATE PURPOSE: A TOOTHLESS IDEAL?

### *a. Background*

From a legal perspective, corporate purpose may be defined as how "the aims and ultimate beneficiaries of the corporate enterprise" are conceptualized.[21] Corporate law scholars have long debated whether the company should be operated for the benefit of shareholders or stakeholders such as employees and creditors.[22] By the turn of the century, the consensus among Anglo-American scholars was that shareholders had the better of the argument: shareholder primacy was *the* law, or at least the dominant orientation of corporate law.[23]

Initial attempts at integrating stakeholderism—the interests of groups touched by or contributing to business activity *except* shareholders' interest in corporate profit-maximization[24]—into corporate law fared poorly. A notable example was Section 172 of the U.K. Companies Act 2006. The product of extensive law reforms in the United Kingdom, Section 172 permitted directors to consider the interests of stakeholders in the management of the company.[25] This reform was critically received by corporate law scholars, with many opining that Section 172 merely affirmed the shareholder

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[21] Christopher Bruner, *Power and Purpose in the "Anglo-American" Corporation*, 50 VA. J. INT'L L. 579, 592 (2010).

[22] The literature is legion. *See, e.g.*, E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153–57 (1932); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 319–28 (1999); Paddy Ireland, *Company Law and the Myth of Shareholder Ownership*, 62 MOD. L. REV. 32, 52–57 (1999); Lorraine Talbot, *Trying to Save the World with Company Law? Some Problems*, 36 LEGAL STUD. 513, 514–19 (2016); Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 103–08.

[23] *See* Bebchuk & Tallarita, *Illusory Promise, supra* note 6, at 103; *see also* Talbot, *supra* note 22, at 514–16 (describing the history of shareholder primacy in corporate law through the perspective of Anglo-American scholars).

[24] *Cf.* the classical definition given in R. Edward Freeman & David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, 25 CALIF. MGMT. REV. 88, 89 (1983) ("The word *stakeholder* . . . refers to 'those groups without whose support the organization would cease to exist.' The list of stakeholders originally included shareowners, employees, customers, suppliers, lenders, and society.") (italics original) (citation omitted).

[25] *See* Companies Act 2006, c. 46 § 172 (UK); *see also* Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach*, 29 SYDNEY L. REV. 577, 578–79 (2007) [hereinafter Keay, *Tackling the Issue of the Corporate Objective*] (providing a brief account of the reforms).

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DOI: https://doi.org/10.58112/jil.45-4.1

primacy orientation of U.K. corporate law[26] and stopped short of imposing a duty on directors to stakeholders.[27]

The British Academy's project on "The Future of the Corporation" was the next arrow in stakeholderism's quiver. Initiated in 2017 and led by Colin Mayer, the project's goal was to redefine the purpose of companies as "[p]rofitably solving the problems of people and planet, and not profiting from creating problems."[28] This pithy definition of "corporate purpose" makes the normative argument that companies should not focus exclusively on shareholder profit-maximization but should go beyond financial objectives to achieve societal goals. Corporate purpose from this perspective is synonymous with stakeholderism, insofar as it

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[26] *See, e.g.*, Keay, *Tackling the Issue of the Corporate Objective*, *supra* note 2525, at 610–12; Talbot, *supra* note 2222, at 529; Langford, *Use of the Corporate Form for Public Benefit*, *supra* note 10, at 988–89.

[27] *See* Talbot, *supra* note 22, at 529 ("[T]he presence of a 'non exhaustive' list of considerations does not mean that directors owe a duty to stakeholders, or to the long-term consequences of their decision making, as commentators hope it means . . . . Directors can have *regard* to stakeholders when acting for the benefit of its members, but no more. Today, that is what representing capital means.") (italics original) (citations omitted); *see also* Keay, *Tackling the Issue of the Corporate Objective*, *supra* note 25, at 604–05 ("[T]here does not appear to be a great movement away from the shareholder value principle . . . . While, undoubtedly, [Section] 172 does give the appearance of embracing aspects of stakeholder theory, with the requirement that directors are to have regard for wide-ranging interests . . . [t]he bottom-line is that unlike in Germany and other European jurisdictions stakeholders under ESV have no control over, or input to, company affairs."); *see also* Joan Loughrey et al., *Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance*, 8 J. CORP. L. STUD. 79, 85 (2008) ("Secondly, the interests of various constituencies, who can be called "stakeholders", were to be taken into account. The result was that the enlightened shareholder value approach maintained the shareholder-centred paradigm favoured by those advocating the shareholder value principle, but at the same time it required, in appropriate circumstances, consideration to be given to a wider range of interests. Nevertheless, it would seem that the duty to foster the success of the company for the benefit of the members and the duty to take into account other interests can be seen in a hierarchal way, something that the CLRSG advocated when it proposed a similar approach, with the former being regarded more highly than the latter. This is because the end result must be the promotion of the benefit of the members' interests above those of the broader interests set out in clause B3(3) [*i.e.*, what became Section 172]."); *see also* THE BRIT. ACAD., PRINCIPLES FOR PURPOSEFUL BUSINESS (Nov. 2019), https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf [https://perma.cc/97WF-BVT5] [hereinafter BRIT. ACAD. PRINCIPLES] ("The problem [that enlightened shareholder value as encapsulated in Section 172 of the Companies Act] creates is that it does not permit directors to further interests of stakeholders at the expense of shareholders and it does not provide protection to companies that promote purposes beyond shareholder value.").

[28] *Future of the Corporation*, *supra* note 1.

purports to give stronger weight to stakeholder interests over shareholder profit-maximization.[29] "The Future of the Corporation" received widespread acclaim among business leaders and was spotlighted at the World Economic Forum Annual Meeting in 2019.[30]

Growing interest in "corporate purpose" among business leaders breathed new life into stakeholderism. Across the pond, the Business Roundtable released the BRT Statement on the Purpose of the Corporation that endorsed stakeholderism instead of shareholder primacy. One hundred eighty-one CEOs of U.S. corporations signed the statement to express their commitment "to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders."[31] Institutional investors have also come out in support of stakeholderism. Larry Fink, Blackrock's CEO, stated in his 2018 letter to CEOs that "[c]ompanies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."[32] Slowly but surely, the tide of business rhetoric on both sides of the Atlantic—and with it, much of the world[33]—seems to be turning in favor of stakeholderism.

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[29] *See* Hsieh et al., *supra* note 7, at 55 ("If maximi[z]ing financial benefits conflicts with societal goals, a corporation with a strong corporate purpose will give considerable weight to societal goals.").

[30] Colin Mayer, *It's Time to Redefine the Purpose of Business. Here's a Roadmap*, WORLD ECON. F. (Jan. 7, 2020), https://www.weforum.org/agenda/2020/01/its-time-for-a-radical-rethink-of-corporate-purpose/ [https://perma.cc/FZ23-Z3KA].

[31] *BRT Statement*, *supra* note 3.

[32] Larry Fink, *A Sense of Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/ [https://perma.cc/SP22-KMMF].

[33] Germany may be an exception to this, as it has long been uncontroversial that the board (*Vorstand,* or managing board) may take stakeholder interests into account in decision-making. *See* Holger Fleischer, *Corporate Purpose: A Management Concept and Its Implications for Company Law*, 18 EUR. CO. & FIN. L. REV. 161, 178–80 (2021). What is less clear, even in Germany, is whether stakeholder interests can ever legally trump shareholder interests. Scholars have also recently observed that Asian jurisdictions have arguably adopted stakeholder elements in corporate law well before the latest round of interest in corporate purpose. *See, e.g.*, Dan W. Puchniak & Lin Lin, *Institutional Investors in China: An Autochthonous Mechanism Unrelated to UK-cum-Global Stewardship*, *in* GLOBAL SHAREHOLDER STEWARDSHIP 379, 416 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022) ("[T]he 2002 Chinese [Corporate Governance Code] was already encouraging listed companies to 'be concerned with the welfare, environmental protection and public interests of the community' and to 'pay attention to the company's social responsibilities'.")

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DOI: https://doi.org/10.58112/jil.45-4.1

Yet corporate law scholars are skeptical of this Damascene conversion to stakeholderism, and their pessimism appears to be well-founded. In their 2020 article, Bebchuk and Tallarita demonstrate that CEOs who signed the BRT Statement often did so without seeking board approval or ratification. Further, public companies that signed the statement maintained corporate governance guidelines generally reflecting a shareholder primacy approach. Bebchuk and Tallarita concluded that "the [Business Roundtable] statement was mostly for show."[34] In a follow-up article, the same authors conclude that "our findings support the view that the BRT Statement did not represent a meaningful commitment and was not planned or expected to bring about meaningful improvements in the treatment of stakeholders."[35] Another working paper by a different research team reports that BRT Statement signatories do not engage in stakeholder-oriented practices more than non-signatories.[36]

Already, early signs suggest that without legal consequences for directors who fail to uphold their commitment to re-orientating their company's purpose away from shareholder profit-maximization, such commitments might well be doomed to be nothing more than sound and fury.[37] Before considering enforcement,[38] however, commitments to redefining corporate purpose need to be concretized as a matter of corporate law. This is the subject of the next section.

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(citations omitted); Umakanth Varottil, *Shareholder Stewardship in India: The Desiderata*, *in* GLOBAL SHAREHOLDER STEWARDSHIP 360, 378 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022) ("[T]he emphasis of corporate law and investor engagement . . . in India . . . is founded on the pluralist stakeholder theory."); *see also* Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective*, 40 SEATTLE U. L. REV. 465, 478–89 (2017) (discussing debates and reforms in India).

34 Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 98.

35 Bebchuk & Tallarita, *Will Corporations Deliver*, *supra* note 9, at 1086.

36 Aneesh Raghunandan & Shivaram Rajgopal, *Do Socially Responsible Firms Walk the Talk?*, J.L. & ECON. 1-3 (forthcoming).

37 *See* WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5, l. 29–31 ("It is a tale / Told by an idiot, full of sound and fury / Signifying nothing.").

38 This is the subject of Parts III to V *infra*.

*b. Concretizing Corporate Purpose as Law*

In 2019, the British Academy's "The Future of the Corporation" project published the *Principles for Purposeful Business*.[39] Principle 1 declares:

> Corporate law should place purpose at the heart of the corporation and require directors to state their purposes and demonstrate commitment to them.[40]

By way of elaboration on *how* corporate law would accomplish this, all the *Principles* had to say were:

> [A] possible formulation . . . could be: "directors of companies must establish their company purposes, act in a way they consider most likely to promote the fulfilment of their purposes, and have regard to the consequences of any decision on the interests of shareholders and stakeholders in the firm."[41]

Being more concerned with operationalizing vague ideas as—at least potentially—enforceable "hard" law, corporate law scholars have proposed at least three ways to concretize commitments to corporate purpose into law.

The first is to encourage companies to incorporate statements of corporate purpose departing from the shareholder primacy norm into their corporate charters (or corporate "constitutions" in Anglo-Commonwealth parlance[42]). The British Academy's Principles for Purposeful Business may be read as an example of this approach.[43] While this may be done on an *ad hoc* basis in individual ordinary for-profit entities, a modern and popular trend is the introduction of

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39 BRIT. ACAD. PRINCIPLES, *supra* note 27.

40 *Id*. at 20.

41 *Id*.

42 *See, e.g.*, Companies Act 2006, c. 46, §§ 17–18 (UK), https://www.legislation.gov.uk/ukpga/2006/46/contents [https://perma.cc/M8XK-EKB4]; Companies Act 1967, 2020 rev. ed., § 35(1), (Sing.), https://sso.agc.gov.sg/Act/CoA1967 [https://perma.cc/J8L8-XKLV]; Corporations Act 2001 (Cth) §§ 134–36 (Austl.).

43 *See* BRIT. ACAD. PRINCIPLES, *supra* note 27, at 20.

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legislation enabling the formation of social enterprise-type nonstandard corporate entities such as "benefit corporations."[44]

However, *having* firm-level corporate purpose provisions and *enforcing* them are two separate things. Enforcement of commitments to stakeholderist corporate purposes are fraught with immense difficulty. First, firm-level corporate purpose statements may in practice be too vague and fall short of articulating sufficiently concrete commitments the fulfillment (or not) of which may be reasonably judged. In other words, overly vague statements of purpose are structurally incompatible with enforcement according to due process of law—at least in jurisdictions materially adhering to Western concepts of legality.[45] Second, even if a corporate purpose statement were on its face sufficiently concrete for legal enforcement, the doctrine of *ultra vires* has been abolished for standard for-profit entities in many Anglo-Commonwealth jurisdictions[46] and has effectively "[fallen] into disrepair" for the United States generally.[47] Accordingly, there are no effective legal mechanisms to restrain standard for-profit corporate entities from entering into transactions with third parties or undertaking activities that are contrary to, or inconsistent with, corporate purpose provisions. Formal benefit corporations and other nonstandard entities fare little better. Even where legislation has theoretically provided for a private right of action to enforce the

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[44] For a model law designed for implementation in the United States but which has since been removed from the website, *see* B Lab, Model Benefit Corporation Legislation with Explanatory Comments (Apr. 17, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/N3R6-JFZZ] [hereinafter Model Benefit Corporation Legislation]. For a clearinghouse tracking legislation on benefit corporations and other nonstandard entities in the United States, *see* SOCIAL ENTERPRISE LAW TRACKER, https://socentlawtracker.org/ [https://perma.cc/9ZTQ-B3FZ] (last visited June 11, 2021). For the United Kingdom, *see* Companies (Audit, Investigations and Community Enterprise) Act 2004, c. 27, § 26 (UK), https://www.legislation.gov.uk/ukpga/2004/27/contents [https://perma.cc/LZ2C-7R52] (introducing the "community interest company"). For a broad overview, *see generally* Langford, *Use of the Corporate Form for Public Benefit*, *supra* note 10 (discussing companies with one or more purposes in addition to or in lieu of shareholder wealth maximization and the implications for directors' duties in such companies).

[45] That is not to say that a dispute may not be litigated in the court of public opinion or argued at a shareholder meeting, but that is quite different from legal enforcement.

