

## BOARD DIVERSITY IN SINGAPORE\*

Conventional wisdom predicts that independent directors help curb director misfeasance by critically overseeing management, and is the hallmark of good governance. However, such wisdom might not be too wise and fully accurate as board independence was clearly insufficient to prevent corporate scandals such as Enron. Indeed, board independence is not sufficient in and of itself, and board diversity complements board independence in improving corporate governance. As there are many benefits to a diverse board, Singapore should adopt a gender quota regime to attain a critical mass of female directors on corporate boards. As the broader framework of Singapore's Code of Corporate Governance is on a comply-or-explain basis, such a quota should similarly not be mandatory. Such a comply-or-explain gender quota strikes a good balance between capitalising on the effectiveness of a quota system, yet doing away with any rigidity which might come with it. A disclosure rule, promoting transparency in corporations' diversity policies, should also be enacted to ensure corporations' commitment towards gender diversity. Both the quota and disclosure rule are mutually reinforcing, and would definitely help Singapore in attaining an inclusive and vibrant society.

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### I. Introduction

1 Independence as a solution to director misfeasance is now a recurring theme in the corporate governance codes of many jurisdictions, as independent directors are seen as better monitors with their ability to bring an outside perspective when making board decisions.<sup>1</sup> However, having independent directors would not have prevented the Enron and WorldCom corporate scandals.<sup>2</sup> Indeed, Enron had already abided by the

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1 Erica Beecher-Monas, "Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?" (2007) 86 Or L Rev 373 at 375.

2 Erica Beecher-Monas, "Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?" (2007) 86 Or L Rev 373 at 375.



corporate best practices of having independent directors on its board, but this did not stop the board from “falling asleep at the wheel”.<sup>3</sup> This is because independence has mainly focused on the absence of any conflict of interests,<sup>4</sup> but this does not go far enough in achieving the level of monitoring sufficient for good corporate governance, and to discourage groupthink.<sup>5</sup> Corporate governance should strive to have “active, open-minded thinking”,<sup>6</sup> and this is where board diversity steps in to “achieve the kind of active, critical thinking that independence rules are designed to achieve”.<sup>7</sup> Together, board independence and board diversity can produce more effective boards with increased perspectives and better performance through more active decision-making.<sup>8</sup>

2 While board diversity has always been discussed in business literature, little is mentioned in corporate governance literature and it is only in recent years that pertinent questions about the specific content of board diversity have surfaced. While board diversity comprises many different characteristics such as age, ethnicity, nationality and education background, gender diversity is a common element in all countries as the issue of low female representation on boards is universal.<sup>9</sup> Thus, this article will focus on the gender diversity of board members. Besides, as there is an increasing demand for corporations to provide more opportunities for women to rise up to the challenge of becoming directors, it is timely and interesting to examine whether gender diversity improves corporate performance and the ways to ensure such diversity. Indeed, the International Monetary Fund chief Christine Lagarde believes that “if the Lehman Brothers had been the Lehman Sisters, today’s economic crisis clearly would look quite different ... there were [only] two women on the 10 person board of the Lehman Brothers”.<sup>10</sup> This is corroborated by Hedge Fund Boss Lex van Dam, who declared that “women have a much higher sense of risk control than men ... and it can

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- 3 Erica Beecher-Monas, “Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?” (2007) 86 Or L Rev 373 at 375.
  - 4 Erica Beecher-Monas, “Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?” (2007) 86 Or L Rev 373 at 376.
  - 5 Erica Beecher-Monas, “Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?” (2007) 86 Or L Rev 373 at 376.
  - 6 Erica Beecher-Monas, “Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?” (2007) 86 Or L Rev 373 at 376.
  - 7 Erica Beecher-Monas, “Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?” (2007) 86 Or L Rev 373 at 377.
  - 8 Erica Beecher-Monas, “Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?” (2007) 86 Or L Rev 373 at 376.
  - 9 Akshaya Kamalnaath & Yamini Peddada, “Women in Boardrooms: Formulating a Legal Regime for Corporate India” (2012) 1(6) *Journal on Governance* 675 at 681.
  - 10 J F Corkery & Madeline Taylor, “The Gender Gap: A Quota for Women on the Board” (2012) *Corporate Governance eJournal (Bond)* 1 at 4.

help avoid many of the disasters that risk taking by a male dominated trading environment has caused over the years".<sup>11</sup>

3 Currently, there are varying sentiments to gender diversity, with only some countries adopting it. Even among these countries, different approaches to enforcing gender diversity have been implemented. While some countries like Norway have mandatory quotas to ensure that a certain number of board members are women, other countries such as the US have diversity disclosure procedures.<sup>12</sup> In Singapore, while there is a provision in its corporate governance code which states that boards should comprise a diverse group of directors, it does not require corporations to disclose these diversity policies nor have a quota, and thus, has not much force.<sup>13</sup> In fact, while Singapore has one of the highest education and workforce participation rates for women, Singapore's female board representation is still one of the lowest among developed countries.<sup>14</sup> Hence, this article aims to critically discuss whether there is a need to more actively regulate board diversity in Singapore.

4 The balance of this article will proceed as follows. In Part II,<sup>15</sup> the criteria of independent directors in Singapore will be discussed. Part III will show how focusing on independence alone is insufficient, and that board diversity is necessary to improve corporate governance.<sup>16</sup> Part IV will then discuss the benefits of board diversity.<sup>17</sup> Part V will discuss various factors which could possibly influence the ease of adoption of board diversity regulation in Singapore.<sup>18</sup> Part VI will then examine in detail the four main models of board diversity, namely: (a) Norway's mandatory gender quota; (b) the Netherlands' comply-or-explain gender quota; (c) the US's mandatory diversity disclosure regime; and (d) the UK's comply-or-explain diversity disclosure regime, to determine which model is the most suitable for Singapore to adopt.<sup>19</sup> In Part VII, this article will argue that Singapore should adopt a boardroom gender quota, but under a comply-or-explain regime.<sup>20</sup> Such a regulation combines the

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11 J F Corkery & Madeline Taylor, "The Gender Gap: A Quota for Women on the Board" (2012) *Corporate Governance eJournal (Bond)* 1 at 4.

12 For a discussion of board diversity in Norway and the US respectively, see paras 47–48 and 50–53 below.

13 For a discussion of board diversity in Singapore, see paras 56–57 below.

14 Marleen Dieleman, Meijun Qian & Muhammad Ibrahim, *Singapore Board Diversity Report – Time for Women to Rise* (NUS Centre for Governance, Institutions & Organizations) <[http://bschool.nus.edu/Portals/0/images/CGIO/Report/Singapore%20Board%20\\_Diversity\\_Report\\_%202013\\_Final.pdf](http://bschool.nus.edu/Portals/0/images/CGIO/Report/Singapore%20Board%20_Diversity_Report_%202013_Final.pdf)> at p 34 (accessed 15 July 2015).

15 See paras 5–7 below.

16 See paras 8–15 below.

17 See paras 16–21 below.

18 See paras 22–44 below.

19 See paras 45–55 below.

20 See paras 55–67 below.

benefit of a quota system to create a critical mass of female directors, while still mitigating the rigidity and harshness of a quota system, and makes it more acceptable to corporations by having it under a comply-or-explain regime. This article then concludes that diversity is strength, and it is hoped that Singapore will harness such strength in the near future.

## II. Independent directors in Singapore

5 Without question, a significant feature of corporate governance is the managerial authority vested in the board. Section 157A(1) of the Singapore Companies Act<sup>21</sup> clearly provides that the “business of a company shall be managed by or under the direction of the directors”. Given the central role that boards play and the risk created by the separation of ownership and control such that directors could “line their pockets at the investors’ expense, diverting funds or shirking in their efforts”,<sup>22</sup> Bebchuk notes that “selecting directors with the appropriate abilities and characteristics is important”.<sup>23</sup> Such a sentiment is especially relevant in the light of how Singapore courts are often slow to interfere with commercial decisions taken by directors.<sup>24</sup> This then raises the question of what are the “appropriate abilities and characteristics” Singapore directors should possess such that their decisions would be rightly respected?

6 Independence is widely seen as the solution to solving director misfeasance, as independence ensures that directors “do not feel beholden to managers”, and “can be trusted to critically examine decisions made by officers, as opposed to simply rubber-stamping those decisions”.<sup>25</sup> As such, these independent directors can monitor management and minimise the danger of management abusing their power,<sup>26</sup> especially in dispersed shareholdings where shareholders “face coordination and rational apathy problems”.<sup>27</sup> On the other hand, in concentrated shareholdings, controlling shareholders can “exert their power by appointing and removing directors and are therefore in a better position

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21 Cap 50, 2006 Rev Ed.

22 Erica Beecher-Monas, “Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?” (2007) 86 Or L Rev 373 at 383–384.

23 Lucian A Bebchuk, “The Myth of Shareholder Franchise” (2007) 93 Va L Rev 675 at 680.

24 For a discussion of Singapore’s reluctance to assess the merits of board decisions, see paras 34–39 below.

25 Lisa M Fairfax, “The Uneasy Case for Inside Directors” (2010) 96 Iowa L Rev 127 at 139.

26 Lisa M Fairfax, “The Uneasy Case for Inside Directors” (2010) 96 Iowa L Rev 127 at 139–140.

27 Guido Ferrarini & Marilena Filippelli, “Independent Directors and Controlling Shareholders” (Paper presented to the Shareholder Power Conference at the Faculty of Law, National University of Singapore, 6–7 March 2014) (unpublished) at p 4.

to control the managers' agency cost".<sup>28</sup> However, a different agency cost emerges between majority and minority shareholders, where there is a risk that the former might tunnel wealth out of the corporation for their own benefit.<sup>29</sup> As such, independent directors in concentrated shareholdings perform a different function of supervising managerial actions, to prevent such actions from being driven by majority shareholders to the detriment of minority shareholders.<sup>30</sup>

7 The definition of "independence" in Singapore is codified in the Singapore Code on Corporate Governance<sup>31</sup> under a comply-or-explain regime, and is based on a director "who has no relationship with the company, its related corporations, its 10% shareholders or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgment with a view to the best interests of the company".<sup>32</sup> Such relationships mainly relate to whether the director in question is an immediate family member, or has a relationship with a substantial shareholder. This is probably because the majority of Singapore corporations listed on the Singapore Exchange have concentrated shareholdings,<sup>33</sup> and for independent directors to provide effective supervision and checks-and-balances, they must be independent of substantial shareholders.

### III. Marrying independence with board diversity

8 As monitoring agents, independent directors can adopt two forms of a monitoring board, namely, "strong" and "weak" forms.<sup>34</sup> Under the "strong" form, a monitoring board is supposed to "enhance [firm] performance on an ordinary day-to-day basis", while under the "weak" form, board monitoring will only "occur upon the appearance of significant difficulties in the firm's performance or other extraordinary events".<sup>35</sup> It has been argued that it is difficult for independent directors

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28 Guido Ferrarini & Marilena Filippelli, "Independent Directors and Controlling Shareholders" (Paper presented to the Shareholder Power Conference at the Faculty of Law, National University of Singapore, 6–7 March 2014) (unpublished) at p 4.

29 Guido Ferrarini & Marilena Filippelli, "Independent Directors and Controlling Shareholders" (Paper presented to the Shareholder Power Conference at the Faculty of Law, National University of Singapore, 6–7 March 2014) (unpublished) at p 4.

30 Guido Ferrarini & Marilena Filippelli, "Independent Directors and Controlling Shareholders" (Paper presented to the Shareholder Power Conference at the Faculty of Law, National University of Singapore, 6–7 March 2014) (unpublished) at p 17.

31 Code on Corporate Governance (May 2012) (Singapore).

32 Code on Corporate Governance (May 2012) (Singapore) Art 2.3.

33 For a discussion of Singapore's concentrated shareholding, see paras 40–44 below.

34 Tan Cheng Han, "Corporate Governance and Independent Directors" (2003) 15 SAclJ 355 at 367.

35 Tan Cheng Han, "Corporate Governance and Independent Directors" (2003) 15 SAclJ 355 at 367.

to monitor management daily to achieve the “strong” form of monitoring, as independent directors are usually non-executives who are not directly involved in management, and do not have the same amount of knowledge and expertise as executive directors to assess the different transactions the corporation enters into.<sup>36</sup>

9 Nevertheless, while we are not expecting day-to-day monitoring, it is still essential for monitoring to be robust. The tricky question then arises: How do we ensure and sustain a vibrant and critical discussion on boards to emulate and strive towards this “strong” form of monitoring? The independent requirement in Singapore mainly focuses on the “existence of relationships that have the potential to confer pecuniary or financial benefit on the directors”.<sup>37</sup> However, there are views that the existence of a “structural bias”, that is, “professional or social relationship that naturally develops among members of the board other than those which have the potential of conferring pecuniary or financial benefit to the directors” affects the independence of directors.<sup>38</sup> Such “tendency to evaluate one’s own groups more positively in relation to other groups”<sup>39</sup> emphasises the need for board diversity as gender, race and age have been noted as “the big three” for grouping.<sup>40</sup>

10 This theory of “groupthink” was developed by Yale psychologist Irving L Janis to refer to “the mode of thinking that persons engage in when concurrence-seeking becomes so dominant in a cohesive in-group that it tends to override realistic appraisal of alternative courses of action”.<sup>41</sup> Indeed, group members “maintain self-esteem and emotional equanimity by providing social support to each other”, particularly when they make collective decisions together.<sup>42</sup> Maintaining such a cordial environment then suppresses dissent and critical thinking.

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36 Tan Cheng Han, “Corporate Governance and Independent Directors” (2003) 15SAclJ 355 at 367.

37 Aiman Nariman Mohd-Sulaiman, “Strengthening the Independence Criteria – A Comparison of the UK, Malaysia, Hong Kong and Singapore” (2010) 21(7) ICCLR239 at 245.

38 Aiman Nariman Mohd-Sulaiman, “Strengthening the Independence Criteria – A Comparison of the UK, Malaysia, Hong Kong and Singapore” (2010) 21(7) ICCLR 239 at 245.

39 Michael Healy & Victoria Romero, “Ingroup Bias and Self-Esteem: A Meta-Analysis” (2000) 4(2) Personality & Soc Psychol Rev 157 at 157.

40 Daniel M Wegner & John A Bargh, “Control and Automaticity in Social Life” in, *Handbook of Social Psychology* vol 1 (Daniel T Gilbert *et al* eds) (New York: McGraw-Hill, 4th Ed, 1998) at p 472.

41 Andrew Howard, “Groupthink and Corporate Governance Reform: Changing the Formal and Informal Decision-Making Processes of Corporate Boards” (2011) 20 S Cal Interdisc LJ 425 at 427.

42 Stewart L Tubbs & Robert M Carter, *Shared Experiences in Human Communication* (Transaction Publishers, 1978) at p 184.

11 As such, it is submitted that Singapore's mere emphasis on director disinterestedness and family ties is the reason for the apparent non-correlation between the number of independent directors and firm performance.<sup>43</sup> Simply having independent directors without any independence of thought does not improve corporate governance:<sup>44</sup>

What is needed for an effective board is a mix of people who can provide access to information, critical thinking about the information presented, active voicing of alternative courses of action, and some way of reaching consensus.

12 Indeed, one of the fundamental problems leading to Enron's downfall was the need for conformity and lack of diversity, leading to an inability to raise important questions and challenge group decisions:<sup>45</sup>

Shared backgrounds, financial incentives to bond together, and a board culture promoting unquestioning loyalty to Enron officers, prevented the Enron board from critically evaluating decisions, and led to a sense of invulnerability in risk-taking decisions.

13 In contrast, studies show that diverse boards have greater creativity and innovation, and are thus able to think of more alternative solutions to problems.<sup>46</sup> This is in line with the agency theory, where shareholders' interests would be maximised when agency costs are reduced with more effective monitoring<sup>47</sup> because "women are more inclined to ask questions that would not be asked by male directors".<sup>48</sup> When all these individuals sit on the board together, their different approaches of monitoring management would be effective in developing a comprehensive monitoring mechanism. Indeed, a study over a ten-year

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43 S Bhagat & B Black, "The Relationship Between Board Composition and Firm Performance" in *Comparative Corporate Governance: The State of the Art and Emerging Research* (Klaus J Hopt *et al* eds) (Oxford: Clarendon Press, 1998) at p 281. ("The proportion of independent directors correlates with slower recent past growth, but not with future performance. A null result, of course, can never be proved. But, pending the results of additional tests ..., the burden of proof should perhaps shift to those who support the conventional wisdom that ever greater Board independence is an important element of improved corporate governance": at pp 299–300.)

44 Erica Beecher-Monas, "Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?" (2007) 86 *Or L Rev* 373 at 391.

45 Janis Sarra, "Rose-Colored Glasses, Opaque Financial Reporting, and Investor Blues: Enron as Con and the Vulnerability of Canadian Corporate Law" (2002) 76(4) *St John's Law Review* 715 at 728 and 729.

46 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 *Seattle J Soc Just* 337 at 388.

47 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 *Seattle J Soc Just* 337 at 345.

48 Kevin Campbell & Antonio Miguez-Vera, "Gender Diversity in the Boardroom and Firm Financial Performance" (2008) 83 *J Bus Ethics* 435 at 440.

period from 2001 to 2010 concluded that the likelihood of fraud decreases with increase in board diversity.<sup>49</sup>

14 Nevertheless, as people of different genders tend to have different attitudes and beliefs, diversity could potentially cause tension and clashes among board members.<sup>50</sup> However, because boards do not meet that frequently and usually deal with “non-routine” and “big picture” problems which do not have clear answers, the increased creativity and alternative perspectives represent “functional conflict” and these benefits outweigh any possible negative consequences.<sup>51</sup> Luke Visconti, co-founder of DiversityInc Media, an online magazine which provides information on how diversity strengthens corporate governance, stated that with a diverse board, “you’re going to make fewer bad decisions” and “[by hiring a female director] you’re going to get ... a capable board member”.<sup>52</sup> This is because as the talent pool would be of a wider scope during the selection process, gender diversity necessarily means that a diverse board would be better qualified than less diverse boards.<sup>53</sup> In addition, gender diversity also aids in the fulfilment of directors’ duties as considering different perspectives and evaluating different alternatives leads to more informed and robust decision-making, allowing corporations to “achieve optimal long-term and risk-adjusted returns”.<sup>54</sup>

15 In sum, having a culture of diversity creates a culture of dissent as diverse board members provide diverse perspectives and improve critical thinking. With such a culture of scrutiny, the “strong” form of the monitoring board can then be achieved in Singapore. With such a culture of scrutiny and dissent, creativity and innovation can also be fostered.

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49 Didi Kirsten Tatlow, “More Women on Company Boards Reduces Fraud” *The New York Times* (4 April 2014) <[http://sinosphere.blogs.nytimes.com/2014/04/04/more-women-on-company-boards-reduces-fraud-study-finds/?\\_r=0](http://sinosphere.blogs.nytimes.com/2014/04/04/more-women-on-company-boards-reduces-fraud-study-finds/?_r=0)> (accessed 15 July 2015).

50 Amy J Hillman, Christine Shropshire & Albert A Cannella Jr, “Organizational Predictors of Women on Corporate Boards” (2007) 50(4) *Academy of Management Journal* 941 at 943.

51 Amy J Hillman, Christine Shropshire & Albert A Cannella Jr, “Organizational Predictors of Women on Corporate Boards” (2007) 50(4) *Academy of Management Journal* 941 at 943.

52 Andrew Blackman, “Casting a Wider Net” *The Wall Street Journal* (21 June 2004) <<http://online.wsj.com/news/articles/SB108750155348940393>> (accessed 15 July 2015).

53 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 *Seattle J Soc Just* 337 at 342.

54 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 *Seattle J Soc Just* 337 at 344.



#### IV. Other justifications for board diversity

16 Other than strengthening the culture of monitoring, numerous empirical studies have associated gender diversity with a more successful corporate performance.<sup>55</sup> InterOrganization Network, an organisation advocating for the rise of women to positions of power in the business area, argues that board diversity is “no longer a soft issue”, but rather “a solid business strategy that leads to a return on equity, return on sales, and return on invested capital”,<sup>56</sup> as women increase the competitiveness of corporations by providing innovative perspectives.<sup>57</sup> Indeed, a study by Kang, Ding and Charoenwong, business professors in local universities, found that the appointment of female directors in Singapore was positively linked to share prices.<sup>58</sup> On a broader level, a study of Fortune 500 corporations also concluded that gender diversity contributes positively to financial performance.<sup>59</sup> Corporations in the top quartile of the percentage of female directors performed significantly better in return on sales and return on invested capital than corporations in the bottom quartile.<sup>60</sup> This is because female directors “[suffer] less

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55 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 341. While these studies support the theory that board diversity positively affects financial performance, they do, however, present tricky issues of causation. That is, while board diversity can improve financial performance, a positive relationship could also indicate that more successful corporations have greater resources to dedicate towards improving gender diversity, or that women choose to work in more successful corporations. As researchers have just begun to focus their attention on gender diversity, more substantial empirical work is needed to fully determine how board diversity affects financial performance. Despite this, with other justifications for board diversity, such as enhancing corporate governance, the case for board diversity is still strong.

56 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 341–342.

57 Rebone Edith Matlala, *Board Gender Diversity and Financial Performance* (MBA Thesis, Gordon Institute of Business Science, University of Pretoria, 2011) (unpublished) at p 26.