[46] *See, e.g.*, BRENDA HANNIGAN, COMPANY LAW ¶¶ 5–12 to 5–14 (5th ed. 2018); ROBERT P. AUSTIN & IAN M. RAMSAY, FORD, AUSTIN AND RAMSAY'S PRINCIPLES OF CORPORATIONS LAW ¶ 12.060.3 (loose-leaf, last updated Aug. 2019).

[47] Fisch & Davidoff Solomon, *supra* note 9, at 1315.

corporate purpose and accompanying directors' duties, there may be no monetary or other sanction for directors failing to live up to their commitments,[48] rendering enforcement, if any, of little practical relevance. In any event, firm-level corporate purpose provisions, whether *ad hoc* or in new nonstandard entities, will not be discussed in this Article.

The second set of options would be to give corporate purpose bite through the law of directors' duties. It is trite that in most jurisdictions, directors generally owe legal duties to the companies they serve.[49] Two approaches to a corporate purpose duty for directors have emerged. The first approach proceeds from the premise that enforcing compliance with corporate purpose is possible and consistent with the existing fiduciary duties framework applicable to corporate directors (what I shall call for convenience the "integration approach").[50] An alternative is to legislate a new duty for directors to act consistently with or in furtherance of the corporation's purpose ("independent duty approach"). The latter appears to be favored by a legally trained researcher contributing to the British Academy project.[51]

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[48] *See* Model Benefit Corporation Legislation, §§ 301(c), 303(c), 305(a), 305(b) (providing for "benefit enforcement proceedings" but exempting both the benefit corporation and its directors from monetary liability for failure of the benefit corporation to pursue or create public benefit); *see also* DANA BRAKMAN REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT AND CAPITAL MARKETS 57 (2017) ("These proceedings do not create a free-for-all to debate and disparage the social good claims of benefit corporations. Only directors, shareholders (often only if meeting certain ownership thresholds), and stakeholders identified by an individual benefit corporation in its charter are granted standing to bring a benefit enforcement proceeding. Furthermore, even if successful, such a proceeding will result at most in a trenchant court order to toe the line. Benefit corporation statutes preclude imposition of monetary liability on defendant corporations and fiduciaries alike.") (citations omitted).

[49] Naturally, the precise content of the duties and the extent to which they are theoretically enforceable and enforced in practice all vary widely, but examples of jurisdictions with corporate law regimes in which directors owe no mandatory or default duties (at least on a theoretical or abstract doctrinal level) whatsoever to the companies they serve in should be rare.

[50] *See* Langford, *Use of the Corporate Form for Public Benefit*, *supra* note 10, at 984–85, 1001–04 (discussing how corporate purpose interfaces with existing directors' duties and shareholder's remedies in Australia's corporations statute).

[51] *See* BRIT. ACAD. PRINCIPLES, *supra* note **Error! Bookmark not defined.** and accompanying text; Dalia Palombo, *The Future of the Corporation: Avenues for Legal Change* 11–14, 23–25 (Future of the Corp., Working Paper No. 1, 2019), https://www.thebritishacademy.ac.uk/documents/2553/future-of-the-corporation-avenues-for-legal-change.pdf [https://perma.cc/JVL9-K6KD] (discussing proposed changes to Section 172 of the U.K. Companies Act). Dalia

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DOI: https://doi.org/10.58112/jil.45-4.1

Either of the two corporate purpose duty approaches above must confront a shared problem: a corporate purpose duty is inherently built around a *standard*, not a *rule*.[52] As compared to *rules*, which are more specific and contain greater content fixed *ex ante* through the legislative or rulemaking process, *standards* are framed more generally and require more elaboration of their content through enforcement and adjudication after the making of the standard.[53] A well-drafted rule with clear content and scope of application may be followed or lawfully circumvented relatively easily with or without enforcement activity; it is more difficult, if not impossible, to determine with reasonable certainty whether a standard has been breached prior to or without enforcement and judgment. A new corporate purpose duty for directors must be a standard with some resemblance to "care," "loyalty," or "good faith." As a standard, the demands of the corporate purpose duty on directors—and what constitutes a breach—may well vary wildly from company to company. On the one hand, dispositions of legally-authoritative value[54] arising from enforcement activity—or at least

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Palombo's profile states that she has earned law degrees at Milan, Harvard, and Maastricht and has published in law journals. *Dalia Palombo*, TILBURG UNIV., https://www.tilburguniversity.edu/staff/d-palombo [https://perma.cc/GSF6-3Y5L] (last visited June 4, 2024).

[52] *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (a foundational text setting out this distinction).

[53] *See id.* at 560–62; *see also* ARMOUR & ENRIQUES ET AL., *supra* note 8, at 32 ("*[R]ules* . . . require or prohibit specific behaviors . . . *standards* . . . leave the precise determination of compliance to adjudicators after the fact.") (italics in original).

[54] On the legal value of precedent *see*, *e.g.*, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds. 1997); Ewoud Hondius, *Precedent in East and West*, 23 PENN. ST. INT'L L. REV. 521, 523–28 (2005) (surveying various jurisdictional approaches to precedent); *see generally* Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149 (2013) (exploring how lawyers in civil law jurisdictions use judicial precedents in argument and reasoning); Larry Alexander, *Constrained by Precedent*, 63 S. CALIF. L. REV. 1, 3 (1989) ("The notion that courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems."); Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907 (2021) (setting forth an enabling model of precedent not as "binding" but rather as offering "lawful options"); Holger Spamann et al., *Judges in the Lab: No Precedent Effects, No Common/Civil Law Differences*, 13 J. LEGAL ANALYSIS 110 (2021); Daniel Klerman & Holger Spamann, *Law Matters – Less Than We Thought* (U.S.C. L. LEGAL STUD., Working Paper No. 19-26, May 2022) (reporting weak effects of, respectively, horizontal and vertical precedent).

elaboration in other sources of like value[55]—would be essential to give the new duty adequate content to be workable.[56] On the other, no amount of precedent from past corporate purpose cases would ever be adequate to guide directorial decision-making in future cases.

To be clear: as to the three approaches to "legalizing" corporate purpose—corporate constitution or charter statements, integration approach, and the independent duty approach—this Article takes no firm position on their respective merits. Irrespective of the precise approach for concretizing corporate purpose in law, enforcement via formal legal mechanisms is essential.[57] I explain the significance and practical pitfalls of the two major approaches to enforcement, private enforcement and public enforcement, in the next Part.

## II. PRIVATE AND PUBLIC ENFORCEMENT

By "enforcement," this Article means actions by an actor ("enforcer") to compel a person ("target") subject to a legal norm (*e.g.*, rule or standard) after the target's breach of the legal norm or at the time of an ongoing breach by the target of the legal norm, to either: (1) take action to modify its (*i.e.*, the target's) actions or behavior to comply with said norm; or (2) to bear consequences for breaching the legal norm. By "legal" enforcement, this Article means enforcement of norms with a legal basis, via legal mechanisms, and the consequences of breach must include some of a legal nature. Note that legal enforcement is a necessary, but inadequate, condition of "liability";[58] an attempt at legal enforcement may, for any number of reasons, fail to reach an outcome of director or officer liability. Enforcement may be distinguished from regulation in that

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55 Depending on the jurisdiction, this may take the form of government statements of policy, judicially-produced guidelines (of which sentencing guidelines are an example), statements of interpretations by administrative or judicial branches of government, or even scholarly writing by jurists.

56 *See, e.g.*, ARMOUR & ENRIQUES ET AL., *supra* note 8, at 33 ("Standards, in contrast [to rules], require courts (or other adjudicators) to become more deeply involved in evaluating and sometimes molding corporate decisions *ex post*. These decisions themselves then prescribe the standard to future parties, over time building up to a body of guidance.").

57 *See infra* Part 0 below.

58 *Cf.* the distinction between standards of conduct and standards of review explored in Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law,* 62 FORDHAM L. REV. 437 (1993).

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DOI: https://doi.org/10.58112/jil.45-4.1

enforcement operates *ex post* whereas regulation is *ex ante*.[59] Nonetheless, in keeping with common usage, "regulator" is used interchangeably with "enforcer."

Part 0 first sets out why legal enforcement against directors would matter as part of a corporate purpose duty. Parts i and i set out, respectively, overviews of private and public enforcement of corporate law; ii and ii offer evaluations. In Part iii and iii, how private and public enforcement might fare specifically in the context of enforcing corporate purpose is examined.

*a. Why (Legal) Enforcement Matters*

Before considering the relative merits of private and public enforcement, why should we bother with legal enforcement of the corporate purpose duty? If directors were adequately motivated to comply with the corporate purpose duty by the possibility of nonlegal sanctions (*e.g.*, loss of reputation) or alternative legal sanctions (*e.g.*, removal by shareholder resolution), enforcement would be superfluous.

Although the extent to which people are motivated to comply with law on the *sole* ground that it is *law* is debated,[60] corporate law scholars previously argued that most directors are likely to perform their duties to the company even without the prospect of legal liability.[61] More sophisticated theories were proposed to explain this

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[59] John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 254 (2007) ("Here, an important distinction must be drawn between 'regulation' and 'enforcement.' Regulation works on an 'ex ante' basis, while enforcement operates 'ex post.'").

[60] *See, e.g.*, FREDERICK SCHAUER, THE FORCE OF LAW 48–54 (2015) (distinguishing "comply[ing]" with the law for moral or self-interested reasons from "obey[ing]" the law *qua* law).

[61] *See, e.g.*, Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1265 (1999) ("The level of directorial care is largely driven by social norms, rather than by the threat of liability or the prospect of gain."); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1796 (2001) ("[S]ocial cues both define and determine the appropriate norm of behavior . . . . Corporate case law accordingly can encourage corporate participants to internalize norms of cooperation through social framing—providing information about the social context of relationships within the firm. Judicial opinions unambiguously communicate that directors are fiduciaries and that fiduciary relationships call for trustworthy (loyal and careful) behavior. Corporate directors internalize this norm when they respond to the social signal by adopting the other-regarding preference function that is the hallmark of trust-based relationships.").

phenomenon. Rock posits a theory of Delaware fiduciary law as articulated by the Court of Chancery as "a set of parables or folktales of good and bad managers and directors" "that collectively describe their normative role."[62] This system of "public shaming", Rock claims, serves to deter bad behavior in directors who care for their reputation and standing in the community even when no one is held legally liable.[63] Also focusing on the judicial role, Blair and Stout argue that judges call on directors to demonstrate trustworthy behavior and encourage internalization of prosocial norms.[64] More recently, Shapira proposed a theory of corporate law where corporate law's "de facto primary function" is the generation of information that in turn creates reputational consequences for firms.[65]

However, even scholars professing the view that director *liability* as an outcome is unnecessary at least implicitly concede that legal enforcement is desirable or even a necessary precondition for their worldviews. Judges do not shame people, frame issues, or make people turn over documents *sua sponte* just because they feel like it. Rather, their role is predicated on a real case or controversy, which is in turn predicated on actual legal enforcement attempts by actors who care enough to try suing. While nonlegal sanctions may, under certain conditions and in certain circumstances such as low-stakes environments, be preferrable to or yield superior outcomes than legal enforcement,[66] it cannot be said that legal enforcement is completely unnecessary or irrelevant.

Further, alternative legal sanctions may not be sufficient. For a corporate purpose duty breach, a possible practical sanction may be to not re-elect or re-appoint, or to actively dismiss directors and officers. The power to do so is typically vested in corporate organs such as the shareholder meeting or the board of directors (in a one-tier system) or supervisors (in two-tier systems). This creates a further accountability problem: To whom are these organs

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62 Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1106 (1997).

63 *Id*. at 1104.

64 Blair & Stout, *supra* note 61, at 1796.

65 Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL'Y REV. 1, 56–60 (2017).

66 *See, e.g.*, Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 540 (1998) ("Informal systems of external social control are far more important than law in many contexts, especially ones where interacting parties have a continuing relationship and little at stake.").

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DOI: https://doi.org/10.58112/jil.45-4.1

accountable when they fail to use their revocation powers to discipline those who fail to comply with corporate purpose? While the precise details vary by jurisdiction, it simply cannot be said that these organs themselves are under clear, enforceable, and reliably enforced duties with material sanctions attached.[67] To make matters worse, depending on the contractual arrangements between a manager and the corporation, revocation on an at will basis may still yield considerable financial rewards for the revoked manager[68]—supplying further "evidence of the emptiness of corporate law."[69]

Having made the case for the critical role of legal enforcement of the corporate purpose duty, I now turn to the relative merits of private versus public enforcement.

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[67] In other words, either they owe no duty, minimal duties, or duties of questionable or unenforceable nature to individual shareholders or other stakeholders, or owe duties that are rarely enforced because of other considerations. *See, e.g.*, Gerhard Wagner, *Officers' and Directors' Liability Under German Law – A Potemkin Village*, 16(1) THEO. INQ. L. 69, 85 (2015) (observing that German supervisory boards, being under a duty to monitor managing boards, have little incentive to conduct rigorous investigations of managing boards that might in turn expose the supervisory board's own failings). For a more optimistic view, *see* Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021) (arguing that shareholders' increased access to corporate information, among other things, have contributed to a "resurgence" in directors' oversight duties in Delaware).

[68] Franklin A. Gevurtz, *Disney in a Comparative Light*, 55 AM. J. COMP. L. 453, 465 (2007) (describing how an underperforming director of the Walt Disney Company received a generous golden parachute because of his termination on no-fault basis rather than for cause). For the litigation this spawned, *see, e.g.*, *In re* Walt Disney Derivative Litig., 907 A.2d 693 (Del. Ch. 2005).

[69] Jones, *supra* note 16, at 132 (writing in the context of the trial court decision in *In re* Walt Disney, 907 A.2d 693).