58 *Women and Management: Global Issues and Promising Solutions: Global Issues and Promising Solutions* (Michele A Paludi ed) (2 vols) (Praeger, 2013) at p 75.

59 Nancy M Carter & Harvey M Wagner, *The Bottom Line: Corporate Performance and Women’s Representation on Boards (2004–2008)* (1 March 2011) (Catalyst Knowledge Centre) <<http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards-20042008>> (accessed 15 July 2015).

60 Nancy M Carter & Harvey M Wagner, *The Bottom Line: Corporate Performance and Women’s Representation on Boards (2004–2008)* (1 March 2011) (Catalyst Knowledge Centre) <<http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards-20042008>> (accessed 15 July 2015).

from over-confidence than men”, and hence, “more likely to adopt a measured expansion rate that protected shareholders’ investments.”<sup>61</sup>

17 In addition, board diversity upholds the stakeholder theory. The stakeholder theory states that “the organization is a part of a broader social system wherein the organization impacts on, and is impacted by, other groups within society”.<sup>62</sup> Therefore, different stakeholder groups (for instance, consumers and employees) have different perspectives of how a corporation should function, and upholding such interests may be as pertinent as maximising shareholder value.<sup>63</sup>

Contemporary corporate scholarship often starts from a ‘shareholder primacy’ perspective that holds that directors of public corporations ought to be accountable only to the shareholders, and ought to be accountable only for maximizing the value of the shareholders’ shares. This perspective rests on the conventional contractarian assumption that the shareholders are the sole residual claimants and risk bearers in a public firm. More recent work in economics suggests, however, that this assumption is false. In particular ..., a wide variety of groups are likely to bear significant residual risk and enjoy significant residual claims on firm earnings. These groups include not only shareholders, but also creditors, managers, and employees. Thus economic efficiency may be best served not by requiring corporate directors to focus solely on shareholders’ interests, but by requiring them instead to maximize the sum of all the interests held by all the groups that bear residual risks and hold residual claims.<sup>64</sup>

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61 Didi Kirsten Tatlow, “More Women on Company Boards Reduces Fraud” *The New York Times* (4 April 2014) <[http://sinosphere.blogs.nytimes.com/2014/04/04/more-women-on-company-boards-reduces-fraud-study-finds/?\\_r=0](http://sinosphere.blogs.nytimes.com/2014/04/04/more-women-on-company-boards-reduces-fraud-study-finds/?_r=0)> (accessed 15 July 2015).

62 Yeny Widya Prihatiningtias, *Gender Diversity in the Boardroom and Firm Performance: Evidence from Indonesian Publicly-Listed Financial Firms* (DBA Thesis, University of Canberra, Faculty of Business and Government, 2012) (unpublished) at p 62.

63 Yeny Widya Prihatiningtias, *Gender Diversity in the Boardroom and Firm Performance: Evidence from Indonesian Publicly-Listed Financial Firms* (DBA Thesis, University of Canberra, Faculty of Business and Government, 2012) (unpublished) at p 63.

64 Margaret M Blair & Lynn A Stout, “Director Accountability and the Mediating Role of the Corporate Board” (2001) 79 Wash ULQ 403 at 404.

18 Thus, a diverse board would better represent these different stakeholder groups, which different directors could relate to.<sup>65</sup> For instance, women may understand the market more and so can better cater to customers' concerns about the corporations' goods and services.<sup>66</sup> Larry Johnston, the then CEO of the Albertsons grocery chain, corroborates by stating that:<sup>67</sup>

Women have insight into our customers that no man – no matter how bright, no matter how hardworking – can match. That's important when 85% of all consumer buying decisions made in our stores are made by women.

In addition, due to women's "transformational leadership style" of focusing on "development and mentoring of followers", they are better able to relate to individual needs.<sup>68</sup> Therefore, with more female directors on the board, the corporation would understand societal needs better, and be more aware of social responsibility to the broader community. Indeed, a study of Fortune 500 corporations concluded that the greater the number of female directors, the increased likelihood of a corporation being on the list of responsible corporations such as the Ethisphere Magazine's "World's Most Ethical Companies" and Corporate Responsibility Magazine's "100 Best Corporate Citizens".<sup>69</sup>

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65 See Andrew Keay, "Stakeholder Theory in Corporate Law: Has It Got What It Takes?" (2010) 9 Rich J Global L & Bus 249 at 256–257:

Under stakeholder theory, the duty of managers of corporations is to create optimal value for all social actors who might be regarded as parties who can affect or are affected by a corporation's decisions. The argument is that those who are able to affect or be affected by the corporation are stakeholders, and all stakeholders play a vital role in the success of the corporate enterprise. Stakeholders have a right to be regarded as an end, and not a means to an end (*ie* they are not used just to benefit the corporation in the long run, but their benefits are an end for the corporation). As a consequence, it is necessary for the managers to balance the interests of all stakeholders when making decisions. The aim should be to make the corporation a place where stakeholder interests can be maximized in due course.

66 Yeny Widya Prihatiningtias, *Gender Diversity in the Boardroom and Firm Performance: Evidence from Indonesian Publicly-Listed Financial Firms* (DBA Thesis, University of Canberra, Faculty of Business and Government, 2012) (unpublished) at p 65.

67 Amy J Hillman, Christine Shropshire & Albert A Cannella Jr, "Organizational Predictors of Women on Corporate Boards" (2007) 50(4) *Academy of Management Journal* 941 at 944.

68 Yeny Widya Prihatiningtias, *Gender Diversity in the Boardroom and Firm Performance: Evidence from Indonesian Publicly-Listed Financial Firms* (DBA Thesis, University of Canberra, Faculty of Business and Government, 2012) (unpublished) at p 74.

69 Meredith B Larkin, Richard A Bernardi & Susan M Bosco, "Board Gender Diversity, Corporate Reputation and Market Performance" (2012) 9(1) *International Journal of Banking and Finance* 1 at 1.

19 Similar to the stakeholder theory, the legitimacy theory suggests that “organizations search continuously to assure that they are seen to do business according to the required standards applied in certain societies” to “enhance both the stability and the comprehensibility of organizational activities”.<sup>70</sup> As women leaders are more likely to empathise with societal concerns, they may “establish close relationships with external parties, including the society in general, so that they can draw attention to these parties and maintain it for the sake of the legitimacy of the firm”.<sup>71</sup>

20 If indeed gender diversity has so many benefits, why is diversity not prevalent around the world? To answer such a question, we need to look at organisational factors.<sup>72</sup> Organisational factors are those which relate to the “structures of workplace interactions and the nature of everyday decision-making”,<sup>73</sup> and shed light on why corporations are unlikely to have female directors on their boards.<sup>74</sup> Indeed, lamenting on the low numbers of women on corporate boards, many have pointed to the existence of a “glass ceiling”:<sup>75</sup>

The glass ceiling remains a barrier for women ... largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by these patterns.<sup>[76]</sup>

21 As the traditional recruitment practices for corporate boards are “frequently informal and leverage personal networks”, most directors are selected from “relatively narrow pools of people sharing common

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70 Yeny Widya Prihatiningtias, *Gender Diversity in the Boardroom and Firm Performance: Evidence from Indonesian Publicly-Listed Financial Firms* (DBA Thesis, University of Canberra, Faculty of Business and Government, 2012) (unpublished) at pp 58–59.

71 Yeny Widya Prihatiningtias, *Gender Diversity in the Boardroom and Firm Performance: Evidence from Indonesian Publicly-Listed Financial Firms* (DBA Thesis, University of Canberra, Faculty of Business and Government, 2012) (unpublished) at p 61.

72 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 355.

73 Charlotte Villiers, “Achieving Gender Balance in the Boardroom: Is it Time for Legislative Action in the UK?” (2010) 30 Legal Stud 533 at 537.

74 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 355.

75 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 355.

76 Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach” (2001) 101 Colum L Rev 458 at 469.

experiences, career patterns and backgrounds”.<sup>77</sup> Such recruitment practices reinforce board homogeneity.<sup>78</sup> As such, there is a need to persuade corporations to progress towards board diversity, and enable the Singapore corporate governance environment to be inclusive and tolerant.

## V. Should Singapore adopt board diversity

22 There are three factors which could influence the adoption of board diversity, and these will be examined below. They are: (a) whether corporate law is shareholder-oriented or stakeholder-oriented; (b) the degree of courts’ deference to directors’ business decisions; and (c) the shareholding structure in corporations.<sup>79</sup>

### A. *Whether corporate law is shareholder-oriented or stakeholder-oriented*

23 One of the factors influencing the adoption of board diversity is whether countries subscribe to the narrower shareholder-oriented or the broader stakeholder-oriented model of corporate law. In a stakeholder-oriented model of corporate law, having diverse board members who represent different stakeholders ensures that corporations can better respond to the needs of these stakeholders. Indeed, it seems that countries with more stakeholder-oriented corporate law, such as Norway, Spain and France,<sup>80</sup> have adopted board diversity.

24 The shareholder-primacy model indicates that the corporation’s only concern should be maximising the shareholders’ wealth.<sup>81</sup> This model was conceptualised by Adam Smith in *The Wealth of Nations*,<sup>82</sup> where he stated that “individual acts of economic self-interest combine, through the ‘invisible hand’ of market forces, to further the best interests

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77 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 356.

78 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 356.

79 While certainly other factors such as opportunities for women to obtain higher education are of considerable importance as well, this article focuses more on factors pertaining to the corporate governance environment.

80 Liangrong Zu, *Corporate Social Responsibility, Corporate Restructuring and Firm’s Performance: Empirical Evidence from Chinese Enterprises* (Springer, 2008) at p 89.

81 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 3.

82 Adam Smith, *The Wealth of Nations* (Thrifty Books, 2009).

of society at large.”<sup>83</sup> Smith premised this idea “on the single individual ... an entrepreneur who both owned a small, private enterprise and managed it”, and “would necessarily ... be solely entitled to all the fruits of his property, the profits.”<sup>84</sup> As such, self-interest would drive this hypothetical entrepreneur “to use his industrial property and labor ‘efficiently’ and grow [the corporation] for the strict purpose of accumulating profit” for himself.<sup>85</sup>

25 This “pivotal sequence – ownership, control, full access to profits, efficiency” does not “easily translate to today’s joint-stock corporations, where professional managers manage the investments of others.”<sup>86</sup> In such corporations, self-interest drives these managers to pursue their own benefits rather than their investors’ benefits.<sup>87</sup> Noting the possibility of such conflict, which is commonly known as “agency costs” now, Smith then concluded that managerial corporations could not operate as effectively as single ownership corporations.<sup>88</sup>

26 Centuries later, the shareholder was (and still remains) the “perfect device to reconcile the structure of the modern corporation” with Smith’s classical views.<sup>89</sup> By treating shareholders as a substitute for owner-entrepreneur, economists across the globe apply Smith’s chain of “ownership, control, full access to profits, efficiency” to modern corporations.<sup>90</sup> However, this still does not address managerial

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83 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 7.