*b. Private Enforcement*

*i. Mechanisms*

By private enforcement, this Article refers primarily to shareholder-initiated direct suits[70] and derivative actions.[71] It is well-understood that the company, as the subject to whom directors principally owe their duties, may enforce those duties against the breaching directors. It is therefore possible for the company to pursue enforcement action against incumbent directors.[72] However, provided the company remains a going concern and the directors in breach of duty or their colleagues remain in control of the company, there is doubt over whether a company would, following the usual board-centered corporate decision-making process, take legal action against the errant directors.[73]

In certain situations, direct private enforcement by the company would not be subject to the challenge above. First, where the company comes under new management and the new directors proceed with enforcement against former directors.[74] Second, where

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[70] Alan K. Koh & Samantha S. Tang, *Direct and Derivative Shareholder Suits: Towards a Functional and Practical Taxonomy*, *in* COMPARATIVE CORPORATE GOVERNANCE 431, 438 (Afra Afsharipour & Martin Gelter eds., 2021) ("A direct shareholder litigation mechanism is defined as 'a mechanism that a shareholder or equivalent may, by virtue of or in connection with status as a shareholder, litigate to obtain a legal outcome.'").

[71] *Id.* at 448 ("A derivative litigation mechanism is 'a mechanism that a shareholder or equivalent may, by virtue of or in connection with status as shareholder, takes the place of the company in litigating to obtain a legal outcome binding the company in circumstances where the company does not litigate directly.'").

[72] *See, e.g.*, Jenifer Varzaly, *The Enforcement of Directors' Duties in Australia: An Empirical Analysis*, 16 EUR. BUS. ORG. L. REV. 281, 315 (2015) (reporting that a minority of company-initiated direct actions in Australia fall into this category).

[73] *See, e.g.*, Andrew Keay, *An Assessment of Private Enforcement Actions for Directors' Breaches of Duty*, 33 CIV. J. Q. 76, 79 (2014) [hereinafter Keay, *An Assessment of Private Enforcement Actions*]; Samantha S. Tang, *Corporate Avengers Need Not Be Angels: Rethinking Good Faith in the Derivative Action*, 16 J. CORP. L. STUD. 471, 471 (2016) ("the company's controllers (*i.e.*, managers and/or majority shareholders) . . . would ordinarily prevent the company from punishing their own misbehavio[]r").

[74] *See, e.g.*, Regal (Hastings) Ltd v. Gulliver [1942] 1 All ER 378, [1967] 2 AC 134 (H.L.) (Eng.) (being a landmark judgment on directors' fiduciary duties in the United Kingdom and the Anglo-Commonwealth); *Equitable Life: Timeline of Key Events*, BBC NEWS (Oct. 20, 2010), https://www.bbc.com/news/business-10725923

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DOI: https://doi.org/10.58112/jil.45-4.1

the company becomes insolvent and enforcement action is taken by insolvency practitioners in charge of liquidation or restructuring.[75] Third, enforcement action is taken by a shareholder of the company on the company's behalf via a derivative action.[76] Among these, the derivative action is the sole enforcement mechanism accessible by individual or qualified minority shareholders;[77] unsurprisingly, it is also the focus of much jurisdiction-specific and comparative corporate law scholarship and policymaking. Accordingly, this Article places emphasis on derivative actions.

In addition to claims *by the company* (whether direct or derivative), depending on the jurisdiction and the types of rights and duties involved, enforcement may also be initiated *by shareholders* via *direct actions* in their own right.[78] These may be brought individually or as class actions.[79] Successful private enforcement may, depending on jurisdiction, the cause of action, and the relief sought, result in a range of monetary (compensation or disgorgement of gains) to non-monetary (injunctions, removal of directors, etc.) outcomes.[80] While stakeholders other than shareholders may, exceptionally, be empowered to conduct direct enforcement in certain jurisdictions,[81] these are not widespread.

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[https://perma.cc/SX6P-2S69] (outlining the events of the ultimately abortive attempt by a major insurance company at suing former directors in connection with the company's near-collapse).

[75] *See, e.g.*, Keay, *An Assessment of Private Enforcement Actions*, *supra* note 73, at 80; Varzaly, *supra* note 72, at 312–13 (reporting that a substantial percentage of company-initiated enforcement actions in Australia against directors involved insolvency).

[76] On derivative actions *see generally* ARAD REISBERG, DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE (2007); THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH (Dan W. Puchniak et al. eds., 2012); DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE (2023).

[77] By qualified minority I mean individual or groups of shareholders that satisfy standing requirements such as minimum shareholding percentages or shareholding periods.

[78] *See generally* Koh & Tang, *supra* note 70, at 438–48 (on direct actions).

[79] *Id.* at 442–43 (discussing "direct monetary claims" against directors and the company).

[80] *See id.* at 438–48 (describing potential outcomes in shareholder direct litigation); Alan K. Koh, *Direct Suits and Derivative Actions: Rethinking Shareholder Protection in Comparative Corporate Law*, 21 WASH. U. GLOBAL STUD. L. REV. 391, 421–34 (2022) [hereinafter Koh, *Direct Suits and Derivative Actions*] (providing an expanded taxonomy of direct litigation and their outcomes).

[81] For example, creditors have standing to pursue oppression actions. Canada Business Corporations Act, R.S.C. 1985, c C-44, §§ 2(1), 238, 241. In other

Accordingly, stakeholder-initiated direct actions are beyond the scope of this Article.

*ii. Evaluation*

The efficacy of shareholder-driven [82] private enforcement, whether through direct or derivative suits as a means of director accountability, is limited by several factors. First, assuming that private enforcers seek to maximize their own interests,[83] private enforcement for compensatory aims fails to deliver because there are mainly costs with minimal benefits. For almost all private enforcement mechanisms, the shareholder plaintiff or litigant[84] has little to show for their risk even if they succeed. [85] In many

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jurisdictions, directors and officers are liable to compensate anyone—including but not limited to shareholders and creditors—harmed by their unlawful actions. Kaishahō [Companies Act], Act No. 86 of 2005, §§ 429(1), 597 (Japan), https://elaws.e-gov.go.jp/document?lawid=417AC0000000086 [https://perma.cc/CF62-HU52]; Sangbeob [Commercial Act] arts. 401, 408-8(2), 567 (S. Kor.), *translated in* Korean Legislation Research Institute's online database, http://elaw.klri.re.kr/eng_service/main.do (search required); Gongsifa (公司法) [Company Act of the Republic of China] (Dec. 26, 1929), art. 23(2), Laws & Regulation Database of the Republic of China (Taiwan), https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0080001 [https://perma.cc/M4JB-7MNG]. *But see* WALLACE WEN-YEU WANG (王文宇), 公司法論 [CORPORATION LAW] 216–17 (2018) (doubting whether this section can be a basis for direct suits by shareholders of Taiwanese companies).

[82] Management-driven enforcement in the form of claims by the company are discussed at *supra* notes 72–73 and accompanying text. I do not discuss enforcement driven by creditors, liquidators, administrators, or other external stakeholders as their enforcement powers and functions are typically limited to defense of their creditor interests in situations of insolvency or near-insolvency.

[83] *See, e.g.*, Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2200 (2010) ("By definition, a private enforcer is incentived [sic] to maximize her private welfare . . . ."); Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 521 (2016) ("[P]rivate litigation typically seeks to vindicate the interests of the parties (and their attorneys) . . . .").

[84] I use "litigant" as well because shareholders are, depending on jurisdiction, not necessarily "plaintiffs" in a strict doctrinal sense when bringing derivative actions or other proceedings.

[85] The sole exceptions being direct suits claiming for monetary compensation, and to some extent appraisal actions (public companies only) and withdrawal remedies (close corporations only), as these put money directly into the shareholder plaintiffs' pockets if successful. For a taxonomy of direct and derivative suits with a focus on the possible outcomes of successful legal proceedings, *see* Koh & Tang, *supra* note 70, at 438–52.

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DOI: https://doi.org/10.58112/jil.45-4.1

jurisdictions, some version of the "loser pays" principle applies in civil litigation and puts the shareholder litigant at considerable risk of not being able to recover their legal costs even if they succeed—a risk that only increases if they lose.[86] The tendency towards underutilization in most of the world should be contrasted with the United States, where the perception was that of private *over*-enforcement.[87]

Second, the drawbacks of private enforcement are exacerbated for derivative actions. As stated above, even if monetary compensation (or disgorgement) is obtained pursuant to a successful derivative action, the benefit of that usually goes to the company, not the individual shareholder,[88] although some jurisdictions such as Israel and Canada are exceptions to this.[89] Conversely, the extent to which the shareholder's expenses may be shifted to the company or the defendant, whether before or after the derivative action is concluded, varies widely as a matter of law in

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[86] Koh & Tang, *supra* note 70, at 434, 436–38 (briefly surveying cost allocation rules, fee-shifting, and third-party funding in various jurisdictions).

[87] *See, e.g.*, James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Law*, 100 CALIF. L. REV. 115, 121 (2012) (analyzing the incentives of private enforcers to over-enforce). *But see* Kenneth B. Davis, Jr., *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 388–89 (2008) (arguing that derivative litigation has declined as substitutes develop to address large-cap company issues); Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1749–50 (2004) (finding the number of derivative suits filed to be modest and the litigation agency costs less pronounced than the alternatives).

[88] Koh & Tang, *supra* note 70, at 435–36; Arad Reisberg, *Funding Derivative Actions: A Re-Examination of Costs and Fees as Incentives to Commence Litigation*, 4 J. CORP. L. STUD. 345, 345 (2004) [hereinafter Reisberg, *Funding Derivative Actions*]; John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 304–05 (1981).

[89] *See* § 201, Companies Law, 5759–1999 (Isr.) (granting the court discretion in a case where the company wins against the defendant in the derivative action to order, as a reward for the shareholder bringing the derivative action, a sum to be paid to the shareholder personally); *see also* Arad Reisberg, *Access to Justice or Justice Not Accessed: Is There a Case for Public Funding of Derivative Claims?*, 37 BROOK. J. INT'L L. 1021, 1034–36 (2012). Some Canadian statutes offer a similar discretion for the court. *See, e.g.*, Canada Business Corporations Act, R.S.C. 1985, c C-44, § 240(c) ("In connection with an action brought or intervened in under section 239 [*i.e.*, the derivative action provision], the court may at any time make any order it thinks fit including, without limiting the generality of the foregoing . . . an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary . . . .").

books but does not appear to be common in practice.[90] In addition, the shareholder bringing the derivative action may be held liable for costs or loss incurred by the company, the directors, or both through the derivative action. [91] Derivative actions are also subject to exceptionally severe collective action and freeriding problems as compared to direct, non-collective (*i.e.*, non-class action) actions.[92] With few exceptions, these features weaken the affirmative incentives for and strengthen negative incentives against pursuing derivative actions, and diminish the compensatory and deterrence functions of derivative actions to vanishing point. Unsurprisingly,

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[90] On the relative rarity of indemnity orders that shift the cost burden from the shareholder to the company, *see* Andrew Keay, *Assessing and Rethinking the Statutory Scheme for Derivative Actions Under the Companies Act 2006*, 16 J. CORP. L. STUD. 39, 57 (2016) (reporting on the United Kingdom); Samantha S. Tang, *The Anatomy of Singapore's Statutory Derivative Action: Why Do Shareholders Sue – Or Not?*, 20 J. CORP. L. STUD. 327, 348–49 (2020) (describing Singapore); Lynne Taylor, *The Derivative Action in the Companies Act 1993: An Empirical Study*, 22 N.Z.U. L. Rev. 337, 355 (2006) (New Zealand); Ian M. Ramsay & Benjamin B. Saunders, *Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action*, 6 J. CORP. L. STUD. 397, 445–46 (2006) (discussing Australia).

Of course, if a derivative action is settled, there is the possibility that the company would bear the costs and expenses of litigation. *See, e.g.*, Reisberg, *Funding Derivative Actions*, *supra* note 88, at 348–50 (describing U.S. derivative action doctrines on costs). There is the further possibility of risk shifting to attorneys and litigation funders, but for interests of length I do not explore these further in this Article.

[91] For a survey, *see* MARTIN GELTER, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PRIVATE ENFORCEMENT OF SHAREHOLDER RIGHTS: A COMPARISON OF SELECTED JURISDICTIONS AND POLICY ALTERNATIVES FOR BRAZIL 39–40 (2020); *see also* Martin Gelter, *Preliminary Procedures in Shareholder Derivative Litigation: A Beneficial Legal Transplant?*, 19 EUR. CO. & FIN. L. REV. 3 (2022) (explaining liabilities for costs incurred across corporation structures).

[92] *See, e.g.*, Arad Reisberg, *Theoretical Reflections on Derivative Actions in English Law: The Representative Problem*, 3 EUR. CO. & FIN. L. REV. 69, 79 (2006) ("[S]hareholders suffer a collective action problem when voting which undermines their effectiveness as a decision-making body. A rational shareholder in a public company will not expand the time and effort to evaluate whether a derivative action is in the interests of the company because the shareholder's vote would have only a small effect on the outcome and the small shareholding means that any gains by reason of the derivative action being successful will only be small."); Reisberg, *Funding Derivative Action*, *supra* note 88, at 345 ("A prospective plaintiff, being aware of this "free-riding" effect, has a strong incentive to leave it to someone else to sue. If all shareholders share the same view, then no one is likely to step forward even in situations where litigation would increase total share value.").

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studies of derivative actions outside the United States often reveal a bleak picture.[93]

*iii. Application to a Corporate Purpose Duty*

Private enforcement's most distinctive characteristic and greatest advantage—achieving compensation—is largely negated in the context of a corporate purpose duty. Unless it is an independently unlawful act causing financial or other quantifiable harm to the company's value, mere failure to comply with a corporate purpose oriented towards the interests of other stakeholders may well result in no actionable harm or even result in gains to shareholders.[94] Take, for example, a company whose directors have acted to increase profitability at the expense of employees. The real victims, the employees, have no standing to seek compensation through private enforcement mechanisms in corporate law. However, from the company's perspective and by

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[93] *See, e.g.*, Tang, *supra* note 90, at 347 (reporting just twenty-three written judgments for pretrial derivative action proceedings over twenty-six years in Singapore, a jurisdiction with between 250,000 to 300,000 registered companies); Félix E. Mezzanotte, *The Unconvincing Rise of the Statutory Derivative Action in Hong Kong: Evidence from Its First 10 Years of Enforcement*, 17 J. CORP. L. STUD. 469, 477 (2017) (reporting eighty-three derivative action cases over twenty years in Hong Kong); *Statistics – Local Companies That Have Remained Registered on the Companies Register*, COMPANIES REGISTRY (2018), https://www.cr.gov.hk/en/publication/fact-stat/statistics/local-companies-registered/since-2014.htm [https://perma.cc/635G-AF4X] (reporting that Hong Kong has had about 1.3 million registered companies since 2015); John Armour, *Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment*, *in* RATIONALITY IN COMPANY LAW 71, 78, 83 (John Armour & Jennifer Payne eds., 2009) (reporting a mean of 1.5 derivative actions resulting in written judgment per year in the United Kingdom, a jurisdiction with about 1.5 to 2.1 million registered companies); Varzaly, *supra* note 72, at 305 (reporting zero derivative actions brought against listed companies and a total of thirty derivative or oppression (a direct suit) actions against directors in private companies in Australia from 2001 to 2013); AUSTL. SEC. & INVEST. COMM'N, ANNUAL REPORT 2013–14 at 6 (Oct. 10, 2014), https://asic.gov.au/media/2227467/asic-annual-report-2013-14.pdf [https://perma.cc/CM4F-AD4G] (reporting about 2.1 million registered companies in Australia in 2013–14); *see generally* Brian R. Cheffins & Bernard S. Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385 (2006) (surveying enforcement actions against outside directors of public companies across several jurisdictions).

[94] *See, e.g.*, Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 756 (2019) (commenting on the rarity of shareholders holding directors liable for breaking the law, and the possibility of a legal violation causing benefit for the company and shareholders).

extension the shareholder's, there is no actionable harm and therefore no prospect of obtaining monetary compensation. With no upside and only clear downsides in terms of cost, no private welfare-maximizing shareholder would attempt to hold the directors for breach of their corporate purpose duty for the purposes of obtaining compensation via the legal process.[95] More pertinently, without the prospect of profit, even the United States' vaunted entrepreneurial attorneys would have no reason to offer their services on a contingency basis, further diminishing the prospect of private enforcement. The novelty of enforcing corporate purpose, as compared to more established causes of action, is yet another deterrent to private enforcers.

Private enforcement functions other than compensation (deterrence, denunciation, incapacitation, information production, etc.) may be theoretically achievable in a corporate purpose context with non-monetary sanctions such as injunctions. However, the pool of potential enforcers would be restricted to shareholders who are not financially motivated, whose interests are aligned with those of the stakeholder harmed by breach of the corporate purpose duty, and who are prepared for an outcome where they might be unable to recover their expenses even if they win the enforcement action.

In summary, only extremely determined shareholder plaintiffs or lawyers motivated by reasons other than profit—and crucially, sufficiently well-resourced to bear the virtual certainty that they would make financial losses on enforcement activities—might be inclined to try enforcing corporate purpose. As private enforcement currently stands, this is a remote prospect.

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[95] *See* Fleischer, *supra* note 33, at 183 ("In the absence of direct pecuniary damage, shareholders willing to sue are unlikely to be found in such a case. For their part, the concretely affected stakeholders have no right of action of their own. Granting them a direct or derivative right of action could lead to other dysfunctionalities, such that so far neither the German nor the English or US legal systems have dared to open this Pandora's box.") (citation omitted).

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DOI: https://doi.org/10.58112/jil.45-4.1

*c. Public Enforcement*

*i. Mechanisms*

By public enforcement, this Article means enforcement by state agencies or other public bodies ("public regulators"[96]). While regulators enforcing securities (or financial markets) law are ubiquitous in developed jurisdictions, most notably the U.S. Securities and Exchange Commission ("SEC"), and reasonably common worldwide,[97] public enforcement of core corporate law is not.[98] A rare example of a reasonably well-resourced regulator engaging in, among other things, enforcing core corporate law aspects such as the director's duty of loyalty and care, is ASIC.[99]

Public enforcement may achieve exclusive outcomes not available in private enforcement, namely criminal sanctions,[100] civil

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[96] *See, e.g.*, David Orozco, *Compliance by Fire Alarm: Regulatory Oversight Through Information Feedback Loops*, 46 J. CORP. L. 97, 105 (2020) ("[R]egulators may be broadly defined as institutions that have the public authority to create or enforce legal sanctions against a firm or an individual. This includes state and federal legislatures, courts, agencies, prosecutors, and law enforcement personnel."). Being premised solely on a U.S. context, Orozco's definition may be underinclusive in other jurisdictional contexts, but nonetheless serves as a helpful starting point.

[97] *See, e.g.*, *Ordinary Member Organizations*, INT'L ORG. SEC. COMM'N, https://www.iosco.org/about/?subsection=membership&memid=1 [https://perma.cc/W4FL-BXGK] (last visited June 4, 2024); *Associate Member Organizations*, INT'L ORG. SEC. COMM'N, https://www.iosco.org/about/?subsection=membership&memid=2 [https://perma.cc/E7GT-TFJ3] (last visited June 4, 2024).

[98] *See, e.g.*, Andrew Keay & Michelle Welsh, *Enforcing Breaches of Director Duties by a Public Body and Antipodean Experiences*, 15 J. CORP. L. STUD. 255, 265 (2015) (observing that the United Kingdom "does not have a corporate regulator"). That said, securities law enforcement can overlap with "core" corporate governance enforcement. On this phenomenon in the U.S. context, *see* Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859 (2003).

[99] *See* Keay & Welsh, *supra* note 98, at 265 ("Australia does have [a corporate regulator], and one that is robust and reasonably well funded.").

[100] Some jurisdictions retain "private prosecution" regimes wherein individuals or other non-state parties may bring prosecutions for certain offences. For the United Kingdom, *see, e.g.*, Prosecution of Offences Act 1985, c. 23, § 6(1), (Eng.), https://www.legislation.gov.uk/ukpga/1985/23 [https://perma.cc/M6BB-5WQY] (preserving the right of private prosecution). For New Zealand, *see generally* Anna Louise Prestidge, *Private Prosecutions in New Zealand – A Public Concern?*, 50 VICTORIA U. WELLINGTON L. REV. 107 (2019). In Australia, the Australian Securities and Investments Commission and liquidators

penalties,[101] and administrative sanctions.[102] While regulation of directors and managers through criminalizing conduct is extensive in capital markets law,[103] quintessential criminal sanctions such as fines or imprisonment are somewhat more controversial in the context of breaches of more generally applicable directors' duties in corporate law.[104] Public regulators also have alternatives in non-criminal enforcement mechanisms. One example is Australia's ASIC-administered civil penalty regime. It was introduced in 1993 in response to the deficiencies of criminal enforcement of directors' duties.[105] Civil penalties include declarations of contravention, pecuniary penalties payable to the regulator, and director disqualification.[106] Additionally, ASIC may also use civil penalty proceedings to obtain compensation for victims,[107] and is empowered to enter into legally-enforceable negotiated settlements ("enforceable undertakings") with individuals or companies involving promises as to future conduct or specific actions to be taken.[108] Finally, ASIC has standing to seek a civil injunction against threatened or continuing breaches of directors' duties.[109]

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may bring prosecutions under the Corporations Act 2001, but there is no general right of private prosecution. *See* Corporations Act 2001 (Cth), §§ 534, 1315 (Austl.); *Coeur de Lion Investments Pty Ltd v. Lewis* [2020] 4 QR 455, ¶ 71 (Qld. Ct. App.) (Austl.) (leave to appeal to High Court of Australia denied) ("[Section] 1315 . . . preclude[s] the private prosecution of an offence against the Corporations Act 2001 (Cth).").

101 *See* Corporations Act 2001 (Cth) §§ 1317J(1), (4) (Austl.) (providing that only the Australian Securities and Investments Commission may apply for a "pecuniary penalty order.")

102 *See* Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207, 209 (2009) ("[P]rivate parties cannot impose critical sanctions, such as revoking licenses . . . .").

103 *See, e.g.*, offences relating to fraudulent or misleading disclosures, market misconduct, market abuse, insider trading, etc.

104 On criminal sanctions for breaches of directors' duties in corporate law, *see, e.g.*, Timothy Liau, *Is Criminalising Director Negligence a Good Idea?*, 14 J. CORP. L. STUD. 175 (2014) (discussing Singapore's criminal penalties for director negligence); CARSTEN GERNER-BEUERLE & MICHAEL SCHILLIG, COMPARATIVE COMPANY LAW 528–30 (2019) (discussing France's criminal penalty regime for directors).

105 *See* Michelle Welsh, *Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia*, 42 FED. L. REV. 217, 225 (2014). For an overview of the regime, *see id*. at 233–39.

106 *See* Welsh, *supra* note 105105, at 225; *see also* Corporations Act 2001 (Cth) §§ 1317E, 1317G, 206C (Austl.).

107 *See* Corporations Act 2001 (Cth) § 1317H (Austl.).

108 *See* Australian Securities and Investments Commission Act 2001 (Cth) §§ 93AA, 93A (Austl.).

109 See Corporations Act 2001 (Cth) § 1324 (Austl.).

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DOI: https://doi.org/10.58112/jil.45-4.1

*ii. Evaluation*

As stated above, access to criminal sanctions, civil penalties, and administrative sanctions is typically exclusive to public regulators.[110] Provided the magnitude of the sanction is more than *de minimis* (*e.g.*, substantial fine, imprisonment), criminal sanctions offer the strongest prospect of deterrence.[111] Criminal prosecution has been deployed by regulators in a range of jurisdictions to "send a message" to both the directors involved in the specific case and to other directors more generally.[112] Even without resorting to criminal law, depending on the procedural regime[113] and the regulator's resources and priorities,[114] regulators may still be better equipped than private parties to use litigation to "send a message" to noncompliant subjects through administrative or civil proceedings. For example, even long, costly, and complex litigation may be worthwhile for a determined and well-resourced regulator if it has sufficient symbolic value and serves to advance the interests of non-shareholder stakeholders.[115] Such litigation may also be useful in

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110 *See supra* notes 100–02 and accompanying text.

111 *See* Eilís Ferran, *Corporate Law, Codes and Social Norms – Finding the Right Regulatory Combination and Institutional Structure*, 1 J. CORP. L. STUD. 381, 406–07 (2001); *see also* Michael J. Duffy, *Australian Private Securities Class Actions and Public Interest – Assessing the "Private Attorney-General" by Reference to the Rationales of Public Enforcement*, 32 AUSTL. J. CORP. L. 162, 176–77 (2017).

112 *See* Cheffins & Black, *supra* note 9393, at 1465, 1469–75 (discussing "send a message" criminal prosecutions).

113 Although this varies by jurisdiction, enforcers in criminal (and to some extent administrative) proceedings may benefit from greater investigatory powers making it easier to access nonpublic information or compel testimony from witnesses, as well as possibly lower due process requirements. However, standards of proof in criminal proceedings may be higher than civil or administrative proceedings.

114 *See infra* text accompanying notes 134–139.

115 For a recent example, *see* Cassimatis v. Australian Sec. & Inv. Comm'n [2020] FCAFC 52 (Fed. Ct.) (Austl.) (upholding the first instance decision finding executive directors of a financial adviser company in breach of their statutory duty of care in administering financial advice to vulnerable investors); *see also* Rosemary Teele Langford, *"Dystopian Accessorial Liability" or the End of "Stepping Stones" as We Know It?*, 37 CO. & SEC. L.J. 362, 369 (2020) (characterizing the *Cassimatis* decision as "confirm[ing] that [the Australian statutory duty of care] creates a norm of conduct that transcends the interests of particular shareholders").

establishing standards and providing clarification on emerging areas of law of public interest.[116]

Unless demonstrably tainted by corruption or hidden agendas, enforcement action by a public regulator in the name of the public interest would seem to carry more denunciatory weight by an aggrieved individual suing for personal compensation.[117] When regulators, as repeat players of relative longevity, are in place to monitor and enforce promises as to future conduct (*e.g.*, through enforceable undertakings), enforcement's power to rehabilitate targets increases as compared to when the burden of enforcement falls on private actors. Similarly, the power to disqualify persons from acting as directors and thereby neutralizing them for substantial periods of time or even indefinitely is a potent tool available exclusively to public enforcers.[118]

Although not without its own distinct disadvantages,[119] public enforcement has unique advantages and a lack of disadvantages. Public enforcement is less susceptible to some of the weaknesses plaguing private enforcement such as free-riding.[120] Public enforcers

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116 *See* Riana Cermak, *Directors' Duties to Respect Human Rights in Offshore Operations and Supply Chains – An Emerging Paradigm*, 36 CO. & SEC. L.J. 124, 146 (2018) (citing the example of human rights and corporate governance) ("Another factor taken into account in the decision to commence proceedings is whether 'the case may provide clarification' on pertinent areas of corporate law and regulation. As human rights and corporate governance is an evolving area, it is likely that ASIC would use a case on these principles as a way to provide clarification on the law and send a regulatory message, particularly if it was a high-profile case. In this way, ASIC plays a significant role in setting corporate governance standards through litigation commenced under the civil penalty regime.").

117 This is especially the case if criminal sanctions are invoked. *See* Ryan v. The Queen [2001] HCA 21, 206 CLR 267 ¶ 118 (Austl.); *see also* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 176 (2015); Australian Sec. & Inv. Comm'n v. Vizard [2005] FCA 1037, 145 FCR 57 ¶ 40 (Austl.) ("While shaming is a form of punishment, it is not a substitute for the formal expression by society through its courts that the offender has committed a wrong.").

118 For examples of disqualification periods, *see* Jasper Hedges et al., *Banning Orders: An Empirical Analysis of the Dominant Mode of Corporate Law Enforcement in Australia*, 39 SYDNEY L. REV. 501, 509, 520–21 (2017) (reporting that most disqualifications ("company bans" in that paper) were temporary rather than permanent, and that most disqualifications were administratively imposed by ASIC and thus legally capped at five years rather than potentially permanent judicial disqualifications).

119 *See infra* text accompanying notes 131–40.

120 Jackson & Roe, *supra* note 102,102 at 210 ("Public enforcement is highly imperfect, but because private enforcement is compromised by free-rider and other weaknesses, public enforcement may still be useful."). However, in a multi-public enforcer environment, "piggybacking" by some public enforcers on others may still

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DOI: https://doi.org/10.58112/jil.45-4.1

are also perceived as having greater expertise and accordingly superior enforcers than private enforcers.[121] Public enforcement also creates various positive externalities facilitating private enforcement.[122] On its face, public enforcement has considerable advantages over private enforcement in achieving deterrence, and decisive advantages in retribution, denunciation, incapacitation, and rehabilitation.