84 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 7.

85 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 7.

86 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 7.

87 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at pp 7–8.

88 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 8.

89 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 8.

90 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 8.

self-interest.<sup>91</sup> To effectively curb managerial self-interest, directors must treat shareholders as the “sole locus of concern and analysis.”<sup>92</sup>

27 Indeed, US courts reflect such a position, declaring that the purpose of corporations is to generate profits.<sup>93</sup> In the classic case of *Dodge v Ford Motor Co*,<sup>94</sup> it was stated that:<sup>95</sup>

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among its stockholders in order to devote them to other purposes.

28 Such a shareholder-primacy model is in line with the agency theory where it is essential to align the interests of directors (the agents) to those of shareholders (the principals) to maximise profits.<sup>96</sup>

29 However, recent incidents show that shareholder-primacy does not benefit society or shareholders – the very people who are supposed to be at the centre of protection in this model.<sup>97</sup> For instance, the examiner appointed by the court for the Lehman Brothers Holdings Inc bankruptcy stated that in 2006, Lehman Brothers made the “deliberate decision to embark upon an aggressive growth strategy, to take on significantly greater risk, and to substantially increase leverage on its capital”, causing much loss to shareholders.<sup>98</sup> Today’s shareholder-primacy model, in an

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91 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 8.

92 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 8.

93 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 8.

94 170 NW 668 (Mich Sup Ct 1919).

95 *Dodge v Ford Motor Co* 170 NW 668 (Mich Sup Ct 1919) at 684.

96 Judd F Sneirson, “An Intellectual History of Shareholder Primacy from *Dodge v Ford* through the Rise of Financialism” (Paper Presented at the Sustainable Companies Conference in Norway, 29–30 August 2011) (unpublished) at p 12.

97 Robert Sprague & Aaron J Lyttle, “Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy” (2010) 16 Stan JL Bus & Fin 1 at 7.

98 Robert Sprague & Aaron J Lyttle, “Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy” (2010) 16 Stan JL Bus & Fin 1 at 7.

attempt to maximise short-term gains for shareholders,<sup>99</sup> has unfortunately brought many corporations to the “brink of self-destruction”.<sup>100</sup>

30 As such, a rising school of thought is the stakeholder-oriented model, where the purpose of a corporation is not only to obtain profits for shareholders, but also to have “more secure jobs for employees, better quality products for consumers, and greater contributions to the welfare of the community as a whole”.<sup>101</sup> Ira Millstein, who drafted one of the first *OECD Principles of Corporate Governance*, stated that directors must be “people whom shareholders, employees, suppliers, customers and communities trust to ‘do the right thing’”.<sup>102</sup> Indeed, Professors Henry Hansmann and Reiner Kraakman, who only a few years ago boldly declared that directors should only be accountable to shareholders’ interests, could not deny that today’s society “enhances the probability that [board members] will respond in a principled fashion to the interests of all corporate constituencies simply through moral principles and social pressure”.<sup>103</sup> This broader concept of a corporation’s obligations entails that corporate actors can justify decisions based on the positive impact

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99 *Varieties of Capitalism, Corporate Governance and Employees* (Shelley Marshall, Ian M Ramsay & Richard Mitchell eds) (Melbourne University Press Academic Monographs, 2008) at p 10.

100 Robert Sprague & Aaron J Lyttle, “Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy” (2010) 16 *Stan JL Bus & Fin* 1 at 8. See also Emeka Duruigbo, “Tackling Shareholder Short-Termism and Managerial Myopia” (2011–2012) 100 *Ky LJ* 531 at 536–538:

Short-termism has been defined as ‘a preference for actions in the near-term without due consideration of the long term consequences’. The Business Roundtable describes it as ‘the excessive focus of some corporate leaders, investors, and analysts on short-term, quarterly earnings and a lack of attention to the strategy, fundamentals, and conventional approaches to long-term value creation’. Short-termism may exist both in investing and in corporate management; thus, the focus of this article is shareholder short-termism and the concomitant corporate myopia. Shareholder short-termism is said to manifest in two major ways, namely ‘pressure’ and ‘walk’. Some shareholders’ penchant for quick returns on investment puts pressure on corporate managers to be fixated on short-term results, even at the expense of long-run performance. Besides, shareholders have a tendency to prefer ‘exit’ to ‘voice’. That is, they would rather sell their stock if dissatisfied with corporate management than stay in and affect direction of corporate policy. Ultimately, this works against good corporate performance.

101 Lynn A Stout, “Bad and Not-So-Bad Arguments for Shareholder Primacy” (2002) 75 *Southern California Law Review* 1189 at 1189.

102 Lisa M Fairfax, “The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards” (2005) *Wis L Rev* 795 at 851.

103 Lisa M Fairfax, “The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards” (2005) *Wis L Rev* 795 at 851–852.



they have on society, rather than just on market returns.<sup>104</sup> This is in line with the resource dependency theory, which explains the relational role of the board of directors.<sup>105</sup> According to this resource dependency logic, a board of directors needs more resources in terms of each director's unique individual background, rather than just the human capital of expertise and skill provided by business experts.<sup>106</sup> This is used as a "bridging strategy" or "boundary scanning" which enables the firm to communicate with various stakeholders in society, and "enhance[s] the firm's legitimacy in society and to help it achieve goals of efficiency and improved [corporate social responsibility] performance".<sup>107</sup> For instance, female directors may influence corporations to consider human resources issues pertaining to women.<sup>108</sup> Furthermore, as corporations' corporate social responsibility performance is drawing a great deal of attention, a stakeholder-oriented model allows directors to premise corporate policies on a wide range of environmental and social concerns.<sup>109</sup>

31 Diversity fits perfectly into this stakeholder-concept of the corporate model. As corporations have a responsibility to establish improved relationships with diverse stakeholders, gender diversity on boards would place the corporation in a better position to establish links with different stakeholder groups as female directors bring with them different diverse stakeholder perspectives. As such, countries with a more stakeholder-oriented model would find it easier to adopt board diversity. Indeed, Norway's mandatory labour representation on its boards, which tends to influence board decisions, is one factor relevant to Norway's success with boardroom quotas.<sup>110</sup> As labour representation "opens up communication" in a similar way as female directors do, it is likely that boards with labour representation will be more tolerant and appreciative

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104 Lisa M Fairfax, "The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards" (2005) *Wis L Rev* 795 at 852.

105 Lynne L Dallas, "The Multiple Roles of Corporate Boards of Directors" (2003) 40 *San Diego L Rev* 781 at 805.

106 Silvia Ayuso & Antonio Argandona, "Responsible Corporate Governance: Towards a Stakeholder Board of Directors?" (Working Paper, IESE Business School, University of Navarra, 2007) (unpublished) at p 9.

107 Lynne L Dallas, "The Multiple Roles of Corporate Boards of Directors" (2003) 40 *San Diego L Rev* 781 at 805.

108 Lynne L Dallas, "The Multiple Roles of Corporate Boards of Directors" (2003) 40 *San Diego L Rev* 781 at 806.

109 Henry Hansmann & Reinier Kraakman, "Toward a Single Model of Corporate Law?" in *Corporate Governance Regimes: Convergence and Diversity* (J McCahery, P Moerland, T Raaijmakers & L Renneboog eds) (Oxford University Press, 2002) at p 63.

110 Anne Sweigart, "Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada" (2012) 32 *Nw J Int'l L & Bus Ambassador* 81A at 101A.

of the “increased communication capacities” that women represent.<sup>111</sup> Thus, Singapore’s lack of mandatory labour representation could be an obstacle in the adoption of board diversity.

32 Nevertheless, while Singapore does not have any mandatory labour representation, s 159 of its Companies Act does provide that “the matters to which the directors of a company are entitled to have regard in exercising their powers shall include ... the interests of the company’s employees generally”. Nevertheless, it seems that such a provision has not been utilised in the Singapore courts. Furthermore, while the provision refers to stakeholders’ interests, there is no proposal in the Singapore Companies Act or Code of Corporate Governance to include stakeholder representatives on boards.<sup>112</sup> However, it is submitted that such a trend might change in the near future, given the general paradigm shift towards “balancing the shareholder-profit objective with longer-term, sustainable, and socially responsible business practices”.<sup>113</sup> Furthermore, public utility or state-owned corporations could still have the obligation to be stakeholder-oriented even in shareholder-oriented Singapore.<sup>114</sup>

33 In any event, diversity is also consistent with the shareholder-primacy model of corporate governance as diversity itself does increase shareholders’ value<sup>115</sup> by improving the corporation’s ability to market and develop its products to a diverse consumer base.<sup>116</sup> Hence, be it shareholder-primacy or stakeholder-oriented models of corporate governance, countries should strive to adopt board diversity to “maximize both shareholder wealth and enterprise value”.<sup>117</sup> In fact, given the rising global emphasis on corporate social responsibility, and how board diversity improves corporate performance, there is a greater need and urgency for Singapore to adopt board diversity.

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111 Anne Sweigart, “Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada” (2012) 32 *Nw J Int’l L & Bus Ambassador* 81A at 101A.

112 Silvia Ayuso & Antonio Argandona, “Responsible Corporate Governance: Towards a Stakeholder Board of Directors?” (Working Paper, IESE Business School, University of Navarra, 2007) (unpublished) at p 8.

113 Silvia Ayuso & Antonio Argandona, “Responsible Corporate Governance: Towards a Stakeholder Board of Directors?” (Working Paper, IESE Business School, University of Navarra, 2007) (unpublished) at p 14.

114 Guido Ferrarini & Marilena Filippelli, “Independent Directors and Controlling Shareholders” (Paper presented to the Shareholder Power Conference at the Faculty of Law, National University of Singapore, 6–7 March 2014) (unpublished) at p 7.

115 Regina F Burch, “Worldview Diversity in the Boardroom: A Law and Social Equity Rationale” (2011) 42 *Loy U Chi LJ* 585 at 596.

116 Lisa M Fairfax, “The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards” (2005) *Wis L Rev* 795 at 820.

117 Guido Ferrarini & Marilena Filippelli, “Independent Directors and Controlling Shareholders” (Paper presented to the Shareholder Power Conference at the Faculty of Law, National University of Singapore, 6–7 March 2014) (unpublished) at p 7.

### B. *Degree of courts' deference to directors' business decisions*

34 Another factor, which could affect the adoption of board diversity, is the degree of the courts' deference to directors' business decisions. The more courts defer to directors' business decisions, the more necessary it is to have board diversity as board diversity reduces any potential rubber-stamping of directors' decisions, and helps ensure that boards fulfil their duties to the corporations.