Whether public enforcement is comparably effective at the compensatory function is harder to say. Criminal sanctions and deterrence-type functions are not infrequently combined with quasi-compensatory functions in public enforcement. Australia's ASIC may seek compensation either directly pursuant to its statutory powers [123] or indirectly through enforceable undertakings;[124] the U.S. SEC is also authorized to add civil penalties collected from defendants to "fair funds" for distribution to harmed investors.[125] Unlike self-funding private enforcers, public regulators are funded primarily by public funds, and it is natural to argue that regulatory activities including enforcement should be conducted with a view to maximizing the public interest.[126] When public enforcers are also charged with the responsibility of obtaining compensation, an inherent conflict of interest arises between the

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occur. *See generally* Elysa M. Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 B.Y.U. L. REV 421 (2019) (describing and analyzing the phenomenon of "piggybacking" by state attorneys-general in multi-state enforcement actions).

121 *See, e.g.*, Park, *supra* note 88, 87at 124, n.22 (observing that there is the "idea that the SEC is a better securities enforcer than private parties because of its expertise with respect to the securities laws" and that "[t]he image of the SEC as an independent, expert regulator has been present from the agency's inception.").

122 Jackson & Roe, *supra* note 102,102 at 210 ("[C]entral elements of private enforcement in practice depend on public enforcement."); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 221–25, 234 (1983) (characterizing private enforcers as free-riders who "piggyback" for free on valuable information produced through the efforts of public enforcers); Michelle Welsh & Vince Morabito, *Public v Private Enforcement of Securities Laws: An Australian Empirical Study*, 14 J. CORP. L. STUD. 39, 69–70 (2014) (describing how private enforcers bringing securities class actions respond positively to concurrent ASIC enforcement activity and benefit from the exercise by ASIC of its coercive powers not available to private enforcers).

123 *See* Corporations Act 2001 (Cth) §§ 1317E, 1317H et seq. (Austl.) (setting out ASIC's power to apply to court for compensation orders for contraventions of a wide range of "civil penalty provisions" in the Corporations Act 2001).

124 *See* Australian Securities and Investments Commission Act 2001 (Cth) §§ 93AA, 93A (Austl.); *see also* Welsh & Morabito, *supra* note 122, 122at 54.

125 *See* 15 U.S.C. § 7246(a).

126 *See supra* text accompanying note 83; Welsh, *supra* note 105,105 at 231.

interest of the specific group of victims on whose behalf compensation is sought and the broader public interest represented by the enforcer.[127] Accordingly, there is tension between compensation-seeking and other public regulator functions. In practice, ASIC prioritized strategic enforcement for the purpose of maximizing compliance by individuals over obtaining compensation for victims.[128] This may be constrained in practice by Australian statute, which requires the *courts* to prioritize ordering compensation over pecuniary penalties or fines.[129] Given the various tensions, it should not surprise that the effectiveness of public enforcers, for all their powers and options, at achieving compensatory outcomes continues to be a matter of debate.[130] It is difficult to conclude whether public enforcement is demonstrably superior to private enforcement in performing compensatory functions.

For all their advantages over private enforcers, regulators face unique constraints as well. Regulators rarely succeed in extracting substantial out-of-pocket payments from errant directors,[131] which has implications for deterrence and compensation. A public enforcement strategy focused primarily on punishment would create costs in terms of greater resistance and backlash from affected interest groups,[132] preventing regulators from maximizing their

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127 *See, e.g.*, Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 513–14 (2012).

128 *See* Welsh, *supra* note 105, 105at 231–32, 239; *see also* Welsh & Morabito, *supra* note 122, 122at 58.

129 *See* Corporations Act 2001 (Cth) § 1317QF (Austl.).

130 *See* Welsh & Morabito, *supra* note 122, at 58 ("[ASIC's] focus is not on obtaining compensation for investors."); *See* Jasper Hedges et al., *The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis*, 40 MELBOURNE U. L. REV. 905, 955 tbl.5 (2017) (reporting just five compensation orders were sought as a sanction out of a total sample of 387). *Cf.* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1543 (2006) ("[E]ven in major scandals where the SEC has brought its own action, the damages paid in securities class actions are usually (but not always) a multiple of those paid to the SEC . . . private enforcement seems to dwarf public enforcement".) *with* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 335–37 (2015) (arguing that critiques of the SEC's fair fund practices were not supported by better data).

131 *See* Cheffins & Black, *supra* note 93, at 1467–69 (discussing the circumstances of the few cases in which outside directors ended up out-of-pocket due to public enforcement).

132 *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 20, 25 (1992).

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DOI: https://doi.org/10.58112/jil.45-4.1

retributive potential. Burdensome internal review procedures may also lead to the regulator developing a risk-averse organizational culture,[133] thus forgoing otherwise promising opportunities to exert deterrence and other functions.

While public regulators, unlike private enforcers, are not constrained by a need to maximize their interest in each enforcement attempt, that does not mean that resource constraints are irrelevant. Staff headcounts and budgets for enforcement vary widely between jurisdictions even when adjusted for population and gross domestic product. [134] Even well-resourced public enforcers, including Australia's vaunted ASIC, never have enough resources to pursue every event of non-compliance.[135] Public regulators are necessarily bureaucratic in nature, which may place them at a relative disadvantage in talent recruitment and retention; staff turnover also impairs speed and efficiency of decision-making and enforcement action.[136] Due to resource constraints,[137] as well as the necessity of responding to different types of infringements differently, public enforcement may be largely lenient, and punitive primarily in

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133 *See, e.g.*, Park, *supra* note 87, at 147 (describing the U.S. SEC).

134 *See, e.g.*, Jackson & Roe, *supra* note 102, at 214 tbl. 2.

135 *See, e.g.*, Welsh, *supra* note 105, at 232.

136 For a description of this in the context of the SEC, *see* Park, *supra* note 87, at 147 ("As an enforcement case goes through each step of the SEC's vetting process, supervisors must take time to understand the case and will have opportunities to raise objections. In the interim, there is often staff turnover, causing additional delay as new staff become acquainted with the case. The time it takes to assess a complex case may decrease the momentum of the case, leaving a nominal settlement as the most attractive option. Excessive delay reduces the initiative of the staff and impact of the enforcement case that is ultimately brought. The frustrations of dealing with a bureaucracy make it difficult to attract and retain elite attorneys who are best able to handle innovative principle-enforcement actions.") (citations omitted).

137 For a description of how public regulators work within budgetary and other constraints to achieve "maximum voluntary compliance," *see* Welsh & Morabito, *supra* note 122, at 51 ("One of the realities facing most, if not all, public regulators is that, due to budgetary and other constraints, it is simply not possible to detect, investigate and instigate enforcement action in response to every contravention of the law that occurs. Therefore, successful public regulators recogni[z]e there is a need to adopt enforcement policies and procedures that are targeted at encouraging maximum voluntary compliance with the legal requirements they are tasked to enforce. Often the enforcement policies and procedures adopted by public regulators will provide guidance on which types of matters will be investigated, which types of matters will proceed to enforcement and which of the available enforcement mechanisms will be utili[z]ed.").

selected, egregious cases.[138] Regulators may also be under pressure to bring large numbers of relatively easy enforcement actions to boost their numbers.[139] Government corruption may continue to be a factor hampering public enforcement in some jurisdictions.[140]

In summary, public enforcement offers good potential for deterrence, but much less for compensation. Being publicly funded to serve the public interest, regulators can act in the interests of non-shareholder stakeholders. Despite greater resources overall, public enforcers remain constrained by available resources and the need to balance conflicting interests and priorities.

### *iii. Application to a Corporate Purpose Duty*

Public enforcers, armed with tools that private actors can only dream of and empowered to further the interests of stakeholders other than shareholders, seem at first glance well-placed to enforce a corporate purpose duty. While public regulators *can*—at least theoretically—just about enforce *anything* that the law (or the state) empowers them to, they are never in a position where they can enforce *everything* they are allowed to. The constraint is that of resources and priorities: unless additional resources—primarily funding and personnel—are provided, enforcing corporate purpose duty breaches means diverting resources away from other enforcement and regulatory activities. Such diversion of resources would be difficult to justify unless enforcing the corporate purpose duty is demonstrably in the public interest.

Even if public regulators were inclined to devote resources to enforcing corporate purpose, another problem confronts them:

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138 According to responsive regulation theory, regulators should deploy a range of tools (the "enforcement pyramid") strategically, beginning with leniency and escalating in response to continued infringements, so as to elicit the maximum amount of compliance from regulated subjects possible. *See generally* AYRES & BRAITHWAITE, *supra* note 132.

139 Park, *supra* note 87, at 147 ("[T]he SEC . . . is judged partly based on the number of enforcement cases it brings. Given its relatively large size and jurisdiction, the SEC is expected to produce a certain amount of enforcement output. It is easier for the SEC to generate a high volume of cases by bringing [simpler, less-innovative] rule-enforcement cases.")

140 *See, e.g.*, Jackson & Roe, *supra* note 102, at 210 ("[T]he problems of public administration are familiar and profound—public officials have imperfect incentives, are often poorly informed on many market matters, and are too often corrupt . . . .").

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diversity. Even if all company directors were imposed with a corporate purpose duty, such a duty would be a standard, not a rule.[141] Conduct constituting breach in one company may very well be in furtherance of corporate purpose in another company. Much turns on how corporate purpose manifests in each company, which can boil down to a question of choice.

If heterogeneity in corporate purpose across companies were to arise,[142] enforcement of a corporate purpose duty must necessarily be customized to the context of each company. Public regulators responsible for thousands to millions of companies in a jurisdiction simply cannot afford that level of individualized attention for each company. By way of analogy, while there are regulators administering consumer protection law, which is relatively uniformly applicable to large numbers of individuals, there is no public enforcement of customized B2B contracts. Exceptional scenarios aside, it is unlikely that a corporate purpose breach in one company would, without more, also be a matter of broader public interest justifying the costs of public enforcement. Compared to enforcement of generally applicable duties such as duties of care or loyalty, or the duty not to make misleading statements, judicial precedents produced through corporate purpose duty public enforcement in idiosyncratic contexts would be less likely to be of guidance to courts, regulators, or regulated actors in the future.

In summary, public enforcement of a corporate purpose duty is unlikely to be either cost-effective enough or sufficiently in the public interest to be publicly justifiable.

*d. Third Way(s)? The Promise of Hybrid Enforcement*

The analysis above[143] established that neither private nor public enforcement seem to be promising means of operationalizing a proposed corporate purpose duty. Unless a workable system of enforcement is conceived, there would be no point in trying to legislate or develop doctrinally a director's corporate purpose duty.

141 *See supra* Part b above.

142 This would likely be the case if companies were to follow the British Academy's recommendation (text accompanying *supra* note **Error! Bookmark not defined.**) and adopt their own corporate purpose statements.

143 *Supra* parts iii, iii.

The next Part explores two alternative "hybrid" enforcement approaches by analyzing examples from Taiwan, the People's Republic of China, and Japan.

## III. HYBRID ENFORCEMENT: THREE CASE STUDIES

In this Part, I examine case studies from three jurisdictions—Taiwan, China, and Japan—serving as examples of hybrid enforcement of corporate law. The essential features of "quasi-public" (Taiwan and China) and "quasi-private" enforcement, and a comparative analysis of their merits for enforcement of a corporate purpose duty, are the subject of Part IV.

### *a. Taiwan and China: "Quasi-Public" Enforcement*

#### *i. Taiwan*

The Securities and Futures Investors Protection Center (證券投資人及期貨交易人保護中心, abbreviated in Chinese as "投保中心", and in English either "SFIPC" or just "IPC") was established in 2003 as part of the regulatory regime created by the Securities Investor and Futures Trader Protection Act (證券投資人及期貨交易人保護法, "SIFTPA"). It was enacted in 2002 and entered force in 2003.[144] The SIFTPA mandated the establishment of one or more "protection institutions" (保護機構) by stakeholders in Taiwan's securities market under the direction of the state Financial Supervisory Commission (金融監督管理委員會, "FSC").[145] The FSC is further authorized to prescribe regulations governing the affairs of, and to exercise its supervisory powers over, any protection institution.[146] In particular, the FSC has power to appoint a protection institution's board of directors and supervisors.[147] Although established

144 *See* ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA], amended June 10, 2020, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/XNW5-83BV] (Taiwan).

145 *Id.* arts. 3, 7.

146 *Id.* arts. 8, 16.

147 *Id.* arts. 3, 11, 15.

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DOI: https://doi.org/10.58112/jil.45-4.1

pursuant to the SIFTPA, any protection institution would be legally organized as a foundation (財團法人) and regulated by the Civil Code and other applicable legislation for matters not specifically provided for in the SIFTPA.[148] As the IPC—which is to date, and appears likely to continue to be, the sole protection institution established pursuant to the SIFTPA[149]—the IPC is functionally synonymous with "protection institution" within the meaning of SIFTPA.

Despite organizationally structured as a non-profit foundation rather than a government agency, the IPC has a strong public character.[150] The IPC's funding is, while technically independent of the government budget, rooted in state legislation. The SIFTPA mandates that the operational funding of each protection institution, called the "protection fund" (保護基金),[151] be drawn from designated stakeholder institutions upon establishment,[152] and subsequently replenished through statutory levies on these institutions and investment returns on the protection fund.[153] Protection institutions may also accept donations from any party, whether corporate or individual, Taiwanese or foreign,[154] but it may not profit off any litigation it has successfully concluded.[155] The

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148 *Id.* arts. 5, 8.

149 Andrew Jen-Guang Lin, *The Challenges and Contemporary Issues of Taiwan's Investor Protection System: A Model to Learn or to Avoid*, 11 NAT'L TAIWAN U. L. REV. 129, 144 (2016); *see also id.* at 144 n.49–145 n.50 and accompanying text (describing how the IPC inherited the functions and physical infrastructure of a forerunner institution). On the forerunner institution, *see, e.g.*, *id.* at 141–43; Curtis J. Milhaupt, *Nonprofit Organizations as Investor Protection: Economic Theory and Evidence from East Asia*, 29 YALE J. INT'L L. 169, 177–78 (2004).