35 The courts' deference to directors' business decisions is the essence of the business judgment rule, which some jurisdictions have adopted in their corporate law regimes.<sup>118</sup> This business judgment rule is the courts' way of maintaining a balance between the directors' authority of making their own business decisions, yet still upholding the shareholders' right of holding directors accountable for their decisions,<sup>119</sup> and has its origins in the US jurisprudence.<sup>120</sup> In the landmark case of *Aronson v Lewis*,<sup>121</sup> the Supreme Court of Delaware stated that in making a business decision, directors are "presumed to have acted independently, on an informed basis and in the good faith belief that the decision is in the best interests of the corporation".<sup>122</sup> The burden then lies on the shareholder plaintiff to establish facts to rebut this presumption.<sup>123</sup> Indeed, independent directors are not only viewed as checks-and-balances on directorial misfeasance, but also as "substitutes for judicial interference with corporate affairs and government regulation of corporations".<sup>124</sup> This is especially because courts lack the business expertise to adjudicate on business decisions, since these decisions "cannot be [easily] classified as either right or wrong at the time they were made".<sup>125</sup>

36 Nevertheless, in many situations, the effectiveness of independent directors might be compromised when they are unable to

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118 Thomas C Pelto, Sr, "False Halo: The Business Judgment Rule in Corporate Control Contests" (1988) 66 Tex L Rev 843 at 844.

119 Ann M Scarlett, "A Better Approach for Balancing Authority and Accountability in Shareholder Derivative Litigation" (2008) 57 U Kan L Rev 39 at 57.

120 Ann M Scarlett, "A Better Approach for Balancing Authority and Accountability in Shareholder Derivative Litigation" (2008) 57 U Kan L Rev 39 at 59.

121 473 A 2d 805 (Del Sup Ct 1984).

122 E Norman Veasey, "The Defining Tension in Corporate Governance in America" (1997) 52 Bus Law 393 at 394.

123 Ann M Scarlett, "A Better Approach for Balancing Authority and Accountability in Shareholder Derivative Litigation" (2008) 57 U Kan L Rev 39 at 60.

124 Lisa M Fairfax, "Sarbanes-Oxley, Corporate Federalism, and the Declining Significance of Federal Reforms on State Director Independence Standards" (2005) 31 Ohio NU L Rev 381 at 385.

125 Demetra Arsalidou, "Objectivity vs Flexibility in Civil Law Jurisdictions and the Possible Introduction of the Business Judgment Rule in English Law" (2003) 24(8) Comp Law 228 at 232.

“identify and control [their own] biases”.<sup>126</sup> This idea of “bounded rationality”, meaning the “inability of people to perceive their own ethical limitations”, illustrates how people can be ignorant of how their biases influence their decision-making process.<sup>127</sup> Independent directors are human beings who are prone to such unconscious bias. This is where board diversity steps in to play an important role in ensuring that boards have engaged in comprehensive due diligence which is deserving of protection under the business judgment rule. First, empirical research shows that female directors have better attendance records than male directors,<sup>128</sup> and that the more gender diverse a board is, the more male directors feel pressured to improve their attendance rates.<sup>129</sup> Such improved board attendance results in greater due diligence as meetings are one main way in which directors’ responsibilities are being carried out.<sup>130</sup> In addition, psychological research illustrates that individuals make decisions based on their own personal backgrounds and life experiences.<sup>131</sup> As such, when there is a lack of board diversity, there is lesser board due diligence because of the “little opportunity to flesh out varied viewpoints and to utilize different analytical techniques”.<sup>132</sup> Hence, independence and board diversity ensure that directors fulfil their obligations to the corporation, and provide reassurance for courts to decrease judicial intervention into the merits of business decisions.

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126 Antony Page, “Unconscious Bias and the Limits of Director Independence” (2009) U Ill L Rev 237 at 239.

127 Antony Page, “Unconscious Bias and the Limits of Director Independence” (2009) U Ill L Rev 237 at 239–240.

128 Aaron A Dhir, “Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity” (2010) 35 Queen’s LJ 569 at 593.

129 Renee B Adams & Daniel Ferreira, “Women in the Boardroom and Their Impact on Governance and Performance” (2009) 94 J Fin Econ 291 at 297. See also J F Corkery & Madeline Taylor, “The Gender Gap: A Quota for Women on the Board” (2012) *Corporate Governance eJournal (Bond)* 1 at 7:

Well-prepared, enthusiastic women on the board also have a positive effect on other board members. The guys need to prove that they’re also well prepared and enthusiastic. This creates a positive cycle where preparations and involvement in board meetings increase in general. Men’s behaviour appears to change when women join the board ... Better-prepared, more involved board members also affect the productivity of the board in a positive way.

130 Aaron A Dhir, “Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity” (2010) 35 Queen’s LJ 569 at 593.

131 Seletha R Butler, “All On Board! Strategies for Constructing Diverse Boards of Directors” (2012) 7 Va L & Bus Rev 61 at 77.

132 Seletha R Butler, “All On Board! Strategies for Constructing Diverse Boards of Directors” (2012) 7 Va L & Bus Rev 61 at 77.

37 Indeed, this could be the reason why countries like the US and Australia have started to adopt measures to improve board diversity<sup>133</sup> as the business judgment rule is firmly entrenched in their corporate law regimes.<sup>134</sup> The Delaware case of *In re The Walt Disney Co Derivative Action*<sup>135</sup> (“*Disney*”) illustrates how board diversity could help improve directors’ decision-making process. In *Disney*, the shareholders alleged that the board made “hasty and uninformed” decisions with regards to the amount of compensation to be awarded to the outgoing president of Disney.<sup>136</sup> Nevertheless, the Supreme Court found that these directors were protected under the business judgment rule, and did not breach any fiduciary duties.<sup>137</sup> It is submitted that board diversity fits squarely with such cases as it would assure courts that the board considered different perspectives and made informed decisions, such that the directors “acted in good faith and believed that they were acting in the best interests of the company”.<sup>138</sup>

38 Although Singapore does not have a formal business judgment rule,<sup>139</sup> its judicial attitude is also one of reluctance to assess the merits of directors’ business decisions. In *ECRC Land Pte Ltd v Ho Wing On Christopher*,<sup>140</sup> the court stated that:<sup>141</sup>

The court should be slow to interfere with commercial decisions taken by directors. It should not, with the advantage of hindsight, substitute its own decisions in place of those made by directors in the honest and reasonable belief that they were for the best interest of the company, even if those decisions turned out subsequently to be money-losing ones.

39 As such, adopting board diversity in Singapore justifies the courts’ non-interference with directors’ business decisions, as board

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133 In 2010, the Australian Securities Exchange amended its Corporate Governance Principles to include gender diversity disclosure and policy principles. Also, as will be elaborated in paras 50–53 of this article, in 2009, the US enacted a mandatory diversity disclosure requirement.

134 Michael Legg & Dean Jordan, “The Australian Business Judgment Rule After *ASIC v Rich*” (2010) 269 Co LN 1 at 2.

135 906 A 2d 27 (Del Sup Ct 2006), affirming 907 A2d 693 (Del Ch 2005) (*Disney*).

136 Thomas W Joo, “A Trip through the Maze of ‘Corporate Democracy’: Shareholder Voice and Management Composition” (2003) 77 St John’s L Rev 735 at 749.

137 Franklin A Gevurtz, “Disney in a Comparative Light” (2007) 55 Am J Comp L 453 at 453.

138 Stephanie L Soondar, Allen Major & Candace Hines, “Litigation and Recoupment of Executive Compensation” (2010) 6 Hastings Bus LJ 397 at 459.

139 Hans Tjio, “The Rationalisation of Directors’ Duties in Singapore” (2005) 17 SAclJ 52 at 64.

140 [2004] 1 SLR(R) 105 (HC).

141 *ECRC Land Pte Ltd v Ho Wing On Christopher* [2004] 1 SLR(R) 105 at [49]. See also *Vita Health Laboratories v Pang Seng Meng* [2004] 4 SLR(R) 162 at [17]: Directors should “not be coerced into exercising defensive commercial judgment, motivated largely by anxiety over legal accountability and consequences”.

diversity is precisely about how a more energetic and robust management would handle decision-making processes. In fact, it is submitted that board diversity is even more essential in Singapore. This is because the lack of a formal business judgment rule with clear guidelines under which directors' decisions would not be interfered with, results in uncertainty where directors are constantly fearful that courts would second-guess their business decisions with hindsight bias.<sup>142</sup> Therefore, board diversity helps alleviate such uncertainty by ensuring that directors are carrying out their fiduciary obligations when they consider diverse perspectives during their decision-making process and make informed decisions.

### C. *Shareholding structure in corporations*

40 A third factor which affects the role of board diversity is the shareholding structure in corporations, as the primary function of board of directors differs according to whether shareholding in corporations is concentrated or dispersed. For dispersed shareholdings, monitoring of management is likely to be the main focus of boards as dispersed ownership structures “potentially generate free rider problems in so far as they hinder direct managerial supervision by shareholders”.<sup>143</sup> As such, for countries with dispersed shareholdings like the US and the UK,<sup>144</sup> board diversity further helps to increase perspectives and improve the monitoring of management.

41 Singapore, on the other hand, has concentrated shareholdings, with a majority being family-owned corporations.<sup>145</sup> Indeed, a study of the 100 largest firms in Singapore in 2007–2008 showed that 69 were family-owned companies, of which the concentration of shares can be as high as 69.25%.<sup>146</sup> In such family-owned corporations, the manager-shareholder problem is less severe as controlling shareholders usually “dedicate individual efforts to monitoring and have access to superior

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142 Ann M Scarlett, “Confusion and Unpredictability in Shareholder Derivative Litigation: The Delaware Courts’ Response to Certain Corporate Scandals” (2008) 60 Fla L Rev 589 at 600.

143 Kurt A Desender, “The Relationship between the Ownership Structure and the Role of the Board” (Working Paper, V K Zimmerman Center for International Education and Research in Accounting, University of Illinois, 2007) (unpublished) at p 7.

144 John Armour, Brian R Cheffins & David A Skeel, Jr, “Corporate Ownership Structure and the Evolution of Bankruptcy Law in the US and UK” (2002) 55 Vand L Rev 1699 at 1700.

145 Luh Luh Lan & Umakanth Varottil, “Shareholder Empowerment in Controlled Companies” (Paper presented to the Shareholder Power Conference at the Faculty of Law, National University of Singapore, 6–7 March 2014) (unpublished) at p 11.

146 Luh Luh Lan & Umakanth Varottil, “Shareholder Empowerment in Controlled Companies” (Paper presented to the Shareholder Power Conference at the Faculty of Law, National University of Singapore, 6–7 March 2014) (unpublished) at p 11.

information”.<sup>147</sup> Rather, a different agency problem emerges between majority and minority shareholders, as the former may extract “illicit pecuniary benefits” from the corporation at the expense of the minority shareholders.<sup>148</sup>

42 Nonetheless, there are various functions which independent directors are “uniquely positioned to exercise that are useful counterweights to the presence and influence of controlling shareholders”.<sup>149</sup> First, independent directors should exercise vigilance and maintain a constant “alertness and willingness to question and object”, to compel controlling shareholders to “abandon a proposed course of action [detrimental to the corporation] or to undo what has already been done”.<sup>150</sup> Second, independent directors serve as an “intermediary function” among management, shareholders and family directors, as some family directors could be “estranged both from management and other family members”.<sup>151</sup>

43 Board diversity further bolsters these two functions, as women “ask different questions ... [from] male directors, and bring a different set of experiences and concerns with them into the boardroom”.<sup>152</sup> This allows the board to critically analyse shareholders’ actions and prevent the exploitation of minority shareholders. Furthermore, female leaders are usually “consensus builders, conciliators, and collaborators”.<sup>153</sup> As such, they might be better able to resolve any conflicts among a corporation’s shareholders, its board members and management. This is especially relevant in Singapore’s family-owned enterprises where conflicts could be greater as compared to non-family enterprises because of family tensions, sibling competition and rivalry.<sup>154</sup>

44 Hence, be it concentrated or dispersed shareholdings, board diversity plays a pivotal role. This further strengthens the position that

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147 Kurt A Desender, “The Relationship Between the Ownership Structure and the Role of the Board” (Working Paper, V K Zimmerman Center for International Education and Research in Accounting, University of Illinois, 2007) (unpublished) at p 9.

148 Deborah A DeMott, “Guests at the Table?: Independent Directors in Family-Influenced Public Companies” (2008) 33 J Corp L 819 at 837.

149 Deborah A DeMott, “Guests at the Table?: Independent Directors in Family-Influenced Public Companies” (2008) 33 J Corp L 819 at 846.

150 Deborah A DeMott, “Guests at the Table?: Independent Directors in Family-Influenced Public Companies” (2008) 33 J Corp L 819 at 847.

151 Deborah A DeMott, “Guests at the Table?: Independent Directors in Family-Influenced Public Companies” (2008) 33 J Corp L 819 at 854.

152 Evan Roberts, “Corporate Leadership and the Unfinished Diversity Movement” (2012) 14(2) *Duquesne Business Law Journal* 277 at 290.

153 Karin Klenke, *Women in Leadership: Contextual Dynamics and Boundaries* (Emerald Group Publishing, 2011) at p 7.

154 Nick Wilson, Mike Wright & Louise Scholes, “Family Business Survival and the Role of Boards” (2013) 37(6) *Entrepreneurship Theory and Practice* 1369 at 1371.

Singapore should adopt board diversity, especially given that Singapore comprises mostly family-owned enterprises. Family-owned enterprises have an even higher risk of expropriation by majority shareholders than state-owned enterprises, because family owners are more likely to “extract private benefits of control” than the State which might still be “motivated by a sense of public interest”.<sup>155</sup>

## VI. Different models of board diversity in other jurisdictions

45 Having established that it is vital for Singapore to actively regulate board diversity, the different models of board diversity in various countries will now be compared and contrasted. Indeed, transatlantic dialogue is increasingly paramount in corporate governance, and reflecting on the diverse international responses to board diversity allows Singapore to determine the most appropriate approach it should adopt. There are two types of regulation – quota regimes *versus* disclosure rules. For the regulatory model of quota requirements, while Norway has been the pioneer of such a regime, a number of European countries like France, Spain, Italy and the Netherlands have subsequently followed suit.<sup>156</sup> On the other hand, other countries, including the US, Australia and the UK, have established disclosure-oriented regimes instead.<sup>157</sup>

46 This article will discuss the four leading regimes in the respective types of regulation, namely: (a) Norway’s mandatory gender quota; (b) the Netherlands’ comply-or-explain gender quota; (c) the US’s mandatory diversity disclosure regime; and (d) the UK’s comply-or-explain diversity disclosure regime. With these different models of board diversity, the path dependence theory reminds us that there is no specific endpoint model which countries should work towards.<sup>158</sup> Rather, different corporate governance structures in different countries influence the adoption of different variations of board diversity.<sup>159</sup> As such, these various models will be analysed and applied to the Singapore context to determine the model of board diversity Singapore should adopt.

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155 Luh Luh Lan & Umakanth Varottil, “Shareholder Empowerment in Controlled Companies” (Paper presented to the Shareholder Power Conference at the Faculty of Law, National University of Singapore, 6–7 March 2014) (unpublished) at p 12.

156 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 *Seattle J Soc Just* 337 at 359.

157 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 *Seattle J Soc Just* 337 at 362.

158 Dan W Puchniak, “The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law” (2007) 9 *Asian-Pacific Law & Policy Journal* 7 at 15.

159 Lucian A Bebchuk & Mark J Roe, “A Theory of Path Dependence in Corporate Ownership and Governance” (1999) 52 *Stan L Rev* 127 at 134.



### A. *Norway's mandatory gender quota*

47 In 2003, Norway became the first European country to pass a mandatory gender quota law for its corporate boards.<sup>160</sup> This law was drafted by Ansgar Gabrielsen, former Norwegian Minister of Trade and Industry, who believed that “the law was not about getting equality between the sexes, it was about the fact that diversity is a value in itself, that it creates wealth”.<sup>161</sup> Indeed, s 6-11a of the Norwegian Public Limited Liability Companies Act<sup>162</sup> states the following:

- (1) In the boards of publicly listed ... companies both genders should be represented, as follows:
  1. Where there are two or three board members, both genders should be represented.
  2. Where there are four or five board members, both genders should be represented with at least two members each.
  3. Where there are six to eight board members, both genders should be represented with at least three members each.
  4. Where there are nine or more members of the board, each gender should be represented with at least 40% each.

48 Norway's 40% quota has proven successful. At the time the quota was passed, there was only 6.8% of female representation on the board; by 2008, which was the deadline for compliance, the quota of 40% was achieved.<sup>163</sup> This is due to harsh sanctions imposed on public corporations which fail to abide by these regulations, as they may be dissolved or liable to pay fines until compliance is obtained.<sup>164</sup> This is significantly harsher than that in Spain where a failure to comply with the required quota of 40% female directors would merely preclude corporations from enjoying preferential treatment during the award of

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160 Douglas M Branson, “An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors” (2012) 37 J Corp L 793 at 797.

161 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 359.

162 Norwegian Public Limited Liability Companies Act (2003).

163 Douglas M Branson, “An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors” (2012) 37 J Corp L 793 at 798.

164 Lord Davies, *Independent Review into Female Representation on UK Corporate Boards: Women on Boards* <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31480/11-745-women-on-boards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf)> at p 22 (accessed 15 July 2015).

government contracts.<sup>165</sup> Such lack of sanctions could be the reason why the proportion of increase of women directors in Spain is not as dramatic as that in Norway.<sup>166</sup> From 2007, when the Spanish quota was enacted, to 2012, the percentage of women directors on Spanish boards increased gradually from 4% to 11%.<sup>167</sup>

### **B. The Netherlands' comply-or-explain gender quota**

49 Since 2013, publicly traded corporations with more than 250 employees in the Netherlands must have a minimum of 30% female board members.<sup>168</sup> However, unlike Norway's mandatory quota, the Netherlands' gender quota is under a comply-or-explain regime.<sup>169</sup> That is, if a corporation fails to comply with the quota, it must explain such non-compliance in its annual report and provide an outline of steps taken to ensure future compliance.<sup>170</sup> Thus far, the Netherlands' quota system has seen results, with the number of women in senior management positions on the rise.<sup>171</sup> While certainly, as mentioned above, a lack of sanctions means that achieving the stipulated quota would take a longer time, it is submitted that a slow but steady progress in generating trust and credibility in female directors and developing a pipeline of top female corporate executives is likely to be a more sustainable solution. Mandatory quotas potentially result in female directors becoming "fast-tracked", such that boardrooms "end up being populated by unqualified and figurehead female directors" and goes against the "true spirit of diversity, which is to include meaningful opposing perspectives".<sup>172</sup>

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165 Lord Davies, *Independent Review into Female Representation on UK Corporate Boards: Women on Boards* <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31480/11-745-women-on-boards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf)> at p 22 (accessed 15 July 2015).

166 Fawn Lee, "Show Me the Money: Using the Business Case Rationale to Justify Gender Targets in the EU" (2013) 36 *Fordham Int'l LJ* 1471 at 1492.

167 Fawn Lee, "Show Me the Money: Using the Business Case Rationale to Justify Gender Targets in the EU" (2013) 36 *Fordham Int'l LJ* 1471 at 1492.

168 Hogan Lovells, "Women on Boards – Netherlands" (13 March 2014) (Lexology) <<http://www.lexology.com/library/detail.aspx?g=59fb9028-6e3b-4f57-b9ab-5067cde915>> (accessed 15 July 2015).

169 "Women on Boards: The Story Continues in Europe and the UK" (2012) 312 *Co LN* 1 at 2.

170 Hogan Lovells, "Women on Boards – Netherlands" (13 March 2014) (Lexology) <<http://www.lexology.com/library/detail.aspx?g=59fb9028-6e3b-4f57-b9ab-5067cde915>> (accessed 15 July 2015).

171 Janene Van Jaarsveldt, "Women in Dutch Management Roles on the Rise" *NL Times* (26 May 2015) <<http://www.nltimes.nl/2015/05/26/women-in-dutch-management-roles-on-the-rise/>> (accessed 15 July 2015).

172 Zhong Xing Tan, "Stewardship in the Interests of Systemic Stakeholders: Re-Conceptualizing the Means and Ends of Anglo-American Corporate Governance in the Wake of the Global Financial Crisis" (2014) 9 *J Bus & Tech L* 169 at 205.

### C. *The US's mandatory diversity disclosure regime*

50 In 2009, the US Security and Exchange Commissions (“SEC”) enacted a mandatory diversity disclosure requirement:<sup>173</sup>

Describe the nominating committee’s process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder, and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy ....<sup>[174]</sup>

51 This requirement, which came into effect in 2010, is designed “to assess a company’s commitment to developing and maintaining a diverse board”.<sup>175</sup> This is beneficial for investors to understand how boards address diversity and implement their diversity policies, so that investors can make informed investment decisions.<sup>176</sup>

52 Nevertheless, such a requirement has been largely ineffective. SEC Commissioner Luis Aguilar lamented that many corporations provided only vague statements, such as statements indicating that “diversity was something considered as part of an informal policy”, rather than a “discussion of any concrete steps taken to give real meaning to its efforts to create a diverse board”.<sup>177</sup> By “leaving out the steps taken and how those efforts are evaluated”, these corporations are not providing investors with the information they need.<sup>178</sup>

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173 Douglas M Branson, “Pathways for Women to Senior Management Positions and Board Seats: An A to Z List” (2012) Mich St L Rev 1555 at 1565.