150 Lin & Xiang, *supra* note 20, at 516; Wang & Su, *supra* note 19, at 13.

151 ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] arts. 6, 20, June 10, 2020, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/XNW5-83BV] (Taiwan).

152 *Id.* art. 7(2).

153 *Id.* art. 18. On the precise sources and uses of the protection fund a comparative view, *see* Lin, *supra* note 149, at 145–49.

154 ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] art. 18(1) subpara 5, June 10, 2020, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/XNW5-83BV] (Taiwan).

155 *Id.* art. 33.

IPC's protection fund is used, among other things, to finance the IPC's litigation activities.[156]

The IPC's original litigation mandate covered civil court and arbitration claims for securities fraud victims,[157] but this was expanded in 2009 to include derivative suits[158] and removal suits[159] against directors and supervisors of listed companies[160] for breaches of statutes, regulations, or articles of incorporation. Although the SIFPTA does not make this an express pre-requisite for initiating litigation,[161] the IPC is required by its governing regulations to hold shares in every listed company in Taiwan to exercise shareholder rights,[162] and does hold token stakes of 1,000 shares per company for this purpose.[163] The IPC's litigation activities are conducted by its

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156 *Id.* art. 20(1) subparas 2–3.

157 *Id.* art. 28.

158 *Id.* art. 10-1(1).

159 *Id.* art. 10-1(2). For a comparative overview of director removal, *see* Koh, *Direct Suits and Derivative Actions*, *supra* note 80, at 432–33.

160 Taiwan offers two governance structures for listed companies: a 1.5-tier board comprising directors and supervisors, and a one-tier board comprising directors only. On board structures in Taiwan-listed companies, *see generally* Andrew Jen-Guang Lin, *Common Law Influences in Private Law – Taiwan's Experiences Related to Corporate Law*, 4 NAT'L TAIWAN U. L. REV. 107, 113–15 (2009) (describing the three possible board structures for Taiwan corporations); Hsin-Ti Chang et al., *From Double Board to Unitary Board System: Independent Directors and Corporate Governance Reform in Taiwan*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 241, 244–45 (Dan W. Puchniak et al. eds., 2017) (offering a similar account).

161 *See* ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] arts. 10-2, 28 (June 10, 2020), https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/XNW5-83BV] (Taiwan).

162 Zhengquan Touziren ji Qihuo Jiaoyiren Baohu Jigou Guanli Guize (證券投資人及期貨交易人保護機構管理規則) [Regulations Governing Securities Investor and Futures Trader Protection Institutions] art. 9 (Nov. 6, 2020), https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400053 [https://perma.cc/H4BU-MWCW] (Taiwan); *see also* ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] art. 19 (June 10, 2020), https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/XNW5-83BV] (Taiwan) (authorizing the purchase of listed securities).

163 Wang & Su, *supra* note 19, at 15; *see also* ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] art. 19(3), June 10, 2020, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/XNW5-83BV] (Taiwan) (capping the "original investment" (原始投資) at 1,000 shares per company).

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DOI: https://doi.org/10.58112/jil.45-4.1

own staff attorneys and assistants,[164] whose remuneration are subject to approval by the FSC.[165] The IPC has the power to initiate, as the plaintiff, derivative suits against current or former directors or supervisors on behalf of listed companies provided it first makes a demand in writing to the relevant party and that party fails to commence an action within thirty days.[166] For securities class actions, the IPC may, if authorized by at least twenty investors, initiate suit as lead plaintiff[167] and serve also as lead counsel.[168] Investors may opt into the IPC-initiated class action and share in the expenses of a successful suit, but are otherwise not liable for court fees or the cost of legal representation even where the action fails.[169]

To facilitate direct suits (class actions, director removals) and derivative suits, the IPC enjoys several special privileges not applicable to private litigants. For example, the IPC is expressly exempt[170] from the minimum shareholding requirements imposed by Taiwan's corporation law as a pre-condition of initiating derivative and director removal suits.[171] Another exemption

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164 *See* Lin, *supra* note 149, at 164–65 (describing the staffing situation at the IPC).

165 *Id.* at 166.

166 ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] art. 10-1(1), June 10, 2020, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/XNW5-83BV] (Taiwan). These requirements track those under general corporate law. *Cf.* Gongsi Fa (公司法) [Company Act of the Republic of China] art. 214, Dec. 26, 1929, amended Dec. 29, 2021) https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=J0080001 [https://perma.cc/JJ5Y-8NBP] (Taiwan).

167 ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] art. 28, June 10, 2020, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/C75W-ZXG6] (Taiwan).

168 Wang & Su, *supra* note 19, at 13.

169 *Id.* at 10, 14–16.

170 ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] art. 10-1(1-2), June 10, 2020, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/G3GS-M8E9] (Taiwan).

171 Gongsi Fa (公司法) [Company Act of the Republic of China] art. 214, Dec. 26, 1929, amended Dec. 29, 2021, https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=J0080001 [https://perma.cc/BLA4-N9YS] (Taiwan); *see also id.* art. 200, (prescribing a 3%

enjoyed by the IPC is the burden under civil procedure law of advancing (as the plaintiff) or bearing (if it lost[172]) the relevant court fees (訴訟費用) for the portion of a civil claim that exceeds NT$30 million (about US$990,000),[173] meaning that its liability for court fees per case is capped at a maximum of NT$251,000 (about US$8,300).[174] The IPC is statutorily barred from accepting remuneration for a successful legal action, and must disburse any compensation received after deducting its expenses to the investors who appointed the IPC to institute the action,[175] a feature that was intended to align the incentives of the IPC and the interests of the investors it represents.[176]

The advantages enjoyed by the IPC in an otherwise unfriendly environment for civil enforcement[177] reflects its position as the *de facto* monopoly enforcer[178]—a "quasi-public representative plaintiff . . . [who] does not rely on private economic incentives . . . ."[179] However, the close links between the IPC and the FSC—the latter being a state regulator wielding supervisory authority over the IPC's operations and activities—have caused concerns about the extent to which the IPC is independent of the

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minimum requirement for director removal suits), art. 214 (prescribing a 1% minimum requirement for derivative suits against directors), art. 227 (applying articles 200 and 214, among others, *mutatis mutandis* to suits against supervisors).

172 Taiwan adopts a partial loser-pays rule with respect to court fees. *See* Wang & Su, *supra* note 19, at 10, 15.

173 ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] art. 35, June 10, 2020, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/S4L7-H25E] (Taiwan). The rules governing court fees are laid down in Minshi Susong Fa (民事訴訟法) [Code of Civil Procedure] arts. 77-13, 78, Nov. 29, 2023, https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=B0010001 [https://perma.cc/7SE8-MUFU] (Taiwan).

174 Calculated based on a NT$30 million claim and applying the rules in Minshi Susong Fa (民事訴訟法) [Code of Civil Procedure] art. 77-13, Nov. 29, 2023, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0010001 [https://perma.cc/EN32-R2ZY] (Taiwan).

175 ZHENGQUAN TOUZI REN JI QIHUO JIAOYI REN BAOHU FA (證券投資人及期貨交易人保護法) [SECURITIES INVESTOR AND FUTURES TRADER PROTECTION ACT OF THE REPUBLIC OF CHINA] art. 33, June 10, 2020, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400038 [https://perma.cc/MW3R-397X] (Taiwan).

176 Wang & Su, *supra* note 19, at 13.

177 *Id.* at 6–12; Lin, *supra* note 149, at 174–75.

178 Wang & Su, *supra* note 19, at 15.

179 *Id.* at 26.

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DOI: https://doi.org/10.58112/jil.45-4.1

state.[180] Regardless, the IPC achieved a degree of success by the numbers. By end-2021, the IPC commenced 70 derivative suits, 71 director removal suits, and hundreds of securities class action lawsuits.[181] The IPC claimed credit for securing NT$1.66 billion (US$55 million) in compensation for investors through settlements in connection with its derivative suit program,[182] and documents (as of early 2023) over thirty instances of court victories in derivative suits on its website.[183] The fact that the IPC has persisted for almost two decades and the legislature's willingness to expand the IPC's mandate over time seems to bode well for its continued role in enforcing corporate law.

*ii. China*

As compared to Taiwan, China's ostensibly NPO-led investor protection approach is of more recent vintage. The China Securities Investor Services Center (中证中小投资者服务中心, abbreviated in Chinese "投服中心" and in English either "CSISC" or "ISC") was founded in 2014 as a limited liability corporation (有限责任公司).[184] The members (股东) of the ISC comprise four of China's stock and futures exchanges and the China Securities Depository and Clearing Corporation.[185] The ISC characterizes itself on its official website in English as "a non-profit financial institution" but does not use the usual Chinese equivalent of the term "non-profit" (非营利) in its

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[180] *See id.* at 24–25 (remarking on the political pressures faced by the IPC); Lin, *supra* note 149, at 193 (arguing that the high-profile nature of cases brought by the IPC militate against the possibility of intervention by the FSC).

[181] SECURITIES & FUTURES INVESTORS PROTECTION CENTER, ANNUAL REPORT 23–24 (2021), https://www.sfipc.org.tw/WebLoadFileUse.ashx?L=2&SNO=+/xPCfjJcPB/E4QOkoqb0Q== [https://perma.cc/L8ZE-EAUY] [hereinafter SFIPC Annual Report].

[182] *Id.* at 24.

[183] *Derivative Suit and Discharge Suit: Winning Cases, Derivative Suit*, SECURITIES & FUTURES INVESTORS PROTECTION CENTER (Nov. 22, 2022, 11:22 AM), https://www.sfipc.org.tw/MainWeb/Article.aspx?L=2&SNO=VEo2NibsEloKuq7FUkNx2A== [https://perma.cc/7R9X-4ZLS].

[184] *Zhongxin Jieshao* (中心介绍) [Introduction to the ISC], CHINA SEC. INV. SVCS. CTR., http://www.isc.com.cn/html/zxjs/ [https://perma.cc/T8CQ-U8XD] (last visited Feb. 15, 2023).

[185] *Zhongzheng Zhongxiao Touzizhe Fuwu Zhongxin Zuzhi Jiagou* (中证中小投资者服务中心组织架构) [Organizational Structure of the ISC], CHINA SEC. INV. SVCS. CTR., http://www.isc.com.cn/html/zzjg/ [https://perma.cc/L267-WJSW] (last visited Feb. 15, 2023).

Chinese language description.[186] The exact relationship between the ISC and the securities regulator, the China Securities Regulatory Commission (中国证券监督管理委员会, abbreviated "证监会" in Chinese and in English "CSRC"), is unclear; the ISC website clearly states in both English and Chinese that it is under the CSRC's "direct administration" (直接管理), whereas a leading scholar has characterized the relationship as that of "supervision" but not "direct[] control."[187]

The internal rules of the ISC provide that it shall hold 100 shares in each company listed on the Shanghai and Shenzhen stock exchanges, and also may at the CSRC's direction acquire other types of securities.[188] Since 2016, the ISC has assisted in investor securities litigation,[189] and from 2020, the ISC was granted the power to act as representative plaintiff in securities class actions if it receives authorization from at least fifty investors[190] and the case meets several stringent criteria as laid down by the CSRC.[191] While opt-in class actions may be brought by private litigants and entrepreneurial attorneys,[192] the involvement of the ISC in a class action proceeding converts it into a full opt-out action,[193] with participating investors sharing the court fees but bearing no liability for attorney's fees.[194] Rules issued by the Supreme People's Court on securities class actions grant the ISC preferential treatment in terms of exemption from advancement of court fees at the start of legal proceedings and potential reduction or exemption from liability for court fees even in

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186 *Id.* It does, however, call itself a "public benefit" (公益) entity on the Chinese site. *Id*.

187 *Gàikùang* (概况) [Overview], CHINA SEC. INV. SVCS. CTR., http://www.isc.com.cn/html/gk/ [https://perma.cc/C6QH-M8CZ] (last visited Apr. 4, 2024); Lin & Xiang, *supra* note 20, at footnote 222.

188 *See* Zhongzheng Zhongxiao Touzi Zhe Fuwu Zhongxin Chigu Xingquan Gongzuo Guize (Shixing) (中证中小投资者服务中心持股行权工作规则(试行)) [ISC Rules for Share Holding and Exercise of Powers (Trial Implementation)] art. 9, May 15, 2019, http://www.isc.com.cn/html/xqgz/20190515/822.html [https://perma.cc/9ZXN-KYEL].

189 Lin & Xiang, *supra* note 20, at 530.

190 ZHENGQUAN FA (证券法) [SECURITIES LAW OF THE PRC] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2019, effective Mar. 1, 2020), art. 95, Standing Comm. Nat'l People's Cong. Gaz. 343, Mar. 15, 2020 (China).

191 Lin & Xiang, *supra* note 20, at 540–41, 550–51.

192 *Id.* at 533–36 (describing key features of the current lawyer-led class action regime in China).

193 *Id.* at 541–42.

194 *Id.* at 530, 542–43.

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DOI: https://doi.org/10.58112/jil.45-4.1

an unsuccessful case.[195] The ISC, however, does not presently appear to have been expressly authorized to initiate derivative suits against listed company directors or supervisors, and its nominal hundred shares in each company would not be sufficient to satisfy the one percent minimum shareholding requirement otherwise applicable to derivative suit plaintiffs under corporation law.[196]

The extent to which the ISC functions as a true hybrid, NPO-led as opposed to state-led enforcement is debatable, given that it is not only a company owned by state-owned entities,[197] but also an entity that is under the direct supervision, if not administration, of the CSRC,[198] and which scrutinizes the ISC's decisions in class actions.[199] As of early 2023, the ISC concluded just one representative opt-out class action,[200] but one which is carefully choreographed with various state bodies and state-linked entities acting swiftly to achieve a headline-worthy result.[201] It remains to be seen how the ISC would pick its enforcement priorities going forward, but at present there are no indications that it would adopt a comparably aggressive litigation program as its Taiwan counterpart.