174 17 CFR § 229.407(c)(2)(vi) (2011).

175 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 365.

176 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 366.

177 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 367.

178 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 367.

53 Such ineffectiveness is due to SEC's failure to define the term "diversity".<sup>179</sup> As there are many different aspects of diversity, and corporations can then define diversity in any way they prefer, this disclosure requirement leaves "ample room for corporations to avoid addressing boardroom diversity in a meaningful fashion".<sup>180</sup> In particular, gender diversity is neglected altogether.<sup>181</sup> Indeed, in its 2011 survey of corporate directors, when PricewaterhouseCoopers LLP questioned directors as to whether the "discussion about the new proxy disclosure rule ... [led them] to re-think the mix of directors currently on the board", a vast majority of these directors responded "no".<sup>182</sup> Such a response indicates that corporations have not taken a critical view of the diversity disclosure requirement, and that more robust regulation is required to foster boardroom diversity.<sup>183</sup>

#### *D. The UK's comply-or-explain diversity disclosure regime*

54 In 2010, a provision was included in the UK Corporate Governance Code, such that the "search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender".<sup>184</sup> Corporations must either comply with the provision or explain any deviation.<sup>185</sup> In 2011, this provision was further amended such that corporations are also required to have "a description of the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives".<sup>186</sup>

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179 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 Seattle J Soc Just 337 at 365.

180 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 Seattle J Soc Just 337 at 367.

181 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 Seattle J Soc Just 337 at 368.

182 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 Seattle J Soc Just 337 at 369.

183 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 Seattle J Soc Just 337 at 369.

184 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 Seattle J Soc Just 337 at 363.

185 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 Seattle J Soc Just 337 at 363.

186 Sonja S Carlson, "Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards" (2012–2013) 11 Seattle J Soc Just 337 at 364.

55 In addition to the disclosure requirement, in 2011, Lord Davies of Abersoch, a former government minister, issued an independent review of women on UK corporate boards.<sup>187</sup> The review recommended that UK listed companies in the FTSE 100 should aim voluntarily to have a minimum of 25% of female board members by 2015.<sup>188</sup> Since then there has been a steady increase in female directors, and by 2014, female representation on FTSE 100 boards stood at 20.7%, up from 12.5% in 2011.<sup>189</sup> While some have used the UK as an example to argue that there is no need for the law to effect any quota to improve female representation on boards, the robust increase in female directors in the UK was ironically due to the looming threat of a mandatory quota at the EU level, pushing UK corporations to “advance the diversity agenda as a means of preempting unwelcome regulatory attention.”<sup>190</sup> This shows that, ultimately, a quota (or threat of a quota) is still necessary to effect change in boardrooms, and as with the US, merely having a diversity disclosure requirement is just not effective enough.

## VII. How should Singapore enforce board diversity

56 Currently, Art 2.6 of Singapore’s Code of Corporate Governance just states that corporations “should comprise directors who as a group provide an appropriate balance and diversity of skills, experience, gender and knowledge of the company”, without providing any requirement for corporations to either disclose such diversity policy or to have a specified number of women directors. While Singapore’s requirement at least specifically states that boardroom diversity includes gender diversity, it does not specify how corporations should go about promoting such diversity by having diversity policies in place and the substantive content of such policies. As such, Singapore’s requirement is even less comprehensive than the disclosure regime in the US, which is already ineffective in promoting diversity. Commissioner Aguilar’s disappointment with the US disclosure regime further highlights how the current Singapore requirements are even more insufficient to foster the desired “meaningful relationship between diverse boards and improved corporate financial performance”.<sup>191</sup> Merely stating that corporations should try to take into account gender diversity is in fact not saying much, and a target quota should be set to ensure that corporations would

187 Neil Hodge, “Women on Board” (2012) 8 No 3 In-House Perspective 21 at 24–25.

188 Neil Hodge, “Women on Board” (2012) 8 No 3 In-House Perspective 21 at 24–25.

189 Lord Davies, *Davies Review Annual Report 2014: Women on Boards* <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/320000/bis-women-on-boards-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320000/bis-women-on-boards-2014.pdf)> at 2 (accessed 15 July 2015).

190 Sandeep Gopalan & Katherine Watson, “An Agency Theoretical Approach to Corporate Board Diversity” (2015) 52 San Diego L Rev 1 at 6.

191 Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards” (2012–2013) 11 Seattle J Soc Just 337 at 370.

actually look into gender diversity and not just pay lip service. Indeed, while the policy intent to encourage board diversity is commendable, more formal mechanisms need to be in place to shape the conduct of corporations.

#### A. *Implementation of a quota*

57 Quotas necessarily lead to action. Indeed, Norwegian scholars argue that without a quota regime such as that in Norway, companies would not be motivated enough to include more women on their boards and it would be difficult to break out of the masculine culture which pervades corporate organisations.<sup>192</sup> However, others have argued that quotas result in “tokenism”:<sup>193</sup>

Quotas have a disproportionately negative effect because there will always be a question in people’s mind that somebody only got onto a board or into a certain position because of a quota.<sup>194]</sup>

58 More specifically, R M Kanter’s landmark study, which examines the effects of minority women members (“tokens”) on the board, identifies three behavioural consequences of tokenism, namely, visibility, polarisation and assimilation.<sup>195</sup> First, visibility indicates that tokens find themselves being constantly monitored and may “perceive a pressure not to out-perform dominants” or even “choose to become socially invisible and maintain a low profile”.<sup>196</sup> As such, tokens “exhibit passive and obedient behaviour” and are pressured to conform to the opinions of the majority.<sup>197</sup> Second, polarisation implies that the majority on the board “feels threatened or uncomfortable around tokens”, and therefore “they heighten their boundaries by exaggerating their commonality and

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192 Anne Sweigart, “Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada” (2012) 32 Nw J Int’l L & Bus Ambassador 81A at 89A.

193 Kristina T Geraghty, “Taming the Paper Tiger: A Comparative Approach to Reforming Japanese Gender Equality Laws” (2008) 41 Cornell Int’l LJ 503 at 535.

194 Anne Sweigart, “Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada” (2012) 32 Nw J Int’l L & Bus Ambassador 81A at 94A.

195 Anne Sweigart, “Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada” (2012) 32 Nw J Int’l L & Bus Ambassador 81A at 94A.

196 Beate Elstad & Gro Ladegard, “Women on Corporate Boards: Key Influencers or Tokens?” (2010) *Journal of Management and Governance* <<https://oda.hio.no/jspui/bitstream/10642/1046/1/770025.pdf>> at p 8 (accessed 15 July 2015).

197 Beate Elstad & Gro Ladegard, “Women on Corporate Boards: Key Influencers or Tokens?” (2010) *Journal of Management and Governance* <<https://oda.hio.no/jspui/bitstream/10642/1046/1/770025.pdf>> at p 10 (accessed 15 July 2015).

exaggerating the differences of tokens.”<sup>198</sup> This causes tokens to feel isolated and find it difficult to integrate with other board members who might be less inclined to share information with tokens, and also exclude tokens from informal networking channels where socialisation occurs.<sup>199</sup> Finally, assimilation means that tokens are “forced into stereotypical categories defined by the dominants”, and in this context, the traditional role women should play.<sup>200</sup> Such stereotypical prejudices result in male directors giving “less credence” to arguments from female directors and underestimates their contributions, preventing female directors from exerting influence over board decision-making.<sup>201</sup>

59 However, such fears of tokenism do not seem to have materialised in Norway as these female directors appear to emphatically feel that they can contribute meaningfully to board discussions without the need to self-censor,<sup>202</sup> and this does not vary according to whether they make up the majority or minority on the board.<sup>203</sup> As such, tokenism is largely a perceived threat rather than a legitimate worry, and fear of tokenism “operates more as a barrier to the passage of divisive legislation mandating higher boardroom participation of women rather than an obstacle to the effectiveness of women once they are situated on boards.”<sup>204</sup> These unfounded fears of tokenism affirm that Singapore should adopt a quota regime.

60 In fact, it is precisely this “from the top” rather than “from the bottom” approach of quota legislation which tackles the problem of board

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198 Beate Elstad & Gro Ladegard, “Women on Corporate Boards: Key Influencers or Tokens?” (2010) *Journal of Management and Governance* <<https://oda.hio.no/jspui/bitstream/10642/1046/1/770025.pdf>> at p 8 (accessed 15 July 2015).

199 Beate Elstad & Gro Ladegard, “Women on Corporate Boards: Key Influencers or Tokens?” (2010) *Journal of Management and Governance* <<https://oda.hio.no/jspui/bitstream/10642/1046/1/770025.pdf>> at p 8 (accessed 15 July 2015).

200 Beate Elstad & Gro Ladegard, “Women on Corporate Boards: Key Influencers or Tokens?” (2010) *Journal of Management and Governance* <<https://oda.hio.no/jspui/bitstream/10642/1046/1/770025.pdf>> at p 8 (accessed 15 July 2015).

201 Beate Elstad & Gro Ladegard, “Women on Corporate Boards: Key Influencers or Tokens?” (2010) *Journal of Management and Governance* <<https://oda.hio.no/jspui/bitstream/10642/1046/1/770025.pdf>> at p 13 (accessed 15 July 2015).

202 Anne Sweigart, “Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada” (2012) 32 *Nw J Int’l L & Bus Ambassador* 81A at 95A.

203 Beate Elstad & Gro Ladegard, “Women on Corporate Boards: Key Influencers or Tokens?” (2010) *Journal of Management and Governance* <<https://oda.hio.no/jspui/bitstream/10642/1046/1/770025.pdf>> at p 20 (accessed 15 July 2015).

204 Anne Sweigart, “Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada” (2012) 32 *Nw J Int’l L & Bus Ambassador* 81A at 96A.

homogeneity.<sup>205</sup> Quotas might be a blunt measure, but definitely effective in attaining a certain proportion of female directors. Indeed, by adding just one woman to a corporate board would not be useful, since three or more female directors are necessary to effect a change.<sup>206</sup> Such a “critical mass” ensures that these female directors’ opinions are not dismissed without consideration, and thus encourages more discussion:<sup>207</sup>

The real change occurs when there are three or more women on the board and women feel more comfortable, less constrained about what the men would think, and their interactions become more positive. Importantly, diversity becomes not a ‘woman’s issue’, but group responsibility and the critical mass normalizes women’s presence as leaders.

61 In a 2011 study, Mariateresa Torchia, Andrew Calabrb and Morten Huse analysed approximately 300 Norwegian firms to determine how gender diversity affects innovation, which is the “creation or adoption of an idea or behaviour that is new to the organization”.<sup>208</sup> The empirical research showed that when the number of women increased from one or two to a consistent minority of at least three women, they are able to positively increase innovation in a corporation.<sup>209</sup> Indeed, “the magic seems to occur when three or more women serve on a board together”, where these women are “no longer seen as outsiders and are able to influence the content and process of board discussions more substantially”.<sup>210</sup>

62 In addition, perhaps more women rising to top positions with the implementation of a quota can motivate and encourage other women to strive to rise up to such a challenge as well. Furthermore, as recruitment partners have a tendency to hire candidates who are similar to them, male directors are more likely to pick male candidates.<sup>211</sup> Therefore, with more

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205 Jean J Du Plessis, Ingo Saenger & Richard Foster, “Board Diversity or Gender Diversity? Perspectives from Europe, Australia and South Africa” (2012) 17(2) *Deakin Law Review* 207 at 247.

206 Anne Sweigart, “Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada” (2012) 32 *Nw J Int’l L & Bus Ambassador* 81A at 95A.

207 Siri Terjesen, Ruth Sealy & Val Singh, “Women Directors on Corporate Boards: A Review and Research Agenda” (2009) 17(3) *17 Corp Governance: An Int’l Rev* 320 at 328.

208 Mariateresa Torchia, Andrew Calabrb & Morten Huse, “Women Directors on Corporate Boards: From Tokenism to Critical Mass” (2011) 102 *Journal of Business Ethics* 299 at 303.

209 Mariateresa Torchia, Andrew Calabrb & Morten Huse, “Women Directors on Corporate Boards: From Tokenism to Critical Mass” (2011) 102 *Journal of Business Ethics* 299 at 311.

210 Deborah L Rhode & Amanda K Packel, “Diversity on Corporate Boards: How Much Difference Does Difference Make?” (2014) 39 *Del J Corp L* 377 at 409.

211 Tamara S Smallman, “The Glass Boardroom: The SEC’s Role in Cracking the Door Open So Women May Enter” (2013) *Colum Bus L Rev* 801 at 809.



female directors on board, they would have a say on who should be selected to the board.<sup>212</sup> Over time, the pool of competent women taking up executive positions would then increase.<sup>213</sup>

63 However, it must be noted that as a quota would likely raise concerns of meritocracy, it is vital for this quota regime to be “balanced out” with mentoring programmes to assist the transition of eligible women to becoming board directors.<sup>214</sup> This will ensure that the quota regime is viable in the long run. Indeed, in a rush to name females to directorships, Norwegian corporations named one woman to 11 corporate boards.<sup>215</sup> Such lack of eligible women directors makes board diversity unfeasible as “no one, not even Superwoman, can serve adequately on more than three or perhaps four boards”,<sup>216</sup> especially with the stringent standards of fiduciary duties in recent years. As such, much is needed to groom women to step up to the challenge of becoming directors. The establishment of BoardAgender in Singapore, which “aims to provide a forum in Singapore to facilitate a greater awareness and understanding of the benefits of gender balanced business, and the advancement of more women into senior leadership roles and the boardroom”,<sup>217</sup> is a positive step and more should be done in this direction to ensure that corporations are utilising the best talent within the pool of both men and women, to increase innovation, profitability and sustainability in today’s competitive economy. Indeed, some time is needed to groom the future female leaders of tomorrow, and having a comply-or-explain quota provides such time for trust in female directors to develop and for talent to be groomed.

#### **B. Coupled with diversity disclosure rule**

64 A disclosure rule, where Singapore corporations must have in place formal diversity policies, should also be enacted in the Singapore Code of Corporate Governance to work in tandem with the quota. Disclosure of diversity policies ensures that boards become more

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212 Tamara S Smallman, “The Glass Boardroom: The SEC’s Role in Cracking the Door Open So Women May Enter” (2013) Colum Bus L Rev 801 at 809.

213 Tamara S Smallman, “The Glass Boardroom: The SEC’s Role in Cracking the Door Open So Women May Enter” (2013) Colum Bus L Rev 801 at 809.

214 Akshaya Kamalnaath & Yamini Peddada, “Women in Boardrooms: Formulating a Legal Regime for Corporate India” (2012) 1(6) *Journal on Governance* 675 at 694.

215 Douglas M Branson, “An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors” (2012) 37 J Corp L 793 at 804.

216 Douglas M Branson, “An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors” (2012) 37 J Corp L 793 at 804.

217 See <<http://www.boardagender.org/about>> (accessed 15 July 2015).

transparent in their dedication and commitment to gender diversity.<sup>218</sup> Such transparency is essential for the overall success of gender diversity as one of the reasons for Norway's successful quota regime is Norway's history of transparency.<sup>219</sup> Indeed, public databases were instrumental in helping Norway corporations achieve the target quota of women directors, by "identifying talented women and motivating them to take on management and board positions".<sup>220</sup>

65 While such an intrusive programme as in Norway, which makes everyone's employment details public, is definitely too radical to implement in Singapore and perhaps even unnecessary, transparency in terms of disclosure of diversity policies is definitely necessary as it allows investors to make informed decisions and spurs corporations to constantly evaluate the effectiveness of their diversity policies. As such, Singapore should amend its current diversity provision to mandate that corporations have a policy concerning diversity of its board members, and disclose such policy in their annual corporate governance reports. In fact, this is what Hong Kong is currently doing. In 2012, Hong Kong Exchanges and Clearing Ltd introduced a new Code Provision to its Corporate Governance Code requiring companies listed in Hong Kong, on "a 'comply-or-explain' basis, to have, and report on, a policy on board diversity".<sup>221</sup> Singapore's adoption of such a disclosure policy, coupled with its quota regime on gender diversity, would be mutually reinforcing, and greatly increase board diversity in Singapore.

**C. Gender diversity regulation should be under a comply-or-explain regime**

66 However, while Norway has a mandatory quota system, and Singapore definitely can choose to go as far as Norway, it is submitted that Singapore should instead follow countries like the Netherlands and adopt its gender diversity regulation under a comply-or-explain regime as the broader framework of Singapore's Corporate Governance Code itself is based on a comply-or-explain regime. Indeed, mandatory corporate governance legislation can trigger a variety of costs. Firstly, surveillance and enforcement costs can be significant, as the regulator has to monitor

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218 Barbara Black, "Stalled Gender Diversity on Corporate Boards" 37 U Dayton L Rev 7 at 14.

219 Anne Sweigart, "Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada" (2012) 32 Nw J Int'l L & Bus Ambassador 81A at 96A.

220 Anne Sweigart, "Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada" (2012) 32 Nw J Int'l L & Bus Ambassador 81A at 96A.

221 Fern Ngai, *Improving Governance through Board Diversity: A Guide for Companies Listed in Hong Kong* (Community Business) <[http://www.communitybusiness.org/images/cb/publications/2013/DOB\\_Guide\\_Eng.pdf](http://www.communitybusiness.org/images/cb/publications/2013/DOB_Guide_Eng.pdf)> at p 3 (accessed 15 July 2015).

the market to mete out sanctions in cases of violation.<sup>222</sup> Secondly, corporations' compliance costs can be substantial, as corporations must restructure themselves to abide with these legal rules even if the cost of such restructuring is greater than its benefits.<sup>223</sup> For instance, board diversity might be more important and beneficial for consumer industries where women are themselves the consumer target and so could provide valuable information for these corporations.<sup>224</sup> Indeed, as described by Roberta Romano:<sup>225</sup>

The [most] efficacious corporate law regimes are the product of competitive legal systems, which permit legal innovations to percolate from the bottom up by trial and error, rather than being imposed from the top down by regulators or corporate governance entrepreneurs, who are far removed from the day-to-day operations of firms. In that regard it is important to point out that the bulk of the provisions of competitive corporate codes are enabling, permitting firms to tailor their internal organization to their specific needs.

67 Combining a quota system with a comply-or-explain regime is a good balance. The lack of sanctions under a comply-or-explain regime makes board diversity more acceptable to corporations, but yet still maintains the effectiveness of a quota regime in achieving a critical mass of female directors. Requiring corporations to provide reasons for non-compliance is “a balance between the stick and the carrot”, where it allows for “self-regulatory efforts to be properly scrutinized, but does not interfere unnecessarily in the arrangement of governance structures.”<sup>226</sup> As such, Singapore should adopt a comply-or-explain regime. In addition, Singapore should perhaps also stage the expected compliance date and percentage of women directors to allow corporations to transit and adapt more smoothly to the required number of female directors on boards.

## VIII. Conclusion

68 While absence of any conflict of interests might be a first step to improve board decision-making, it is definitely not sufficient. As long as directors come from the same narrow pool of people, it is definitely

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222 Anita Indira Anand, “An Analysis of Enabling vs Mandatory Corporate Governance Structures Post Sarbanes-Oxley” (2006) 31 Del J Corp L 229 at 242.

223 Anita Indira Anand, “An Analysis of Enabling vs Mandatory Corporate Governance Structures Post Sarbanes-Oxley” (2006) 31 Del J Corp L 229 at 245.

224 Network of Executive Women, *Women 2020: The Future of Women's Leadership in Consumer Products and Retail*, at p 5 <[http://c.ymcdn.com/sites/www.newonline.org/resource/resmgr/women\\_2020/new\\_women2020.pdf](http://c.ymcdn.com/sites/www.newonline.org/resource/resmgr/women_2020/new_women2020.pdf)> (accessed 15 July 2015).

225 Roberta Romano, “The Sarbanes-Oxley Act and the Making of Quack Corporate Governance” (2005) 114 Yale LJ 1521 at 1529.

226 House of Lords, *Women on Boards Report: House of Lords, European Union Committee, 5th Report of Session 2012–13* (The Stationery Office, 2012) at p 33.

impossible to “achieve the range of experience and perception that goes into active, open-minded thinking” as “nourishing a culture of dissent requires respect for differences.”<sup>227</sup> Indeed, independent directors are a means to an end, rather than the end itself. The end itself really is independence of thought. To achieve this goal, both independent directors and board diversity are required to promote diversity of perspectives and inspire critical thinking to deliver sustainable growth for corporations.

69 Although introducing gender diversity quotas would be a radical decision, quotas still remain the best way to introduce gender diversity and it is hoped that the glass ceiling currently deterring women from assuming positions in corporate boards in Singapore will soon be “replaced by a glass slipper”, and “Cinderella will take her rightful place beside the prince in governance of the realm.”<sup>228</sup>

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227 Erica Beecher-Monas, “Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?” (2007) 86 Or L Rev 373 at 412.

228 Mildred Woryk, “Women in Corporate Governance: A Cinderella Story” (2011–2012) 37 U Dayton L Rev 21 at 38.