*b. Japan – "Quasi-Private" Enforcement*

In contrast with Taiwan and China, Japan does not adopt a state-connected enforcement model in corporate law matters. However, one NPO[202]—of completely civilian origin—have made its mark on the history of corporate law enforcement in Japan.

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195 *Id.* at 542.

196 GONGSI FA (公司法) [COMPANY LAW OF THE PRC] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, rev'd Dec. 29, 2023, effective Jul. 1, 2024), art. 189(1) (previously art. 151(1)), (China).

197 *See supra* text accompanying note 185.

198 *See supra* text accompanying note 187.

199 Lin & Xiang, *supra* note 20, at 556.

200 *See Gudong Susong* (股东诉讼) [Shareholder Suits], China Sec. Inv. Svcs. Ctr., http://www.isc.com.cn/html/gdss/ [https://perma.cc/5WXF-5LWH] (last visited Feb. 15, 2023) (listing only one case, Haili Biotech). For a summary in English of this case, *see* Lin & Xiang, *supra* note 20, at 557–58.

201 Lin & Xiang, *supra* note 20, at 558.

202 There is a spiritual successor, but this will not be discussed due to lack of space.

The *Kabunushi Ombuzuman* (株主オンブズマン) ("KO") [Shareholders Ombudsman [203] ] was a non-profit "citizens' organization" (*shimin dantai*) founded in February 1996.[204] Although the KO remained active through at least 2007,[205] it became defunct by the early 2010s. It was officially dissolved on July 10, 2019,[206] given the death of one of its leading figures, its ageing key members, and having accomplished part of its mission.[207] The underlying motivation, at least for the KO's founders, appears to have been to advance social justice through holding corporations accountable.[208] The focus on exercising shareholders' legal rights was instrumental; the objective was to improve the environment for ordinary

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[203] According to the translation given by the KO's leader, Professor Morioka Kōji, on his English-language website. Kōji Morioka, *About Kabunushi (Shareholders) Ombudsman: Its Goals and Activities*, ZEPHYR, https://web.archive.org/web/20070624102325/http://www.zephyr.dti.ne.jp/~kmorioka/about%20KO_e.html [https://perma.cc/K64E-ZT9H] (last visited June 4, 2024).

[204] Morioka Kōji, Kabunushi Ombuzuman Ankēto Chōsa Kekka Sōran (1996–2007) no happyō ni atatte (株主オンブズマン・アンケート調査結果総覧（1996～2007）の発表にあたって) [On the Release of the Compendium of Results of Surveys by the Shareholders Ombudsman (1996–2007)] 1 (2008), https://www.kansai-u.ac.jp/Keiseiken/publication/material/asset/chosa106/106-1.pdf [https://perma.cc/UC3R-2FJP] [hereinafter Morioka, *Sōran*]. The author was a founding member and leader of the KO.

[205] *See* Morioka, *Sōran*, *supra* note 204 (summarizing KO activities from 1996 to 2007).

[206] Naikakufu (内閣府) [Cabinet Office, Government of Japan], *Tokutei Hi-eiri Hōjin Kabunushi Ombuzuman* (特定非営利活動法人株主オンブズマン) [*Specified Nonprofit Activities Corporation Shareholders Ombudsman*], NPO HŌJIN PŌTARU SAITO (NPO 法人ポータルサイト) [NPO ENTITIES PORTAL], https://www.npo-homepage.go.jp/npoportal/detail/113000962 [https://perma.cc/5DHD-A9N8] (last visited June 4, 2024).

[207] *Tateiwa Yōichirō, Kigyō no fusei wo tadashite kita "kabunushi ombuzuman" ga kaisan; kigyō kanshi no yakuwari wo oe* (企業の不正をただしてきた「株主オンブズマン」が解散　企業監視の役割を終え) [*Righter of Corporate Wrongs "Kabunushi Ombudsman" Has Dissolved, Ending Its Corporate Monitoring Role*], IN FACT (Aug. 2, 2019), https://infact.press/2019/08/post-2683/ [https://perma.cc/STA6-7YKV].

[208] *See* Ōtsuka Hiroshi, *Irai naki hōdōin: "Kabunushi Ombuzuman" to kabunushi daihyō soshō* (依頼なき法動員：『株主オンブズマン』と株主代表訴訟) [*Legal Mobilization Without Clients: The Shareholders Ombudsman and Derivative Actions*], 47 KŌBE HŌGAKU ZASSHI (神戸法學雜誌) [KOBE L.J.] 705, 723 (1998) [hereinafter Ōtsuka, *Hōdōin*]; Kōji Morioka, *About Kabunushi (Shareholders) Ombudsman: Its Goals and Activities*, https://web.archive.org/web/20070624102325/http://www.zephyr.dti.ne.jp/~kmorioka/about%20KO_e.html (last visited June 4, 2024). *But see infra* note 230 and accompanying text for an academic's skeptical view of the KO's stated motivations).

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DOI: https://doi.org/10.58112/jil.45-4.1

shareholders to exercise their rights for the purpose of promoting corporate disclosure.[209]

At its founding in 1996, the KO was then unique among social movement organizations by taking the form of a for-profit business entity, the *Yūgen Kaisha* (YK) limited liability corporation.[210] The minimum legal capital of ¥3 million was donated by founding member and attorney Sakaguchi Tokuo.[211] The YK was chosen because at the time non-profit organizations did not have access to a legal form at a reasonable start-up cost.[212] Eventually, in 2003, the KO converted into an Osaka Prefecture-certified nonprofit corporation[213] (*tokutei hi-eiri katsudō hōjin*, literally "corporation engaging in specified non-profit activities"[214] but commonly abbreviated in Japanese as *NPO Hōjin*[215]). By 1997, the KO held shares in over 300 issuers, and counted among its approximately 150 members not only attorneys, but also individual shareholders, leading citizens in the community, and public accountants.[216]

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209 Ōtsuka, *Hōdōin*, *supra* note 208, at 735.

210 *Id.* at 734. On the YK's basic legal characteristics and place within Japan's business entities, *see* Alan K. Koh, *Shareholder Protection in Close Corporations and the Curious Case of Japan: The Enigmatic Past and Present of Withdrawal in a Leading Economy*, 53 VAND. J. TRANSNAT'L L. 1207, 1220–22 (2020).

211 Interview of Sakaguchi Tokuo by Abe Shūichirō, Gekkan Ōsaka Bengoshikai (月刊大阪弁護士会) [OBA Monthly Journal] 19, 20 (Sept. 2013), https://www.osakaben.or.jp/matter/db/pdf/2015/oba_newsletter-25.pdf [https://perma.cc/5H8C-DXXP] [hereinafter *Sakaguchi Interview*].

212 Milhaupt, *supra* note 149, at 179 n.46.

213 Morioka, *Sōran*, *supra* note 204, at 1.

214 Translation from Tokutei hi-eiri katsudō sokushin hō (特定非営利活動促進法) [Act on Promotion of Specified Non-profit Activities], Law No. 7 of 1998, art 2(2), as translated at https://www.japaneselawtranslation.go.jp/en/laws/view/3028 [https://perma.cc/BKC9-CF4U].

215 Tokutei hi-eiri katsudō sokushin hō (特定非営利活動促進法) [Act on Promotion of Specified Non-profit Activities], Law No. 7 of 1998 (Japan) (the governing statute for *NPO Hōjin* nonprofit corporations (NPO 法人)).

216 Ōtsuka, *Hōdōin*, *supra* note 208, at 733–34; Kōji Morioka, *About Kabunushi (Shareholders) Ombudsman: Its Goals and Activities*, https://web.archive.org/web/20070624102325/http://www.zephyr.dti.ne.jp/~kmorioka/about%20KO_e.html (stating that the KO "is a nonprofit organization consisting of lawyers, accountants, scholars, individual shareholders and other citizens"); *see also* Milhaupt, *supra* note 149, at 178–79 ("Shareholder Ombudsman, an NPO "dedicated to the goal of reforming Japanese management practices to incorporate the views of ordinary shareholders and citizens", was founded in 1996 by a group of lawyers, (179) accountants, and academics. The organization is a spin-off of the Osaka-based Citizens' Ombudsman, a watch dog group that monitors the government bureaucracy and the relationship between government and business.").

Although registered as a corporate entity, functionally the KO was a network featuring a core of key members who were clear repeat players in the roles of both plaintiff and lawyer, as well as a more loosely affiliated network of shareholders and lawyers who participated *ad hoc*. In its corporate law enforcement activities, legal teams (*bengodan*) for each individual lawsuit are formed around key attorney members, although non-KO member attorneys also join such teams, participate in deliberations, and share in litigation workload on an *ad hoc* basis.[217] Once a legal team has been formed, even the most active and central non-attorney "citizen members" (*shimin kai'in*) would delegate all litigation-related matters to the legal team.[218] Despite the lack of strict continuity, key members were involved in multiple legal teams and presumably built up considerable personal expertise.[219] The KO's funding was both internal (donations out of the KO lawyers' cut of payments made by defendant directors pursuant to settlement or court victory)[220] and external (from proceeds of fund-raising activities, members' subscriptions, and donations).[221]

The KO's activities included shareholder litigation, often in the form of derivative actions.[222] All of KO's high-profile litigation victories—mostly by settlement and rarely by judgment[223]—involved unlawful activities against non-shareholder stakeholder interests. Large settlements (ranging from ¥120 million to 380 million) and commitments to establish compliance regimes were obtained in high profile lawsuits relating to illegal payments by

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217 Ōtsuka, *Hōdōin*, *supra* note 208, at 736 (observing that young (i.e. under-40) attorneys formed the core of such "ordinary activists").

218 *Id.* at 729.

219 *Id.* at 738.

220 *Sakaguchi Interview*, *supra* note 211, at 20; Milhaupt, *supra* note 149, at 197. Retainers charged by KO attorneys upon commencement of suit were however token sums that did not contribute to the KO's funding. *See* Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. LEG. STUD. 351, 369 (2001) [hereinafter West, *Why Shareholders Sue*] (reporting retainers of just 300,000 to 500,000). For a description of the attorneys' fees involved in KO-involved litigation settlements, *see id.* at 369 tbl. 6. *See also* Milhaupt, *supra* note 149, at 197 (reporting that junior attorneys receive modest compensation from KO work but senior attorneys do not).

221 Ōtsuka, *Hōdōin*, *supra* note 208, at 734; *Sakaguchi Interview*, *supra* note 211, at 20.

222 On the barriers to entry and cost considerations for derivative action plaintiffs under Japanese law, *see infra* note 236.

223 Milhaupt characterizes some of the KO's settlements as "arguably the equivalent of a judicial victory both in terms of compensation received . . . and their impact on the corporate community." Milhaupt, *supra* note 149, at 180.

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DOI: https://doi.org/10.58112/jil.45-4.1

directors of Japan's leading companies to *sōkaiya* racketeers.[224] A no-damages settlement with a compliance and disclosure commitment by the company was also obtained after the KO filed suit in a case where the company was levied penalties for failing to meet its legal hiring quota of persons with disabilities.[225] The KO also pursued corporate governance failures with implications for stakeholders external to the company. The concealment of a mass recall of motor vehicles led to a KO suit that was settled with the payment by the company's former leadership of ¥180 million towards a compliance fund to be used to establish an internal whistleblowing system.[226]

## IV. HYBRID ENFORCEMENT FOR CORPORATE PURPOSE?

This Part distills from the three case studies examined in the preceding Part the key features of two classes of hybrid enforcement, quasi-public and quasi-private, that lie between the private and public ends of the spectrum. It then considers their respective utility in the enforcement of a corporate purpose duty.

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[224] Morioka, *Sōran*, *supra* note 204, at 3, 4 and tbl.1 (citing successes at Takashimaya, Ajinomoto, Nomura Securities, Dai-ichi Kangyo Bank (defunct and absorbed into what became today's Mizuho Financial Group), and Kobe Steel); Ōtsuka, *Hōdōin*, supra note 208, at 718. For the leading account of *sōkaiya* in English, *see* Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436 (1994). For the legal framework, *see* Kaishahō [Companies Act], Act No. 86 of 2005, arts. 120(1) (Japan) (prohibiting the provision of economic benefit by any person to any shareholder in connection with the exercise of shareholder rights), 970(1) (making it a criminal offence for any director or executive officer (*shikkōyaku*) to breach article 120(1)), art. 120(4); *see also* Kaishahō Shikō Kisoku (会社法施行規則) [Regulations for the Enforcement of the Companies Act], Ministry of Justice Order No. 12 of 2006, art. 21 (directors and executive officers involved in the provision of benefit are jointly and severally liable to the corporation for the amount of benefit unlawfully provided). *Cf.* Shōhō (商法) [Commercial Code], Act. No. 48 of 1899, arts. 295(1), 266(1) Item 2, 497(1) *with* Tokureihō (株式会社の監査等に関する商法の特例に関する法律) [Act on Special Provisions of the Commercial Code Concerning Audits, etc. of Stock Companies], art. 29-10(1) (providing for criminal liability); Shōhō, arts. 266(1) Item 2; *and* Tokureihō (株式会社の監査等に関する商法の特例に関する法律) [Act on Special Provisions on the Commercial Code Concerning Audits, etc. of Stock Companies], art. 21-20(1) (providing for civil liability) (all three have been repealed).

[225] Morioka, *Sōran*, *supra* note 204, at 9 (involving Japan Airlines).

[226] *Id.* at 3 (involving Mitsubishi Motors).

*a. Quasi-Public Enforcement*

*i. Features*

Both Taiwan and China offer examples of "NPO-led"[227] or "quasi-public"[228] enforcement. Briefly, the quasi-public model is built around a state-sanctioned non-profit organization, the "quasi-public enforcer," that principally utilizes *private* enforcement mechanisms such as derivative suits and securities class actions. As a state-connected and -supported entity, the quasi-public enforcer is subject to a special legal regime and supervision by a state regulatory body. Special privileges, typically in terms of minimum shareholding requirements (Taiwan) and the treatment and quantum of required court fees (Taiwan and China) that are not available to purely "private" litigants, are granted to the quasi-public enforcer facilitate the commencement of lawsuits using otherwise "private" enforcement mechanisms. The enforcer may draw on state, private, or both types of funding for its operations, but it appears that funding from state-connected sources (*i.e.*, either mandatory contributions pursuant to state law in Taiwan's case, or capital from state-linked institutions in China's) seem to be more important. Taiwan's quasi-public enforcement regime enjoyed gradual and moderate levels of success, while China's is still relatively new with one notable success under its belt. Both existing examples of quasi-public enforcement seem reasonably suitable for enforcing relatively conventional directors' duties in contexts such as misstatements in securities disclosures and legal compliance. Conversely, there is no evidence at present that the enforcers have taken interest in holding directors accountable for failure to comply with company-specific constitutional provisions.

To sum up, quasi-public enforcement is characterized by 1) establishment pursuant to state-initiated action and under a special state regulatory framework; 2) ongoing supervision by, and accountability to, a state authority; 3) funding sources secured by state law, sourced from state-linked entities, or both; 4) use of private enforcement mechanisms as modified by exclusive legal privileges enjoyed as a litigant; and 5) *de jure* quasi-monopoly.

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227 Lin & Xiang, *supra* note 20, at 516, 529.

228 Wang & Su, *supra* note 19 (creating the "quasi-public" label for Taiwan's regime).

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DOI: https://doi.org/10.58112/jil.45-4.1

*ii. Evaluation*

As the analysis above shows, quasi-public enforcement is still very much public, requiring state law to lay down the necessary regulatory framework and state-initiated action to establish the quasi-public enforcer. Post-establishment, the state must at a minimum commit to maintaining the quasi-public enforcement framework comprising funding, supervision, special privileges, and quasi-monopoly aspects. Given that the enforcer's mandate is determined by the state, whether enforcement of a corporate purpose duty can be added to that mandate is in turn up to the state's priorities. No competing quasi-public enforcers may, given the quasi-monopoly enjoyed by the incumbents, emerge to undertake a new mandate unless the state so directs. The existing mandates of quasi-public enforcers appear to be centered on protecting securities market investors who have suffered actionable harm from corporate or managerial misconduct. If a breach of a corporate purpose duty were to result in civilly actionable loss to investors, it would be a simple case; addressing that would be either within or at most a minor and principled extension of the quasi-public enforcer's existing mandate. However, where a breach causes no loss, legal action would be difficult for the quasi-public enforcer to justify. Finally, there is the possibility that duty-creating corporate purpose provisions would be worded differently in each company. Much like in the case of "pure" public enforcement, the resulting diversity would complicate the formulation of publicly justifiable enforcement priorities for the quasi-public enforcer.[229]

In conclusion, quasi-public enforcement of corporate purpose is possible, but difficult unless 1) the corporate purpose duty is sufficiently uniform across all companies within the scope of the enforcer's mandate, and 2) the breach causes loss for shareholders.

[229] *Cf.* Part iii.

*b. Quasi-Private Enforcement*

*i. Features*

The KO attracted scholarly attention, but not in the context of corporate law enforcement. West, in his article on derivative actions in Japan, discounted the KO's stated non-profit, public interest oriented motivations, and instead painted a picture of the KO attorneys as opportunistic rent-seekers[230] that was inconsistent with their actions.[231] The KO was subsequently featured in Milhaupt's pioneering study of non-profit "investor organizations."[232] While Milhaupt's article picked up on how the KO and other nonprofit organizations were supplying public goods,[233] its framing of the KO's activities as "investor protection" downplayed the KO's stakeholderist goals.[234] Puchniak and Nakahigashi's derivative actions study identified that the KO's motivations were not financial but rather political,[235] but, like West and Milhaupt before them, did not see KO-type derivative actions as representing a fundamentally different model of corporate law enforcement. None of the studies sought to compare the KO against public enforcement, which, understandably, would have been difficult given that the jurisdiction against which Japan is usually compared, the US, does not feature public enforcement of corporate law directors' duties.

In contradistinction with the "quasi-public" nature of the state-connected NPOs that lead enforcement in Taiwan and China, this

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230 West, *Why Shareholders Sue*, *supra* note 220, at 369–70.

231 *See* Dan W. Puchniak & Masafumi Nakahigashi, *Japan's Love for Derivative Actions: Irrational Behavior and Non-Economic Motives and Rational Explanations for Shareholder Litigation*, 45 VAND. J. TRANSNAT'L L. 1, 47–48 (2012) (criticizing West's analysis).

232 Milhaupt, *supra* note 149, at 178–81.

233 Milhaupt, *supra* note 149, at 179 ("[T]he objectives stated in [the KO] charter exercising shareholders' legal rights, improving corporate information disclosure, and serving as a voice for the expression of shareholder opinion – are public goods.").

234 *Cf.* Milhaupt, *supra* note 149, at 197 ("NPOs as providers of investor protection appear to have emerged (in the case of . . . Japan's Shareholder Ombudsman) . . . at this particular time for a simple reason: the demand for investor protection has increased significantly in . . . Japan in the past half decade") *with supra* notes 208–09, and accompanying text (describing the KO's ultimate aim was greater corporate disclosure and social justice, with exercise of shareholder's rights merely as a means to an end).

235 Puchniak & Nakahigashi, *supra* note 231, at 54–56, 62.

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Article characterizes the KO as a "quasi-private" enforcer. The KO was founded and operated entirely by private citizens receiving neither funding nor other support from the state or its instrumentalities. The KO's pursuit of non-profit, often pro-stakeholder interests through private enforcement activities in the capacity of a shareholder against directors of prominent companies lends it public characteristics, but there is nothing to suggest that the organization at any benefited from exclusive legal advantages or financial resources conferred by the state. The KO used the Japanese derivative action extensively, which had, as compared to other enforcement mechanisms elsewhere, relatively low barriers to usage.[236] By supplying their own *pro bono* or *low bono* in-house legal expertise, the KO was able to overcome most of the limited financial disincentives arising from Japan's relatively favorable costs regime.[237] This enabled them to pursue their objectives without being excessively constrained by financial costs. The ability to apply profits from earlier, successful suits to subsequent litigation made the KO self-funding to an extent.

The KO achieved a measure of success in financial terms, notably by achieving record-breaking settlements for the companies whose directors they targeted. However, compensation of the companies harmed by breaches of directors' duties is not the point; rather, the KO's real objective was always to advance stakeholder or broader social objectives. Compensation obtained via settlement is often then earmarked for improving corporate governance and honoring other commitments as negotiated with the quasi-private enforcer. The primary goal of the KO is thus best characterized as behavior modification.

As a quasi-private enforcer, the KO demonstrated that, at least within a jurisdictional context with a sufficiently benign legal regime for initiating litigation, a pool of volunteer legal talent, and causes worth fighting for, shareholder litigation can be utilized by private actors to serve essentially pro-stakeholder, pro-public ends. Despite its successes, the heyday of the KO in the late 1990s to early

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[236] There was never a minimum shareholding requirement as a condition of access to Japan's derivative suit regime, and since 1993 the court fees payable for initiating a derivative suit have been affordable. For a historical account, *see* West, *Why Shareholders Sue*, *supra* note 220, at 355–56. For the current law, *see* Koh, *Direct Suits and Derivative Actions, supra* note 80, at 403.

[237] In Japan, shareholder derivative action litigants do not in principle, even if they lose, risk bearing the full legal expenses including attorneys' fees of the defendants. *See* West, *Why Shareholders Sue*, *supra* note 220, at 355–56; Koh, *Direct Suits and Derivative Actions, supra* note 80, at 403.

2000s was relatively brief, which suggests that impermanence could be an inherent feature of a public interest-oriented enforcer without state support.

In summary, quasi-private enforcement is characterized by: 1) establishment by private individuals or civil society actors pursuant to general regulatory frameworks applicable to for-profit or non-profit organizations; 2) primary legal accountability to the members of the organization; 3) private funding sources such as donations, sales, and returns on successfully concluded lawsuits (whether by judgment or settlement); 4) use of private enforcement mechanisms on the same legal basis as any other private litigant; and 5) no *de jure* quasi-monopoly status.

### *ii. Evaluation*

By contrast with quasi-public enforcement, quasi-private enforcement requires neither state mandate nor state-facilitated resources. The quasi-private enforcer relied on harm to the company or to shareholders as the pretext on which to initiate litigation against directors, but the use of shareholder's litigation rights is merely a means to a public-interest end, and not the end *per se*. It is thus entirely possible for a well-resourced quasi-private enforcer to attempt legal action against breach of corporate purpose duty regardless of whether shareholders can be shown to suffer loss. Legal privileges enjoyed by quasi-public enforcers are desirable but not indispensable for quasi-private enforcers. So long as the shareholder litigation regime permits private enforcement of corporate purpose, quasi-private enforcement may emerge.

Compared to public and quasi-public enforcers, quasi-private enforcers can seem impermanent. However, quasi-private enforcement as an *institution* (not the individual enforcer organizations) may well be no less resilient than public or quasi-public enforcers. So long as the legal pre-requisites for quasi-private enforcement (*i.e.*, minimum shareholding requirements; reasonable court fee amounts; loser-does-not-pay-all rule) remain stable, the quasi-private enforcement space is always open to entrants. All it takes for quasi-private enforcement to get started is a handful of lawyers, some start-up funding, a couple of shareholders to lend or gift their shares, and a stakeholderist objective that they are willing to try suing for. These are conditions that more jurisdictions would be likely to meet than would be the case for private or public

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enforcement, making the quasi-private enforcement model—at least potentially—a legal institution more amenable to transplant or diffusion.

To conclude, quasi-private enforcement has much going in its favor insofar as corporate purpose is concerned. There is natural affinity between the public interest-, social justice-oriented character of quasi-private enforcers and their allies, and the stated pro-social motivations driving the corporate purpose paradigm. When the claims sought to be advanced are novel and thus risky ones like the corporate purpose duty, a quasi-private enforcer is less likely to be deterred than a private enforcer given the former's complete absence of profit motive. While quasi-private enforcement shares some limitations with private enforcement in terms of legal barriers to suit, it suffers from no disadvantages that would specifically hinder enforcement of the corporate purpose duty. Quasi-private enforcement is therefore a model that is better suited for transplant or diffusion to jurisdictions otherwise ill-equipped for private, public, or quasi-public enforcement.

## V. CONCLUSION

A flashpoint in the corporate purpose debate between business leaders and business scholars on one side, and corporate law scholars on the other, is what corporate purpose means for corporate law. To operationalize corporate purpose into corporate law, and to make directors more accountable on corporate purpose matters, support for a legal, enforceable duty of directors to comply with corporate purpose has emerged, with the British Academy's November 2019 proposal being a leading example. The inevitable next question: who would enforce such a corporate purpose duty?

This Article engages with and contributes to the emerging scholarship on the corporate purpose duty by offering an answer to the enforcement conundrum. Due to doctrinal, economic, and institutional limitations, neither conventional paradigm of legal enforcement—"private" enforcement by shareholders and "public" enforcement by regulators—are up to the task of enforcing a corporate purpose duty. Using case studies from three East Asian jurisdictions—Taiwan, the People's Republic of China, and Japan—this Article identifies a novel form of hybrid enforcement ("quasi-private"), and critically compares this with an existing hybrid ("quasi-public") in the context of enforcing corporate purpose.

Despite its limitations, quasi-private enforcement is a solution that avoids the serious downsides of private, public, or quasi-public enforcement; is uniquely compatible with a corporate purpose duty; and theoretically feasible in a wide range of jurisdictions.

This Article's contribution is a timely one. Corporate law scholars familiar with the limits of enforcement mechanisms would likely conclude that the corporate purpose duty would be unenforceable under prevailing private and public enforcement paradigms. Absent a plausible means of bridging the enforcement gap, the fledgling movement to develop a "hard law" corporate purpose duty is doomed to ultimate failure. By drawing attention to the inevitable enforcement challenges for the corporate purpose duty under existing conventional enforcement mechanisms and proposing a solution that overcomes many of the known obstacles to public or private enforcement, this Article provides the missing pillar on which a corporate purpose duty may one day stand.

*Postscript*

Further, quasi-private enforcement may have applications beyond a corporate purpose duty within the meaning of this Article. Consider the emergence of climate change shareholder litigation. On February 9, 2023, ClientEarth, an environmental law charity, announced that it has commenced a world-first derivative suit against U.K. incorporated and headquartered Shell plc (formerly Royal Dutch Shell), a Big Oil multinational and one of world's top emitters of greenhouse gases, for failure to manage climate risks.[238] The complaint alleged that Shell's directors breached their duty to promote the success of the company under the UK Companies Act.[239] While this high-profile quasi-private enforcement action did

[238] *ClientEarth Files Climate Risk Lawsuit Against Shell's Board with Support from Institutional Investors,* CLIENTEARTH (Feb. 9, 2023), https://www.clientearth.org/latest/press-office/press/clientearth-files-climate-risk-lawsuit-against-shell-s-board-with-support-from-institutional-investors/ [https://perma.cc/FKY6-CA3S].

[239] *ClientEarth Litigation Against Shell's Board: FAQs*, CLIENTEARTH (Feb. 2023), https://www.clientearth.org/media/lf4mcv3v/shell-directors-case-faq-2023.pdf [https://perma.cc/H9YL-L2AF]; *see* Companies Act 2006, § 172, (UK).

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DOI: https://doi.org/10.58112/jil.45-4.1

not succeed in the end,[240] the ClientEarth suit demonstrated quasi-private enforcement's continued attractiveness and potential as an enforcement model and its adaptability to new challenges in corporate law.

[240] Clientearth v. Shell Plc [2023] EWHC 1897 (Ch) ¶ 99 (Eng.) (declining claimant permission to continue the derivative claim against Shell and other defendants). Permission to appeal against the first instance decision was refused by both the High Court and Court of Appeal, bringing the proceedings to an end. *See* Clientearth v. Shell Plc [2023] EWHC 2182 (Ch) ¶ 39 (Eng.); Clientearth v. Shell Plc, CA-2023-001866 (E.W.C.A. Civ. Div.) (Nov. 14, 2023), https://www.clientearth.org/media/w2rdknei/07-court-of-appeal-pta-decision.pdf [https://perma.cc/VYL7-ZAHJ].